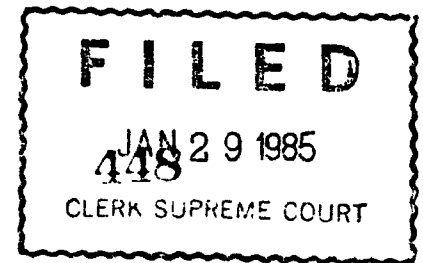


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JAMES KIMBALL,)

Defendant-Appellant.)

Filed January 29, 1985

4-441
84-440

Appeal from the Iowa District Court for Pottawattamie County - Leo Connolly, Judge.

Defendant appeals his conviction of second degree theft alleging the trial court abused its discretion by refusing to grant a remedy for the State's failure to give timely notice of two witnesses. REVERSED AND REMANDED FOR NEW TRIAL.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., Schlegel, and Havden, JJ.

SCHLEGEL, J.

Defendant, James Kimball, appeals his conviction of second degree theft alleging the trial court abused its discretion by refusing to grant a remedy for the State's failure to give timely notice of two witnesses. We reverse and remand for new trial.

On October 6, 1983, Kimball was charged with one count of second degree theft in violation of Iowa Code sections 714.1(2), .2(2) (1983). The trial information asserted he had misappropriated a check in his possession by disposing of it in a manner inconsistent with the owner's rights in the check. The trial information was accompanied by minutes of testimony listing two witnesses: Norman Kenney and Loren Vallier.

On November 17, 1983, the State notified Kimball that two additional witnesses—Nancy Whitt and Michael Hunter—would be called at trial. That notice, given only five days before Kimball's trial was scheduled to begin, did not comply with Iowa Rule of Criminal Procedure 18(2), which requires the prosecutor to give ten days advance notice of additional witnesses.

On the day of trial Kimball moved that the testimony of both Whitt and Hunter be excluded because the State had not complied with rule 18(2). In opposing the motion the State gave no explanation for its failure to comply with the rule. Instead, the State contended that Kimball would not be surprised by the testimony of the two witnesses because Kimball had previously subpoenaed both of them. In fact, the State's assertion was erroneous. Kimball had only subpoenaed Hunter.

The trial court overruled Kimball's motion to exclude the two witnesses' testimony. Kimball then requested a continuance. The trial court denied the request.

Throughout these proceedings and during the subsequent trial Kimball was acting pro se. However, a court-appointed attorney was also present and acting as standby counsel.

Kimball was convicted as charged and sentenced to incarceration for a term of up to five years. He appeals, asserting the trial court abused its discretion by failing to grant a remedy for the State's violation of the notice provisions of Iowa Rules of Criminal Procedure 18(2).

I. Violation of Rule 18(2). Iowa Rule of Criminal Procedure 18(2) clearly states that additional witnesses may be presented by the State if the State has given "the defendant . . . a minute of testimony of such witness's evidence . . . at least ten days before the commencement of the trial." Iowa R. Crim. P. 18(2). The State in this case presented no explanation for its failure to comply with this simple rule.

One of the objects of our criminal judicial system is to provide the accused a fair trial. "Defendant is entitled to no more, and he must have no less." State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969). To achieve that objective, the State of Iowa has established the Iowa Rules of Criminal Procedure. See Iowa Code § 801.3 (1983). The rule in question here, rule 18(2), promotes the goal of a fair trial by assuring the defendant adequate time to prepare for trial. See State v. Love, 300 N.W.2d 137, 138 (Iowa 1981). We want to emphasize that rule 18(2) serves an important purpose.

When the State violates this rule without offering any excuse, it gives the appearance of an attempt to circumvent the purpose of the rule and conduct a trial by ambush. Whether the failure to comply with the rule was due to neglect or incompetence, the best interests of society are not advanced by denying the accused a fair trial.

However, as strongly as we feel about the importance of complying with rule 18(2), we realize that the lack of notice alone does not constitute grounds for reversing the conviction. When rule 18(2) is violated, rule 18(3) grants the trial court discretion to fashion a remedy for the violation. We therefore examine the actions of the trial court.

