IN THE COURT OF APPEALS OF IOWA

No. 0-2011 / 96-1976
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANTE DARNELL HUNTER
a/k/a DONTAY DARNELL HUNTER,
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Defendant-Appellant Darnell Hunter appeals from his conviction and sentence for second-degree sexual assault in violation of Iowa Code 709.3(3) (1993). Defendant contends (1) the charges should be dismissed because he was never waived to adult court; (2) there was prosecutorial delay denying his due process rights; (3) his trial attorney was ineffective in failing to seek dismissal of the charges; (4) the district court erred in joining his case with his co-defendants and in overruling his motion to sever; (5) the district court erred in excluding evidence of the victim's sexual history; (6) his speedy trial rights were violated; and (7) the district court abused its discretion in sentencing him. **CONVICTION AFFIRMED, REVERSED FOR RESENTENCING.**

Darrell G. Meyer, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

SACKETT, C.J.

Defendant-Appellant Darnell Hunter appeals from his conviction and sentence for second-degree sexual assault in violation of Iowa Code 709.3(3) (1993). The incident allegedly took place on November 23rd or 24th of 1993; at which time defendant was sixteen years old. Defendant and Clarence Evon Williams, Jr. were charged with the crime by a trial information on January 10, 1996. *See State v. Williams*, 574 N.W. 2d 293 (Iowa 1998). Williams and defendant's cases were then joined for trial with the case of Bryon Carter Griffin, II. Defendant waived his right to be tried by a jury. Following a trial to the court, the defendant was found guilty as charged. This appeal follows.

Defendant contends (1) the charges should be dismissed because he was never waived to adult court; (2) there was prosecutorial delay denying his due process rights; (3) his trial attorney was ineffective in failing to seek dismissal of the charges; (4) the district court erred in joining his case with his co-defendants and in overruling his motion to sever; (5) the district court erred in excluding evidence of the victim's sexual history; (6) his speedy trial rights were violated; and (7) the district court abused its discretion in sentencing him. We affirm the conviction and remand for resentencing.

Defendant was one of four men allegedly to have sexually abused L.H., then a minor child. The court could have found the following facts. The incident happened at the home of Griffin, a co-defendant. Sometime between ten p.m. and eleven p.m., on November 23, 1993, Lincoln Dixon and co-defendant Williams arrived at Griffin's house. Defendant followed L.H. into a bedroom and shut the door. L.H. was heard saying "no" and her friend went to the bedroom to

see what was happening. Upon opening the door, the friend saw defendant on top of L.H. on the bed. L.H. was fighting the defendant. Defendant then slammed the door in the friend's face. The friend went to the living room. She saw Williams enter the house and she left. The friend also heard statements made that defendant was raping L.H.

Dixon, who pled guilty to a lesser offense in exchange for testifying against the other individuals alleged to have participated in the sexual abuse of L.H., testified he saw defendant on top of L.H. having sexual intercourse. Dixon testified L.H. was saying, "stop." Dixon further testified Williams next had sexual intercourse with L.H. while defendant held her down. Then Williams held L.H. down while Griffin had sexual intercourse with her. Finally, somebody held L.H. down while Dixon had sexual intercourse with her.

Following the events L.H. was taken to the hospital where she was examined by a doctor. At the hospital blood and semen evidence was collected. A vaginal swab was taken and L.H.'s clothes were preserved. Dried semen was found on the crotch, the lower back portion, and the center back portion of L.H.'s panties. Marie Sides, a criminalist with the Iowa Division of Criminal Investigation, conducted blood serology tests on the evidence. A DNA analysis of the evidence gathered from the victim and blood samples taken from the alleged participants in the sexual abuse was conducted by Supervisory Special Agent John Quill of the Federal Bureau of Investigation. The evidence samples arrived at the FBI laboratory on January 31, 1994. Due to an error in the process, the results of the first DNA analysis were not clear enough to be reliably interpreted. Special Agent Quill requested additional blood samples. On

October 3, the second set of blood samples went to FBI laboratory. A report detailing the results of the DNA testing was sent to Sides on June 27, 1995.

