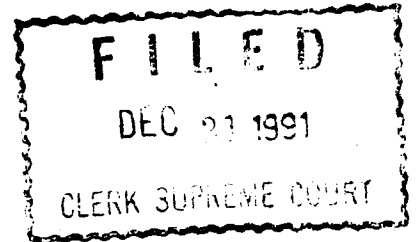


IN THE COURT OF APPEALS OF IOWA

No. 1-390 / 90-1798



STATE OF IOWA,

Plaintiff-Appellant,

vs.

789

DEBRA JO JOHNSON-HUGI,

Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

The State appeals from a district court order dismissing the charge of delivery of amphetamine against Debra Johnson-Hugi for violation of the speedy indictment rule. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ., but decided en banc.

SACKETT, J.

The State appeals a trial court's order dismissing a charge of delivery of amphetamine against defendant-appellee Debra Jo Johnson-Hugi. The trial court dismissed the charge because of a violation of the speedy indictment rule, Iowa R. Crim. P. 27(2)(a). We affirm.

The question on appeal is whether there is substantial evidence to support the trial court's findings that the defendant was arrested on May 22, 1990. Our review is at law, therefore, we are bound by the facts found by the trial court if supported by substantial evidence. See State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983).

The present prosecution is based on an alleged delivery of amphetamine by the defendant to an undercover officer on April 4, 1990. In late April or early May an undercover officer, Graham, gave the defendant \$750 to buy more drugs. The defendant did not know Graham was an undercover officer.

No purchase took place, and on May 22, 1990, Graham and officer Lewis went to the defendant's residence. Graham identified himself as an officer, displayed his badge, and offered defendant the alternative of either being arrested for the April 4, delivery and for the theft of the \$750 or becoming a confidential informant. On May 22, the State had the evidence to bring a charge on the April 4, delivery.

The facts from this point on are in some dispute. We view them in the light most favorable to the trial court's findings. The defendant felt she did not have a choice but to go with the officers. She felt she had been "more or less busted." She was told she couldn't take her own car to the patrol office and once she was there she couldn't leave until the officers agreed. Before the group left for the highway patrol office, the defendant was patted down and her purse was searched. She was given the Miranda warning at the highway patrol office. She told the officers she needed to get to work. She was told she needed to finish what they were talking about and complete paperwork for "cooperating individuals" before she would be returned to her home. At the end of the interview after obtaining defendant's agreement to serve as a confidential informant she was returned home. In the weeks that followed, Graham made numerous contacts with the defendant. He told her he had to contact her and he was not going to go away. He ultimately determined she was not going to cooperate. She was arrested for the April 4, 1990 incident on August 22, 1990, and a charge was filed on September 6, 1990.

Defendant filed a motion to dismiss the charge, contending the May 22, 1990 trip to the patrol office was an arrest and the filing of the information on September 6, some 106 days later, was not timely under the 45-day

deadline contained in the speedy indictment rule of Iowa R. Crim. P. 27(2)(a). The trial court sustained the motion and found with reference to the May 22 trip to the patrol office:

While no formal arrest occurred, the Defendant was effectively deprived of her liberty and was restrained such that a reasonable person would perceive detention was being exercised to the point of denying her freedom.

The State contends the May 22 situation was not an arrest because the defendant was presented with alternative courses of action, and the defendant chose the alternative and was not arrested.

An arrest may occur even though the arresting officer does not serve a warrant or announce to the person he or she is under arrest. See Boelman, 330 N.W.2d at 795. An arrest may occur without the formal service of a warrant. Id., see also State v. Schmitt, 290 N.W.2d 24, 26 (Iowa 1990). The term "arrest," as used in Iowa R. Crim. P. 27(2)(a), has been defined as in section 804.5 of the Iowa Code (1990). See State v. Van Beek, 443 N.W.2d 704, 706 (Iowa 1989); Schmitt, 290 N.W.2d at 26. Section 804.5 provides, "Arrest is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or his or her submission to custody". An arrest is more than mere submission to authority. See State v. Ransom, 309 N.W.2d 156, 159 (Iowa App. 1981). An arrest can be held to have occurred if a reasonable person in the circumstances of

the defendant would have believed he or she was not free to leave. See United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980).

