



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellant,	)	Filed February 22, 1979
vs.	)	
MILTON ALLEN WEIR,	)	
Defendant-Appellee.	)	<u>777</u> 61778 & 61779

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

State appeals from pretrial order dismissing two charges against defendant.
Reversed.

Thomas J. Miller, Attorney General of Iowa, Kermit Dunahoo, Assistant Attorney General, and Jeffrey Millhollin, Adams County Attorney, counsel for appellant.

Stuart Nielsen, of Stanley, Nielsen & Nielsen, of Corning, counsel for appellee.

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

DONIELSON, J.

The State appeals from trial court's pretrial dismissal of two criminal charges against defendant Milton Weir on the grounds that Weir's right to the assistance of counsel had been violated. We reverse.

The following facts appear undisputed from the record made at hearing. Weir was arrested on the evening of January 12, 1978 on a charge of carrying a concealed weapon. He was advised of his rights at the time of his arrest and again at the Corning police station where he was taken. Weir requested the presence of his attorney, Sherman Phipps of Lamoni, and a call was placed to Phipps by an officer about 8:30 p.m. Phipps was not at home and a message concerning Weir's arrest was left for him. Weir's parents were called, and they visited him at the police station. Weir was also taken to a hospital emergency room for examination, apparently because he appeared intoxicated. At 9:55 p.m. Weir was turned over to the Adams County Sheriff's office and placed in a cell in the county jail. No interrogation of Weir had been undertaken after his initial request to see his attorney. Weir testified that he had been drinking and remembered very little of what happened that evening.

At 11:34 p.m., attorney Phipps called the Sheriff's office and asked to speak with his client. Sgt. Richard Gross of the Corning Police Department asked Phipps to call back in the morning as it was late and the sheriff was not available. When Phipps again requested to speak to Weir, Gross informed him that he would have to speak to the sheriff or deputy. Gross and Officer Thomas Nolan then attempted to wake Weir, who had fallen asleep in his cell, to come to the phone. Permission was required from the sheriff or deputy to remove a prisoner from a cell, and accordingly the radio dispatcher contacted Deputy Sheriff Alan McManis by phone, putting Phipps on hold. The dispatcher's log indicates the following:

Go ahead and let Weir talk if he wants to and have 54 [Gross] check and see if awake. 54 advises prisoner said too tired and didn't want to talk to him right now. . . . Have attorney call back in 30 minutes after [the deputy sheriff will] get dressed. . . . Have Phipps on hold. Told lawyer to call back in one-half hour. 22 [Deputy Sheriff McManis] advises he will be in.

The city policemen testified that when Weir was awakened and asked if he wished to speak to his attorney, he replied, "No, I'm trying to sleep." Phipps had informed the radio dispatcher that he believed the police were attempting to prevent him from seeing

his client, and that he would get the charges dismissed. He was not told that Weir had indicated that he did not wish to speak with him, and Phipps did not call back again that night.

The facts indicate we are confronted with a textbook case of a breakdown in communication between the police and the attorney for a criminal suspect. The officers on duty failed to convey to attorney Phipps that Weir did not wish to speak to him and that Deputy Sheriff McManis was coming into the office from home where he had been in bed to ensure that the situation was handled properly. It appears from the record that a simple, courteous, and more extensive conversation between the officers and attorney Phipps could well have avoided this entire case.

However, for Weir to successfully contend that he was denied the assistance of counsel, he must show that his right to a fair trial has been adversely affected. Nothing in the record indicates that there was any interrogation of Weir during the time he was without counsel. No incriminating statements, admission, or other forms of evidence were elicited or sought to be elicited from Weir. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 423, reh'ing denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed. 2d 240 (1977).

Officer Nolan testified:

Q. From the point in time in which you arrested him to the point in time at which you were no longer involved with Mr. Weir, was there ever an attempt made to interrogate him or question him as to any crime?

A. No sir. The only time we questioned him so far as the crime was at the time of the arrest, after we advised him of his rights, and no other time.

Q. No statements were taken from him; nothing was done which would prejudice him in any way so far as statements were concerned or anything of this nature?

A. No, sir.

The constitutional protection afforded by presence of counsel does not come into play when, as here, there is no interrogation. *Brewer v. Williams*, supra. There is simply no showing that Weir was affected adversely, was harmed or was prejudiced in any manner by the confusion that resulted in a delay before his counsel was available to him. It is without dispute in the record that Weir himself did not wish to speak with his attorney when he called but expressed a desire to continue sleeping.

Further, we do not believe that dismissal of the charges against Weir was a proper sanction for the actions taken by the police in this situation. The trial court dismissed

both charges "as a guideline, a deterrent, if you wish for the conduct of officers in the future much as in the case of a search warrant." We cannot see what deterrent effect the dismissal of charges will bring about. We find applicable language in *Michigan v. Tucker*, 417 U.S. 433, 446, 94 S.Ct. 2357, 2365, 41 L.Ed. 2d 182, 194 (1974):

The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. . . . The deterrent purpose . . . necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We reverse the trial court and order the charges against Weir be reinstated.

REVERSED.