Defendant first contends he was prejudiced by prosecutorial delay. The State contends he was not. This claim involves an alleged constitutional violation consequently we review de novo. *State v. Gregg*, 464 N.W.2d 432, 432 (Iowa 1990). To succeed on this issue the defendant must establish: (1) the delay was unreasonable and (2) the delay resulted in actual prejudice to him. *See State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996). Unreasonable delay "involves a consideration of both the length of the delay and the State's reason for it." *Id.* The prejudice must be actual. *State v. Lange*, 531 N.W.2d 108, 111 (Iowa 1995). Mere general assertions of prejudice are not sufficient. *Id.* A legitimate reason for delay is that additional time is needed to further investigate the crime. *See Williams*, 574 N.W.2d at 300. A reason for the delay was the wait to get DNA test results from the FBI laboratory. There is no evidence the State had control over the length of time it took to get the results. The State waited approximately six months after the results of the test were known before filing the charge. The State gives no reason for the delay. Under the same facts the Iowa Supreme Court in *Williams, Id.* found the delay was not unreasonable. We affirm on this issue.

Defendant next contends that he committed the alleged offense as a juvenile and he was not waived to district court, consequently the district court was without jurisdiction to enter judgment and sentence. The State contends the district court had jurisdiction because the defendant never moved to be returned to the jurisdiction of the juvenile court.

Subject matter jurisdiction is the power of a court "to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989). Such jurisdiction flows from the constitution or from statutes and cannot be conferred by consent, waiver, or estoppel. *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993). Subject matter jurisdiction should not be confused with authority. *Id.* "A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case. *Id.* In such a situation we say the court lacks authority to hear that particular case." *Id.*, *Christie*, 448 N.W.2d at 450. Where subject matter jurisdiction exists, an impediment to a court's authority can be obviated by consent, waiver or estoppel. *Mandicino*, 509 N.W.2d at 483.

The Iowa Constitution confers jurisdiction on the district court concerning criminal matters. *See* Iowa Const. art. V, § 6 (district courts shall "have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law"). Iowa Code section 232.8(1)(a) gives the juvenile court "exclusive original jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act unless otherwise provided by law." This provision does not deprive the district court of its criminal jurisdiction. *State v. Yodprasit*, 564 N.W.2d 383, 386 (Iowa 1997). Rather, section 232.8(1)(a) means proceedings concerning delinquent acts must originate in juvenile court and continue in juvenile court until that court waives jurisdiction pursuant to Iowa Code section 232.45. Irregularities in a waiver proceeding are impediments to the district court's authority that (1) do not deprive the district

court of subject matter jurisdiction over criminal proceedings involving the juvenile and (2) can be waived if the juvenile pleads guilty. *Id.* at 387.

Iowa Code section 232.8 (1) (a) (1993) provides:

> The juvenile court has exclusive original jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act unless otherwise provided by law, and has exclusive jurisdiction in proceedings concerning an adult who is alleged to have committed a delinquent act prior to having become an adult, and who has been transferred to the jurisdiction of the juvenile court pursuant to an order under section 803.5

Iowa Code section 803.5(1) (1993) provides:

> An adult who is alleged to have committed a criminal offense prior to having reached the age of eighteen may be transferred to the juvenile court for adjudication and disposition as a juvenile...

The motion to transfer jurisdiction may be made by the State or the defendant within ten days of the initial appearance. Iowa Code § 803.5(2) (1993).

The district court had jurisdiction over the act defendant committed as a juvenile because defendant then an adult was never transferred to juvenile court. We affirm on this issue.

Defendant next contends his trial attorney was ineffective in not moving to dismiss the trial information. We review ineffective assistance of counsel claims de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997). To establish a claim for ineffective assistance of counsel Williams must prove by a preponderance of evidence that: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted. *Id.* at 613-14. The record is not sufficient for us to address this claim and it is reserved for postconviction proceedings.

Defendant next contends the district court erred in first joining his trial with his co-defendants and then refusing to sever the trials. Severing the trials of co-

defendants is required in two instances: (1) where the trial is so complex and the evidence so voluminous that the jury will be confused and cannot compartmentalize the evidence; or (2) where the evidence admitted by or against one defendant is so prejudicial to a co-defendant, the jury is likely to wrongly use it against the co-defendant. *Williams*, 574 N.W.2d at 300.

