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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1980
vs.	)	
STEPHEN MARK MACE,	)	0-196 63487
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Defendant appeals his conviction for robbery in the first degree in violation of section 711.2, The Code 1979. AFFIRMED.

W. H. Gilliam, of Gottschalk & Gilliam, Cedar Falls, for defendant-appellant.

Thomas G. Miller, Attorney General of Iowa, and Douglas F. Staskal, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant, Stephen Mark Mace, appeals conviction of robbery in the first degree in violation of section 711.2, The Code 1979. On appeal, defendant asserts as grounds for reversal: The investigatory stop of the vehicle in which he was riding violated his fourth amendment rights because the source of a police radio description of a robbery suspect was not established on the record and specific and articulable facts did not exist to justify the stop; the trial court's ruling on his motion to suppress should have rested only on the evidence produced at the suppression hearing, not on a particular deposition taken by defendant of an investigating police officer; and his motion for an indentification line-up should have been granted. We affirm the conviction.

I.

On July 3, 1978, defendant was charged in a county attorney's information with robbery in the first degree. Defendant filed a motion to suppress on August 17, 1978, in which he claimed the car in which he had been riding was stopped without probable cause, violating his fourth amendment right to be free from unreasonable searches and seizures. Defendant asked "all evidence arising from . . . [the] stop" be suppressed and the case be dismissed. On August 24, 1978, defendant filed a request that the court order a line-up at the county jail.

The motion to suppress was sustained by the court on October 23, 1978. The court noted the officer, Deputy Sheriff Perigo, who stopped the car in which defendant was riding testified to hearing a description of the robbery suspect over his radio, but that the officer who investigated the robbery "denied" transmitting the information. The court did not detail what evidence was to be suppressed, nor did it rule on the request the charge be dismissed. The State filed a motion to reconsider shortly thereafter. The motion was summarily denied.

On December 13, 1978, the State filed a second motion to reconsider, asserting the then new Supreme Court opinion in Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 403, 58 L. Ed. 2d 387 (1978), should affect the outcome. On January 10, 1979, the court filed an order in which it agreed to reconsider the motion, and ordered that "in connection with the reconsideration" the deposition of an investigating police officer taken by defendant be filed.

On March 6, 1979, the court ruled on the motion to reconsider its suppression ruling. The court described the identification information discovered and transmitted

by Officer Boesen who did not testify at the hearing, but whose deposition had been taken by defendant and was available to the court under its order of January 10, 1979. The court found this information had been conveyed to the deputy who stopped the car by the sheriff's dispatcher, and the stop "was proper as an investigative stop under those circumstances." The motion to suppress was overruled.

On March 12, 1979, the defendant filed a motion to dismiss for failure to provide a speedy trial. It was overruled on the day of trial, along with the long-pending motion for a line-up.

The case was tried to a jury on March 13-15, 1979. The jury returned a verdict of guilty of robbery in the first degree. On April 20, 1979, defendant was sentenced to up to twenty-five years in confinement.

II.

Defendant asserts the investigatory stop of the vehicle in which he was riding constituted a seizure of his person in violation of his fourth amendment rights. Accordingly, he argues the trial court erred in not sustaining his motion to suppress all evidence arising from the allegedly unlawful stop. We disagree.

The law is well established that an investigatory stop of a motor vehicle is constitutionally permissible only if the stopping officer has specific and articulable cause to reasonably believe crime activity is afoot. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980) (quoting Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877-79, 20 L. Ed. 2d 889, 903-04 (1968)); State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976); State v. Cooley, 229 N.W.2d 755, 757-61 (Iowa 1975). Circumstances evoking mere suspicion or curiosity will not suffice. State v. Reese, 259 N.W.2d 793, 795 (Iowa 1977) (quoting Dixon, 241 N.W.2d at 23). In each case, the constitutionality of a seizure is judged by balancing the degree of its intrusion on the individual's fourth amendment rights against the promotion of legitimate governmental interests. Hilleshiem, 291 N.W.2d at 317 (citing Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 361-62 (1979)).

Confronted with alleged constitutional violations, we resolve the issue by making our own independent evaluation of the totality of the circumstances. Hilleshiem, 291 N.W.2d at 316. Our review is de novo. State v. Aschenbrenner, 289 N.W.2d 618, 621 (Iowa 1980). The State has the burden to show the stop was lawful. Hilleshiem, 291 N.W.2d at 316.

In determining whether the court erred in overruling the motion to suppress we may consider not only the evidence adduced in the motion to suppress but also the later trial testimony. State v. Donnell, 239 N.W.2d 575, 577-78 (Iowa 1976). Defendant's argument that the trial court erroneously considered the deposition of Officer Boesen in reversing its prior ruling sustaining the motion is thus without merit, particularly since defendant deposed the officer.