There is substantial evidence to support findings the defendant was directed to accompany the officers to the patrol office and was told she was not free to leave. When she needed to go to the bathroom, a female officer accompanied her. When ultimately allowed to leave, she did not do so unconditionally but with the threat of arrest over head. This fact, characterized by the trial court as a "substantial string attached" to her release, made her release conditional and distinguishes this case from Van Beek, 443 N.W.2d at 706, where defendant's unconditional release within hours of detention placed them back in the same position as before being arrested for purposes of Rule 27(2)(a). The defendant continued to be contacted by agents. There is substantial evidence to support the trial court's decision. It is affirmed.

We recognize that cooperating individual agreements are an important part of law enforcement, and this decision does not severely restrict those agreements. But there is no reason for an individual, cooperating under the State's threat to file criminal charges for a past offense, to indefinitely be left in limbo. There was no termination date on the cooperation agreement in this case. The defendant did not waive any speedy disposition rights. If

the cooperation agreement had had a termination date, and the defendant had waived her speedy trial rights, the defendant's current challenges to the indictment would have had no basis.

The State argues even if there was an arrest on May 22, there was good cause for the State's delay. The State does not in its brief point out where this issue was preserved for review. The State's resistance to the defendant's motion to dismiss filed at the trial court level does not raise the issue of a good cause for the delay. Questions not presented to the trial court will not be addressed on appeal and new theories may not be presented on appeal. See State v. Floyd, 466 N.W.2d 919, 924 (Iowa App. 1990).

AFFIRMED.

All judges concur except Donielson, P.J., and Habhab, J., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. I am troubled by both the reasoning and the policy implications of the majority opinion. I would reverse the trial court's dismissal of the charges against Johnson-Hugi. In explaining my reasoning, I find it helpful to restate the factual background of this case with added specificity.

On April 4, 1990, Debra Johnson-Hugi allegedly delivered amphetamine to an undercover police officer. However, she was not immediately arrested. Instead, in late April or early May, John Graham, an undercover police officer with the Iowa Department of Narcotics Enforcement, gave Johnson-Hugi \$750 with the understanding that she would use the money to buy more drugs. Johnson-Hugi did not know Graham was a police officer.

After several weeks, Officer Graham concluded that the planned drug transaction had fallen through. He was also concerned that Johnson-Hugi suspected him to be a narcotics agent. Therefore, on May 22, 1990, Officer Graham and fellow undercover officer Lori Lewis went to Johnson-Hugi's home in Clear Lake. Once the officers were inside the residence, they had a brief discussion concerning Johnson-Hugi's failure to buy more drugs in order to complete the proposed transaction.

After the conversation, Officer Graham identified himself and Officer Lewis as state narcotics agents, and showed Johnson-Hugi his badge. In the subsequent

conversation, Johnson-Hugi was asked, in substance, whether she wished to cooperate as a confidential informant or be faced with charges of narcotics trafficking and theft of the purchase money. Officer Graham then told Johnson-Hugi that he wanted to take her to the District Eight Highway Patrol Post near Mason City. Johnson-Hugi testified that she did not feel free to leave at that time, having "been more or less busted." She testified that Officer Graham indicated that he wanted her "to go with him to listen to him talk." She testified she felt she had no choice as to whether or not to go with the officers. She believed her choice was between listening to the officer or going to jail.

Johnson-Hugi agreed, and the three went to the highway patrol headquarters. Johnson-Hugi testified that Officer Graham refused to allow her to drive her own car to the station. Officer Graham testified Johnson-Hugi was not forced to ride in the officers' car. Nevertheless, the officers drove Johnson-Hugi to the station in their car, and the trial court found that Johnson-Hugi had been required to ride with the officers. Before leaving for the station, the officers searched Johnson-Hugi's purse and frisked her.

Upon arrival at the Highway Patrol Headquarters, the two state agents were joined by Mr. Garlock, the Assistant Chief of Police of Clear Lake. Officer Graham read Johnson-Hugi her Miranda warnings and explained that which

he wanted her to do. Officer Graham admits in his testimony that Johnson-Hugi stated, several times, that she needed to get to work. He states that he told her "[they] needed to finish what [they] were talking about and then complete State's Exhibit[s] 1 and 2 and at such time that they were completed, [he] would take her back home so she could in fact go to work." Johnson-Hugi testified that she felt intimidated by the surroundings and the circumstances. When she asked to use the restroom, the female agent accompanied her.

