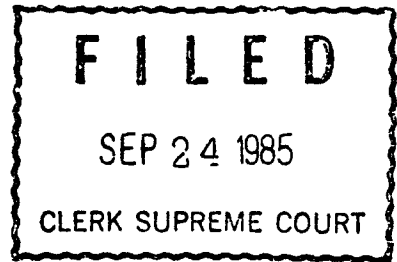


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellant,	)	Filed September 24, 1985
vs.	)	<u>5-384</u>
		84-1728
MYRON GEORGE ENGELHARDT,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Buchanan County, Robert E. Mahan, Judge.

The State appeals from an order dismissing the trial information charging defendant with OWI, second offense, asserting that the trial court abused its discretion in dismissing for failure to afford defendant a speedy trial. **REVERSED; TRIAL INFORMATION REINSTATED.**

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant Attorney General, for plaintiff-appellant.

B. John Burns, Assistant Appellate Defender, for defendant-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

We reverse the trial court's dismissal of the charge against defendant on the ground of failure to afford a speedy trial.

On December 6, 1983, a trial information was filed charging defendant with operating a motor vehicle while intoxicated, second offense. On December 12, 1983, defendant's attorney appeared at the arraignment on defendant's behalf and entered a plea of not guilty. Defense counsel also orally waived defendant's right to speedy trial. The arraignment order stated that "defendant will file a waiver of speedy trial, to confirm the oral waiver. . ." No waiver of speedy trial was ever filed.

Defendant's trial was originally scheduled for March 27, 1983. It was rescheduled for March 28 due to a change in court days. Trial was continued three times for reasons not appearing on the record. On October 3, 1984, defendant's counsel was allowed to withdraw and newly appointed counsel filed a motion to dismiss on the ground that defendant's right to speedy trial under Iowa Rule of Criminal Procedure 27(2)(b) had been violated. The motion was later amended alleging constitutional grounds for dismissal.

Following a hearing on the motion, the court dismissed the information pursuant to Iowa Rule of Criminal Procedure 27(1). The court concluded that the case should be dismissed in the furtherance of justice.

In reviewing the action of the court we are to reverse its ruling only if there is a showing of abuse of discretion. Iowa R. Crim. P. 27(1). See also State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978)(discussion of abuse of discretion). On the other hand, we are to keep in mind that rule 27(2)(b) is "not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions." State v. Hamilton, 309 N.W.2d 471, 475 (Iowa 1981).

We find the State's argument persuasive. The court in dismissing the charge held that a valid oral waiver of defendant's speedy trial rights was executed by the defense counsel for the purposes of rule 27(2). A defendant's attorney can waive speedy trial rights on behalf of a defendant if he or she is acting within the scope of authority given. See State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981). The court went on to find, however, that the "interests of justice" required dismissal. It outlined three reasons. First, no written waiver had been filed as required by the court; second, the State did not request a written waiver be filed; and third, the trial was continued three times for reasons not appearing in the record.

Although no written waiver was filed, this was a duty imposed upon defendant, not the State. No written waiver is necessary in order to waive validly such rights. See Iowa R. Crim. P. 27(2)(b). There was no reason for the State to insist upon the defense filing a written waiver. The State also argues it should not be charged with the errors of the defense attorney once the right was validly waived. Further, although the defendant appeared at the courthouse for his trial twice, his defense counsel did not appear, apparently aware of the continuances. It is the defense counsel's duty to inform his or her client of continuances in the trial.

The defense counters by saying that although the court found waiver occurred for the purposes of the rule, since a written waiver was not filed, the waiver will be accorded less weight, citing Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). In Barker the court went on to point out the factors to consider in determining if a charge should be dismissed for failure to afford a speedy trial. These include the conduct of the prosecutor and defendant, the length of delay, defendant's assertion or nonassertion of the right, prejudice to the defendant, and the reason for the

delay. Id., at 530-32, 92 S. Ct. at 2192-93, 33 L. Ed. 2d at 117-18. The court in Barker could not find sixteen continuances, and a delay between arrest and trial of over five years warranted dismissal of the charge where it appeared the defendant did not want a speedy trial. Id., at 516, 534, 536, 92 S. Ct. at 2185, 2193-95, 33 L. Ed. 2d at 109, 119, 120.

The reasons for the delay do not appear in the record. However, defendant waived his right orally, and failure to file the written waiver was due to defense counsel's inaction. The trial information was filed December 6, 1983, and the motion to dismiss filed October 3, 1984. We do not believe that considering all the factors outlined the State should be charged with the inaction of the defense counsel when it appears defense did not want a speedy trial. We hold the trial court abused its discretion in dismissing the charge and order it be reinstated.

REVERSED; TRIAL INFORMATION REINSTATED.