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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )
Appellee, ) Filed November 22, 1978
vs. )
GEORGE GOFF, ) 680 / 61132
Appellant. )

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Appeal from Polk District Court - Thomas S. Bown, Judge.

Defendant appeals conviction of the crime of robbery with aggravation alleging error in not granting his motion to dismiss for failure to conduct a preliminary examination and for failure to indict within thirty days after being held to answer. - Affirmed.

David G. Tyler, of Cone & Tyler, Marshalltown, for Appellant.

Richard C. Turner, Attorney General of Iowa, Thomas A. Evans, Jr., Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant George Goff appeals from his conviction by jury of the crime of robbery with aggravation in violation of §§ 711.1 and 711.2, The Code. Defendant was arraigned on April 9, 1977, and the preliminary examination was set for May 9, 1977. On May 9th, defendant's counsel appeared and was advised that the State was not prepared to conduct the preliminary examination at that time. Accordingly, on May 10, 1977, defendant's counsel prepared a motion to dismiss for failure to conduct the preliminary examination within 30 days as required by § 761.1, The Code, and further requested a dismissal under § 795.1, The Code, for failure to indict within 30 days after which he had been held to answer. The record is uncontroverted that no preliminary examination was held on April 9th nor did defendant waive his right to such examination.

Goff's first assignment of error is that the trial court erred in overruling his motion to dismiss for failure to conduct the preliminary examination within 30 days as required by § 761.1, The Code. The purpose of a preliminary hearing is to determine whether there is probable cause to believe the defendant has committed an offense. State v. Washington, 160 N.W.2d 337, 339 (Iowa 1968). See also State v. Evans, 169 N.W.2d 200, 205 (Iowa 1969). Section 761.1 allows the magistrate to adjourn the proceedings for a reasonable time to allow defendant the opportunity to send for counsel and § 761.4 prohibits adjournment for a longer period than thirty days.

Nevertheless, a defendant may be convicted upon trial without a preliminary examination where there has been a failure to hold the same. State v. Lass, 228 N.W.2d 758, 762-63 (Iowa 1975). Goff attempts to argue, as did the defendant in State v. Lee, 222 N.W.2d 471, 473-74 (Iowa 1974), that an accused is legally helpless if a magistrate does not offer a preliminary hearing.

In State v. Mays, 204 N.W.2d 862, 865-66 (Iowa 1973), the court stated the defendant was not without a remedy; he could have secured relief by writ of habeas corpus under chapter 663, The Code. In Lee, the court stated that "apart from habeas corpus, the statute on preliminary hearings imposes a mandatory duty on the magistrate to proceed promptly with a preliminary hearing unless the defendant waives it. 222 N.W.2d at 473. Moreover, once having commenced a preliminary

examination, the magistrate may not continue it indefinitely. Section 761.4, The Code; Lee, supra. Therefore, defendant could have sought an order by the trial court ordering the magistrate to conduct the preliminary examination through an action in mandamus under chapter 661, The Code.

In the instant case, the grand jury returned an indictment against the defendant on May 11, 1977. Goff was arraigned on the charge on May 12th and the trial court overruled his motion to dismiss on May 13, 1977. The period from arrest to indictment and from arrest to formal arraignment was 32 and 33 days respectively. This does not rise to the level of unconstitutional delay. See Lee, supra at 474. Goff had available the remedies of habeas corpus or mandamus. The trial court did not err in overruling his motion to dismiss.

Defendant's second contention is that the trial court erred in overruling his motion based upon a failure to indict within the 30 day period from which defendant was "held to answer" pursuant to § 795.1, The Code. The term "held to answer" has been interpreted to mean after preliminary examination or waiver of same. Where a defendant has never been held to answer within the meaning of § 795.1, as in the instant case, § 795.1 is inapplicable and the trial court properly overruled defendant's motion to dismiss. State v. Mays, 204 N.W.2d at 866-67. See also State v. Proulx, 252 N.W.2d 426, 429 (Iowa 1977); State v. Montgomery, 235 N.W.2d 525, 526-27 (Iowa 1975); State v. Sowle, 218 N.W.2d 573, 574 (Iowa 1974); State v. Morningstar, 207 N.W.2d 772, 774-75 (Iowa 1973).

AFFIRMED.