Johnson-Hugi testified Assistant Chief of Police Garlock told her two or three times that if she did not listen and cooperate she would go "to jail for a long time." In essence she was told that she could cooperate as a confidential informant or be confronted with criminal charges.

She agreed to become a confidential informant and filled out the necessary forms. She assisted the agents in filling out a "Cooperating Individual-Background" biographical data form (Exhibit 1) and a Cooperating Informant Acknowledgment" form (Exhibit 2). Finally, the agents drove her back to her home, having spent approximately two hours with her--a good portion of which had been spent in a room with three police officers at the Highway Patrol Headquarters.

Months later, Johnson-Hugi failed to cooperate as an informant. On August 22, 1990, Johnson-Hugi was arrested,

and she was charged on September 6, 1990, based on the alleged April 1990 amphetamine delivery. Johnson-Hugi filed a motion to dismiss, arguing that her meeting with officers on May 22 constituted an arrest and that the filing of the information 106 days later, on September 6, was not timely under the speedy indictment rule. The district court ruled in Johnson-Hugi's favor and dismissed the case.

On appeal, the State contends the district court erred in granting the defendant's motion to dismiss for violation of the speedy indictment rule, Iowa Rule of Criminal Procedure 27(2)(a). The sole issue with which we are presented is whether Johnson-Hugi was arrested on May 22.

Iowa Rule of Criminal Procedure 27(2)(a) provides in pertinent part:

When an adult is arrested for the commission of a public offense, . . . and an indictment is not found against him within forty-five days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives his rights thereto.

The State argues that the meeting between Johnson-Hugi and the narcotics agents on May 22 was not an arrest. The State contends that Johnson-Hugi was never told she was under arrest; but rather, she was presented with two alternatives: she could cooperate, or she could be arrested. Johnson-Hugi chose to cooperate--for a while. Therefore, the State contends, she was not arrested, as the term is defined by the Iowa Code, until August 22. As

such, according to the State's argument, the forty-five-day period prescribed by rule 27(2)(a) did not begin to run on May 22.

The majority opinion cites United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980), for the proposition that "[a]n arrest can be held to have occurred if a reasonable person in the circumstances of the defendant would have believed he or she was not free to leave." Mendenhall certainly cannot be read to stand for such a proposition. The Supreme Court in Mendenhall concluded "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed the he was not free to leave." See id. (emphasis added). There is clearly a difference between the definition of seizure for fourth amendment purposes and the definition of arrest for speedy indictment purposes.

The term "arrest" as used in rule 27(2)(a) is defined as it is in Iowa Code section 804.5 (1989). See Van Beek, 443 N.W.2d at 706 (citing State v. Schmitt, 290 N.W.2d 24, 26 (Iowa 1980)). Section 804.5 defines "arrest" as "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or his or her submission to custody."

The manner of making an arrest is prescribed by Iowa Code section 804.14. This section states:

The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so

Iowa Code § 804.14 (1989). Rule 27(2)(a) and Iowa Code sections 804.5 and 804.14 were enacted together as part of the Iowa Criminal Code. See State v. Schmitt, 290 N.W.2d 24, 26 (Iowa 1980)(citing 1976 Session, 66th G.A., ch. 1245(2), §§ 405, 1301). Because they were passed in the same legislative session and relate to the same subject matter, we construe them together. See id. (citing Manilla Community School District v. Halverson, 251 Iowa 496, 503, 101 N.W.2d 705, 709 (1960)). Accordingly, we must view section 804.14 as informing the definition of "arrest" found in section 804.5. See State v. Ransom, 309 N.W.2d 156, 158-59 (1981); Schmitt, 290 N.W.2d at 26 (citing State v. Thomas, 275 N.W.2d 422, 423 (Iowa 1979)).

The majority cites State v. Boelman, 330 N.W.2d 794 (Iowa 1983), for the proposition that "[a]n arrest may occur even though the arresting officer does not . . . announce to the person he or she is under arrest." Boelman does not stand for such a proposition. Nowhere in the Boelman opinion can such a statement be found or inferred.