The record tends to establish the stopping officer had sufficient knowledge to reasonably believe criminal activity was afoot. Deputy Peligro was investigating a specific crime, the robbery of the Danish Book World, at the time he stopped defendant. See Dixon, 241 N.W.2d at 22-23. Deputy Perigo learned from the dispatcher an older-model, green Chrysler-type vehicle was suspected as being involved in the robbery. This description reasonably matched that of the vehicle defendant was riding in when he was stopped. Deputy Perigo obtained from the dispatcher a description of the suspected robber as 5'8" or 5'9", weighing 170 pounds, with shoulder length dark hair, and wearing a red bandana. Deputy Perigo stated defendant's hair matched this description. The other characteristics would obviously be difficult to discern with defendant sitting in a vehicle. The fact there were two people in the vehicle when Deputy Perigo stopped it is not unreasonable under the circumstances. The vehicle was stopped at approximately 4:30 a.m., which was about one-half hour after the robbery had occurred. Deputy Perigo stopped the car in Washburn, which is approximately two miles outside the city limits of Waterloo, where the robbery occurred. Reviewing these facts, we are convinced the officer had specific and articulable cause to believe criminal activity was afoot; stopping defendant's vehicle was reasonable under the circumstances. Dixon, 241 N.W.2d at 23.

Defendant also contends the stop was unconstitutional because the radio description received by Deputy Perigo of defendant and his vehicle was not based on some reasonable and articulable fact. This argument is derived from Whitely v. Warden of Wyoming Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), in which the Supreme Court held an arrest could not be supported by reliance solely on information received in a radio bulletin unless the record established the source of the information, and the information established the probable cause of arrest. Id. at 564-69, 91 S. Ct. at 1035-37, 28 L. Ed. 2d at 311-13. The applicability of the Whitely holding to investigatory stops has not yet been determined with certainty. In Reese, 259

N.W.2d at 794-96, and Dixon, 241 N.W.2d at 22-23, this issue was not raised even though the police officers involved acted largely on the basis of radio dispatches.

Regardless, the facts show a foundation for the information received by Deputy Perigo by radio broadcast. The description of the robbery suspect was provided by the police officer who interviewed the victim. The vehicle description came from Officer Boesen, who had observed a vehicle parked near the Danish Book World while en route to a restaurant for a meal. He and his partner made this observation at approximately 3:55 a.m. After receiving a report on their radios of the robbery, Boesen called in to the dispatcher the description of the vehicle they had earlier observed, suspecting it may have been involved in the robbery. We hold these facts provide a sufficient foundation for the radio dispatch received by Deputy Perigo prior to stopping defendant. The motion to suppress was properly overruled.

III.

Defendant asserts his statutory rights to a speedy trial were violated by the eight month delay between the time a trial information was filed and when he was brought to trial. Since defendant's argument is based on his statutory right under Iowa R. Crim. P. 27(2)(b) to a speedy trial, his constitutional right to a speedy trial is not at issue here. See State v. Peterson, 288 N.W.2d 332, 334-35 (Iowa 1980); State v. O'Connell, 275 N.W.2d 197, 201 (Iowa 1979). We hold the delay was waived in part by defendant and attributable in other part to defendant and affirm the trial court's overruling of defendant's motion to dismiss.

The speedy trial requirement of Iowa R. Crim. P. 27(2)(b) requires trial be commenced within ninety days of the date of indictment or the date the information is filed. If trial is not commenced within the ninety-day period, the case must be dismissed unless one of three things has occurred: Defendant has waived his right to a speedy trial; the delay is attributable to defendant; or there is good cause for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980); State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979). The determination of whether good cause exists to justify a delay under Iowa R. Crim. P. 27(2)(b) focuses on only one factor: the reason for delay. Petersen, 288 N.W.2d at 335. The surrounding circumstances, however, may affect the strength of the reason that is necessary for good cause. State v. Moritz, 293 N.W.2d 235, 241 (Iowa 1980). These other circumstances include the length of the delay, the defendant's request for speedy trial, and prejudice resulting for the delay. Id.

At this level our review of the ruling on this issue is not de novo. State v. Donnell, 239 N.W.2d 575, 579 (Iowa 1976). Reversal is required only if defendant shows the trial court abused its limited discretion. Id.

Defendant was charged with robbery in the first degree by a trial information filed on July 3, 1978. On August 17, 1978, defendant filed a motion to suppress and requested the case be dismissed upon the granting of the motion. A hearing was held on August 25, 1978, on defendant's suppression motion. At the close of evidence at that hearing, a colloquy occurred between defense counsel, defendant, and the court, in which defendant waived his constitutional and statutory right to a speedy trial "in order to have further consideration of these matters." The delay between July 3, 1978, and October 23, 1978, when the court granted defendant's motion to suppress, was clearly and voluntarily waived by defendant.

After the court reversed its prior ruling and overruled the motion to suppress on March 6, 1979, the trial commenced on March 13, 1979. The critical period, therefore, in our determination is between October 23, 1978, and March 6, 1979. On November 6, 1978, the State filed a motion to reconsider the suppression ruling on the grounds the court had based its ruling on an apparent inconsistency in the evidence that did not exist. This motion to reconsider was overruled on November 9, 1978. After a pre-trial conference was held on November 20, 1978, Judge Van Metre entered an order indicating defense counsel had raised questions concerning the minutes of testimony and both parties raised questions concerning the exclusionary scope of the suppression ruling. Judge Van Metre ordered the trial continued until further order, defendant's request be treated as a renewal of the motion to dismiss raised in the suppression hearing, but not ruled on previously, and counsel submit briefs by December 11, 1978.