II. Abuse of Discretion. Rule 18(3) provides:

Failure to give notice. If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 18(3). Our review of action taken pursuant to this rule is for abuse of discretion. See State v. Ellis, 350 N.W.2d 178, 182 (Iowa 1984). The trial court has broad discretion in fashioning a remedy under rule 18(3). Cf. State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983) (broad discretion in ruling on motions for continuance). The trial court, however, "must actually apply discretion." State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979) (emphasis in original). Failure to apply discretion constitutes an abuse of discretion. See id. We reverse because we conclude the trial court did not exercise its discretion in this case.

We base our conclusion—that the trial court abused its discretion by not exercising discretion—upon a combination of factors. First, we are unable to determine what motivated the trial court because it gave no reasons for its rulings on Kimball's motions for relief under rule 18(3). Second, the trial court had little concern for Kimball's interests; it told Kimball, "Make your motion without the argument." Third, Kimball was acting pro se with standby counsel. And fourth, the State was not asked for an explanation of its violation of rule 18(2).

The proper standard for exercising the discretion granted in rule 18(3) is found in the rule itself. The defendant is to be protected from prejudice due to late notice. See Iowa R. Crim. P. 18(3). In this case, however, there was insufficient attention given to the issue of prejudice. Although the prosecutor argued Kimball would not be surprised by the testimony of the two additional witnesses because they had been subpoenaed by Kimball, in actuality only one had

been subpoenaed. Thus, Kimball could possibly have been surprised by the testimony of the unsubpoenaed witness.

In addition to prejudice by surprise, it is possible the calling of the two additional witnesses forced a change in the whole nature of Kimball's defense. The two additional witnesses were needed by the State to prove its case. Until late notice was given for those two witnesses, Kimball did not need to prepare a defense. The testimony of the two original witnesses would not have presented sufficient evidence to warrant a conviction. Kimball would have been entitled to a judgment of acquittal. But once the other two witnesses were called, Kimball would have to prepare a defense.

Ordinarily the defendant would have to bring these points to the attention of the court. Kimball, however, was acting pro se with standby counsel and it seems unlikely he fully understood the operation of rule 18(3). Moreover, he may have refrained from explaining the prejudice that resulted to him because of the trial court's admonition to "Make your motion without the argument." In either case, the trial court, due to the important part adequate preparation plays in assuring a fair trial, should have made a more detailed inquiry into the matter of prejudice. If it had done so, it would have discovered that Kimball had not subpoenaed both additional witnesses.

We believe the trial court should have asked the State to explain why the notice provision of rule 18(2) was violated. Although the prosecution is no longer required to show diligence to have the testimony of additional witnesses allowed when timely notice is not given, the matter of diligence is still relevant. Rule 18(2) serves an important purpose. If the prosecution cannot offer an explanation for its failure to comply with the rule, the trial court should act liberally in fashioning a remedy, so that the defendant is not subjected to trial by ambush. We are confident that if the doubt is resolved in defendant's favor, a fair trial will result and there will be less likelihood of an appeal.

We also believe the trial court should state its reasons for granting or denying relief under rule 18(3). In doing so, the trial court will show that it has exercised its discretion. Cf. State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979) ("In order for such [an abuse of discretion] standard to operate, it is essential for the trial court to state the reasons for selecting a particular disposition.").

In this case the trial court did not state its reasons for denying Kimball's motion to exclude the witnesses or to order a continuance. Nor did the trial court explain why it did not at least give Kimball an opportunity to discover the witnesses' testimony. Such a remedy was not waived by Kimball, see State v. Thompkins, 318 N.W.2d 194, 198 (Iowa 1982) (interpreting rule 13(6)(c), which is similar to rule 18(3)), and should have been considered by the trial court under rule 18(3). Because the trial court did not state its reasons for denying relief under rule 18(3), we must, considering all the factors previously discussed, hold that an abuse of discretion occurred by failure to exercise discretion.

It is possible the trial court would have made the same rulings on Kimball's motions if it had exercised discretion. However, "[a] refusal or failure to exercise discretion will not be affirmed by demonstrating that the result reached could have been the same upon the exercise of the withheld discretion." Sullivan v. Chicago & Northwestern Transportation Co., 326 N.W.2d 320, 328 (Iowa 1982) (citing State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979)). Therefore, we reverse and remand for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.