In Schmitt, the Iowa Supreme Court held that an officer arresting a person need not inform that person of the

intention to arrest, the reason for the arrest, or that he or she is a police officer under the exigent circumstances which exist when the person is actually engaged in the commission of a criminal offense. 290 N.W.2d at 26 (defendant had escaped police custody and was fleeing on foot). However, in the present case, there were no exigent circumstances which would negate the necessity that the officer inform the defendant of the intention to arrest. Certainly, under the circumstances present in this case, Iowa Code section 804.14 mandates that the officer "inform the person to be arrested of the intention to arrest the person" It is undisputed that no such statement was made to Johnson-Hugi. Therefore, Johnson-Hugi was not taken into custody "in the manner authorized by law." See Iowa Code § 804.5 (1989).

Because, Johnson-Hugi was not taken into custody in the manner authorized by law, she was not "arrested" as that term is defined in Iowa Code section 804.5. Therefore, the trial information could not have been rendered untimely by the May 22 meeting. I find the trial information was timely filed.

The trial court concluded that "[w]hile no formal arrest occurred, . . . the defendant was effectively deprived of her liberty and was restrained such that a reasonable person would perceive detention was being exercised to the point of denying her freedom." The court

held that the "instant factual situation . . . did, in truth, constitute a 'functional arrest'."

In this conclusion, the trial court applied an incorrect legal standard. Johnson-Hugi's belief, reasonable or not, may be relevant only to the question of whether she was taken into custody. However, that question is not dispositive of the larger question of whether she was arrested. Rather, the larger question encompasses the other equally important question of whether or not she was taken into custody in the manner prescribed by law. I find the trial court erred.

The majority's unsound reasoning leads to a holding which will severely restrict law enforcement officials in their legitimate and vital use of non-volunteer confidential informants. The court's decision will certainly shorten the time frame in which "small fish" may be used to lure and catch the "bigger fish" involved in ongoing criminal enterprises. Such a substantial restriction on law enforcement methodology requires a sounder basis than the majority opinion supplies.

For all the reasons stated, I would reverse the judgment of the district court.

HABHAB, J. (dissenting)

I join in Judge Donielson's dissent.

I initially point out our review is for errors of law. Iowa R. App. P. 4; State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983).

This controversy centers around whether Johnson-Hugi was arrested at the time of her initial interview with the police so as to start the time running on the speedy indictment requirement. Other than the defendant's own state of mind, the facts are basically undisputed.

The defendant was suspected of dealing in amphetamines. Subsequently, two police officers visited her. They offered her the alternative of being arrested for drug dealing and theft or cooperating as a confidential informant. She accompanied the officers to the highway patrol station. There further discussions took place regarding the alternative of arrest or cooperation. Johnson-Hugi then agreed to cooperate with the police in return for not pressing charges.

The defendant failed to follow through with her part of the agreement, despite several attempts by the police officers to obtain her cooperation. Finally, based on the defendant's refusal to follow through on the cooperation agreement, the police arrested her for delivery of amphetamine. The charge was filed September 6, more than forty-five days after the initial interview. Thus,

Johnson-Hugi contends her speedy indictment rights were violated. See Iowa R. Crim. P. 27(2)(a).

The term "arrest" as used in Iowa Rules of Criminal Procedure 27(2)(a) is a formal term, not to be confused with "seizure" of the person under the fourth amendment of the United States Constitution. To trigger the running of the speedy indictment rule, the arrest in situations such this is a formal event, as defined by Iowa Code section 804.14. See State v. Schmitt, 290 N.W.2d at 26. That section provides for exigencies as well. Id.

Johnson-Hugi's initial confrontation with the police does not come within the narrow scope of "arrest" as defined by section 804.14. She made a bargain with the police to avoid prosecution. The majority's ruling in this case will curtail the freedom of persons like Johnson-Hugi from bargaining with police in return for cooperation, as the police will have only forty-five days from the time of the initial contact to either conclude the cooperative investigation or bring charges. Additionally, the State's ability to gain information and to offer leniency is likewise curtailed. I do not believe this result is mandated by our rules of criminal procedure.

I believe the Iowa Supreme Court's holding in Schmitt provides the necessary guidance here. An arrest, to trigger the speedy indictment rule, must come within the section 804.14 definition. I would reverse the trial court and remand this case for trial on the underlying charges.