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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )
Plaintiff-Appellee, )
vs. )
DONALD EUGENE BLACK, ) 8-686
Defendant-Appellant.) 88-79

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Appeal from the Iowa District Court for Woodbury County (41639), Philip S. Dandos and Michael S. Walsh, Judges.

Defendant appeals his conviction of sexual abuse in the third degree. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark Joel Zbieroski, Assistant Attorney General, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

**SCHLEGEL, P.J.**

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Defendant Donald Eugene Black appeals his conviction of sexual abuse in the third degree, in violation of Iowa Code sections 709.1 and 709.4(1) (1987). The sole issue on this appeal is whether Black was denied his right to a speedy trial under Iowa Rule of Criminal Procedure 27(2)(b), which states:

> 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 be shown.

Defendant pleaded guilty to the charge of sexual abuse in the third degree on July 8, 1985. Following sentencing and an appeal, this court reversed his conviction and sentence and remanded the case to the district court for new trial. Procedendo issued on February 5, 1987, triggering the ninety-day period under rule 27(2)(b). See State v. Zaehringer, 306 N.W.2d 792, 794-95 (Iowa 1981). Defendant was arraigned and a trial date of April 28, 1987, was set. On April 9, 1987, defendant's counsel filed a motion to suspend proceedings for a competency evaluation, and on that date proceedings were suspended. Defendant was found to be incompetent to stand trial by ruling on May 19, 1987. On August 31, 1987, the defendant was found to be competent to stand trial. Defendant was returned to Woodbury County on September 2, 1987. On September 15, 1987, counsel for defendant wrote to the prosecutor that a

trial date should be set as soon as possible. On September 25, 1987, the defendant filed a request for further psychiatric evaluation and for a deposition of the examining physician. On October 15th, however, defendant canceled the deposition which had been set, and notified the prosecutor that the defense was ready for trial.

The trial court found that on or about October 26, 1987, the prosecutor spoke to the counsel for the defendant. From that conversation it is agreed that the prosecutor indicated a conflict in his trial schedule, and that he would like to set Black's trial for November 17, 1987. To this suggestion, defense counsel told him that the proposed date was fine, and that it was acceptable.

On November 6, 1987, defendant moved to dismiss the charge against him on grounds that his speedy trial rights had been violated. After hearing, the motion was overruled.

In ruling on the defendant's motion to dismiss, the trial court found that counsel's consent to the date of the trial constituted a waiver of speedy trial until the agreed date of November 17, 1987. The court further found that when all of the times chargeable to defendant were deducted from the elapsed time, November 17, 1987, was within the ninety-day period prescribed by the rule. The court said:

> Based upon the above, the number of days in delay not attributable to the defendant (as of the November 17 trial date) amounts to 75 days.

Our scope of review is not de novo. We reverse the trial court only for an abuse of discretion. State v. Lybarger, 263 N.W.2d 545, 547 (Iowa 1978). The trial court's findings of fact on conflicting evidence are binding upon us if supported by substantial evidence. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983).

> The discretion to avoid dismissal in a criminal case is limited to the exceptional circumstance where the State carries its burden of showing good cause for the delay. This is the circumscribed discretion in review on appeal.

Id. (citing State v. Hines, 225 N.W.2d 156, 160-61 (Iowa 1975)).

Under Iowa Rule of Criminal Procedure 27(2)(b), if trial is not commenced within the ninety-day period prescribed by that rule, the case must be dismissed unless one of three things has occurred: (1) the defendant has waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) there is "good cause" for the delay.

The defendant claims that counsel's acquiescence in the fixing of the trial date did not amount to a waiver of defendant's speedy trial right, and that in fact, his comments were only an acknowledgement that the trial date had been fixed for November 17, 1987. He believes that simply to agree with the fixing of that date, without expressly waiving the right to be tried earlier, did not amount to an agreement upon that date. There is no claim

that faced with that date, counsel for the defendant made any objection, or insisted upon trial at an earlier date.

The trial court found that by the acquiescence of counsel for defendant in the November 17th date, defendant waived his right to speedy trial until that date. The trial court's finding is supported by substantial evidence and is therefore binding upon us. As stated by our supreme court:

> [W]e have recognized that acquiescence in the setting of a trial date beyond the speedy trial period is a factor which may be considered in determining whether a defendant has waived his speedy trial rights. See State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976).

Zaehringer, 306 N.W.2d at 795.

Here, defendant was timely arraigned upon the remand of this case for retrial. A trial date, well within the restraints of rule 27(2)(b), was set. All action in the case had to be suspended while defendant regained his competence to stand trial. Approximately six months later, defendant was declared competent to stand trial, and the time commenced to run again. Defendant requested a further mental exam and deposition on September 25, 1987, and then abandoned the deposition on October 15, stating then that he was ready for trial. Some ten days following that date, counsel for the defendant and the prosecutor spoke of the trial date, and the date of November 17 was suggested and acquiesced to by counsel for the defendant. Under this record, we find that the defendant had waived his speedy

trial rights until the trial date of November 17, 1987. Under rule 27(2)(b), "good cause" was shown for failing to afford the defendant a trial within the time constraints of the rule.

> The speedy trial rule is intended to protect a defendant's right to an expeditious retrial, not to provide a weapon for terminating a prosecution which the defendant was not earlier prepared to defend. . . . In the present case, defendant actively participated in the events which delayed his retrial but later sought to take advantage of that delay to terminate the prosecution. This he cannot do.

Zaehringer, 306 N.W.2d at 796. In this case, the delay attributable to defendant, when coupled with the acquiescence and lack of objection to a firm trial date justified the trial court in finding that defendant had waived his right to speedy retrial until November 17, 1987.

The trial court found that when considering all of the delays attributed to the defendant, the trial took place within the ninety days prescribed by the rule. We agree that the delay for an additional mental exam should be attributed to defendant, and find that the court's finding in that regard is also supported by substantial evidence.

We hold that the trial court did not abuse its limited discretion in overruling defendant's motion to dismiss.

**AFFIRMED.**