On December 13, 1978, the State filed its second motion to reconsider the suppression ruling on the grounds the judge who ruled on it was not in a position to do so and the case of Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 403, 58 L. Ed. 2d 387 (1978) (decided December 5, 1978), would change the outcome and the State needed time to get a copy of the case. Defendant filed his brief on the scope of the suppression order on December 19, 1978, and a resistance to the State's second motion on December 20, 1978. On January 4, 1979, defendant filed a motion to strike the State's brief, filed December 28, 1978. On January 10, 1979, the court granted the State's second motion to reconsider and allowed defendant to respond within ten days to the State's brief. On

January 19, 1979, defendant received a continuance until February 6, 1979, to respond. On January 22 a pre-trial conference was held, at which defendant requested a continuance of the trial set for that week. The continuance was granted. Defendant filed his reply brief and argument on February 7, 1980. On March 6, the trial court reversed its prior ruling and overruled the motion to suppress.

The delay then between October 23, 1978, and March 6, 1979, is attributable in large part to the efforts to decide the issues raised by defendant's motion to suppress. A defendant must accept the passage of time reasonably necessary for action upon his or her own motions and application. See State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977); Donnell, 239 N.W.2d at 579. Here, defendant even acknowledged on November 21, 1978, all issues had not been fully determined by the suppression order. The State's two motions to reconsider were efforts to clarify and modify the suppression ruling and raised substantial issues. We deem it significant defendant did not request a speedy trial until he filed his motion to dismiss on March 12, 1979, one day before trial was commenced. Under these circumstances, we hold the State's two motions to reconsider challenging the ruling sustaining defendant's motion to dismiss along with defendant's continuance requests constituted good cause for the delay between October 23, 1978 and March 6, 1979, in bringing defendant to trial. See State v. Albertsen, 228 N.W.2d 94, 96-98 (Iowa 1975) (State's taking certiorari action from court order sustaining defendant's motion to suppress constituted good cause for delay in bringing defendant to trial.).

Defendant's right to a speedy trial was not denied due to his partial waiver and the good cause existing for the delay, which was partially attributable to him. The seven-day period between the overruling of this suppression hearing and the commencement of trial is well within the ninety-day period of Iowa R. Crim. P. 27(2)(b). The trial court did not err in overruling his motion to dismiss. Moritz, 293 N.W.2d at 241.

IV.

Defendant contends the trial court erred in denying his motion for a pre-trial identification line-up. He bases his argument on Iowa R. Crim. P. 12, which grants a defendant in a criminal case the right to depose any witnesses listed by the State on an indictment, information, or notice of additional witnesses. In his motion, defendant requested a line-up be arranged so that the attendant at the Danish Book World who witnessed the robbery would be required to identify him. The trial court overruled this motion on the ground the photographs supplied by the county attorney's office, from

which the witness identified defendant, were adequate. We affirm the trial court's ruling.

Initially, we note Iowa R. Crim. P. 12 does not specifically provide for a pre-trial line-up procedure. The rule provides in part "[a] defendant in a criminal case, may examine all witnesses . . . in the same manner and with like effect and with the same limitations as in civil actions except as otherwise provided by statute and these rules." Id. We find no provision for a pre-trial line-up in the rule. Since defendant deposed the witness, we find he was provided the full opportunity and advantage provided by Iowa R. Crim. P. 12 and the trial court did not err by refusing to allow a line-up under it.

A defendant's right to "nontestimonial identification procedures" is, however, granted by Chapter 810, The Code 1979. This section provides in part that a person charged with an offense may request a district court judge to order a nontestimonial identification procedure. § 810.2, The Code 1979. The court will grant the request, if "it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense . . . ." Id.

Defendant has waived the applicability of section 810.2, The Code 1979, however, by failing to cite that section to the trial court in his original motion or at anytime afterward. Our review is limited to the grounds asserted before the trial court. State v. Matlock, 289 N.W.2d 625, 628 (Iowa 1980); State v. Whiteside, 272 N.W.2d 468, 472 (Iowa 1978). He also has not raised this provision on appeal. Failure to do so constitutes a waiver of that argument. See Iowa R. App. P. 14(a)(5). Even on the merits of the argument, we would find, based on the adequacy of the photographic identification, the trial court would not have abused its discretion in determining a line-up would not be a material aid in determining whether defendant committed the crime.

Defendant argues he was denied his right to confront the witness because of his inability to prepare for cross-examination resulting from the lack of a line-up. This argument is without merit. Defendant had ample opportunity to cross-examine the witness and did so. He does not have an absolute right to demand a pre-trial line-up. § 810.2, The Code 1979.

We hold the trial court correctly overruled defendant's motion for a pre-trial line-up.

We affirm the judgment of the trial court.

AFFIRMED