The district court did not abuse its discretion on this issue. The testimony at trial was not complex nor was the evidence lengthy. The evidence presented by the State was, for the most part, not specifically directed to any one defendant. Both the DNA and blood serology test results implicated all the defendants equally in that none of them could be excluded by the results. The testimony of the witnesses also implicated all three defendants. Defendant has failed to show how he was prejudiced by a joint trial. *Id.*

Defendant next contends the district court abused its discretion in not allowing evidence that L.H. may have had consensual sexual intercourse with another man the evening before the events leading to the filing of this charge. We review for an abuse of discretion. *State v. Knox*, 536 N.W.2d 735, 738 (Iowa 1995). The district court ruled on the defendant's claim finding that if the serologic and DNA analysis of the man defendant claimed the victim had intercourse with excluded him as a donor of the materials tested, then his sexual contact with the victim was not relevant and was inadmissible. But if the analysis failed to exclude him as a possible donor, then the evidence was admissible as tending to make the defendants more or less likely to be the source of the seminal fluid. That is, unless tests eliminate the other man as a possible donor evidence of her contact with him should be admitted. The record is silent as to

the results of the other man's DNA analysis. The defendant has failed to show the relevance of the evidence. The district court did not abuse its discretion in ruling on this issue.

Defendant's next claim is that the district court erred in denying his motion to dismiss for a speedy trial violation. Review of a statutory speedy trial claim is for errors at law. *State v. Finn*, 469 N.W.2d 692, (Iowa 1991).

Iowa Rule of Criminal Procedure 27 (2) (b) provides:

> If a defendant indicted for a public offense has not waived his or her right to a speedy trial, he or she must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary can be shown.

A district court has limited discretion in ruling on a motion to dismiss under Iowa Rule of Crim. P. 27(2)(b). *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999).

The trial information was filed on January 10, 1996. The State had ninety days to try the case. The defendant requested a continuance on March 7, 1996. On March 22, 1996, the defendant filed a motion for independent testing of the DNA samples taken in the case. The motion was scheduled for hearing on April 12, 1996. The court ruled on some pending motions on May 2, 1996. The court rescheduled the trial from May 7 until May 14. The State contends the delay from March 7 until May 14 is attributed to the defendant.

The trial was moved to May 28 on the State's motion and then rescheduled to July 9 on the State's motion because the codefendants had been granted continuances. The State contends the July 9 trial date was continued because of the defendant's motion to dismiss filed on July 8, 1996 and other motion filed by co-defendants. The trial was continued to August 20 and

rescheduled on the State's motion because of the unavailability of a primary witness. Apparently trial happened on September 25, 1996. The State also contends there was good cause not to try him in ninety days and that defendant has shown no prejudice. Defendant has not shown prejudice. Consequently a lesser reason for the delay may therefore constitute good cause. *See State v. Petersen*, 288 N.W.2d 332, 335 (Iowa 1980). Also where defendants are tried together even motions not directly attributed to the defendant can be considered good cause. *See United States v. De Tienne*, 468 F.2d 151, 157 (7th Cir. 1973). The district court did not abuse its discretion in overruling defendant's motion.

Defendant's last contention is that the district court abused its discretion in sentencing him. We review a district court's sentencing order for either an abuse of discretion or defects in the sentencing procedure. *State v. Floyd*, 466 N.W.2d 919, 925 (Iowa App. 1990). The district court ordered defendant's twenty-five year sentence to run consecutive to a ten- and two-year sentence the defendant was then serving. The defendant contends this was an abuse of discretion.

The defendant also contends that the district court impermissibly considered charges for which he had not been prosecuted in sentencing him.

The court said:

> [the]court will see in January of 1995 Mr. Hunter was accused of committing the act of robbery in the first degree with a handgun. The case was settled with the State. In November 1995, Mr. Hunter shot another young man. I point out the reason why the State settled the case was because the handgun wasn't recovered. In all likelihood the handgun used on the other young man was the handgun used by Mr. Hunter.

The court ordered consecutive sentences saying:

> This event was an absolutely careless string of a long, unhappily long series of events in your life which add up to a showing that you

> just didn't care much about other people's rights or their safety or lives, and to tell you in effect you get ten years free, because you happened to have made a serious threat against someone else's life and security another time, is a message that doesn't make any sense.

We agree with defendant that the district court improperly considered unproven crimes in pronouncing sentence. *See State v. Black*, 324 N.W. 2d 313, 315 (Iowa 1982). Accordingly, we affirm the judgment of the district court and remand for resentencing.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.