IN THE COURT OF APPEALS OF IOWA

No. 5-609 / 95-205

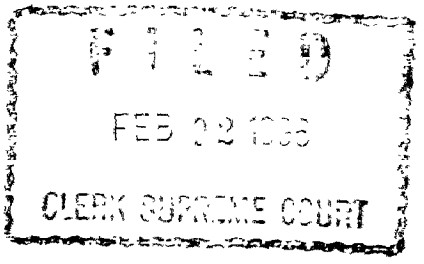
STATE OF IOWA,

Plaintiff-Appellant,

vs.

RUTHANN D. HARTLEY and JEFFREY E. HARTLEY,

Defendants-Appellees.



Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

The State appeals from the district court's dismissal of domestic abuse assault charges against defendants. **AFFIRMED.**

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Fred H. McCaw, County Attorney, for appellant.

Ruthann D. Hartley and Jeffrey E. Hartley, Dubuque, pro se appellees.

Considered by Hayden, P.J., and Sackett, Habhab, Cady and Huitink, JJ.

SACKETT, J.

The supreme court granted the State of Iowa a discretionary review of the district court's denial of the State's motion to reinstate complaints lodged against defendant-appellee Jeffrey E. Hartley and defendant-appellee Ruthann D. Hartley. The State contends the district court abused its discretion in dismissing serious domestic abuse assault complaints against the defendants, husband and wife. We affirm.

On December 16, 1994, Dubuque police officers arrested both defendants and charged each of them with domestic abuse assault causing serious injury in violation of Iowa Code section 708.2A(2)(b) (1993).[1] The next day the two defendants appeared before the district court. The judge found probable cause but dismissed the cases for "lack of prosecution witnesses." The court further noted "neither party desires to pursue the matters against the other."

Four days later the Dubuque county attorney filed a motion to reinstate the complaints. The State contended it did not have notice the court was contemplating dismissal and the court did not have the authority to make that determination prior to

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[1] Section 708.2A(2)(b) provides:

> On a first offense of domestic assault the person commits:
> * * *
> (b) A serious misdemeanor, if the domestic abuse assault is committed without the intent to inflict a serious injury upon another, and the assault causes bodily injury or disabling mental illness.

the presentation of the State's evidence. The State asked the district court to set a hearing on the matter.

The court then entered an order stating it had received the State's motion to reinstate the complaint and stating (1) the action was taken during morning court on Saturday and the county attorney's office was on notice of the time and place of the proceedings and voluntarily elected not to attend, consequently their complaint of lack of notice is without merit; and (2) this was a case where you had to be there to understand and the court felt if the county attorney's office had been present they would not have resisted but probably would have consented and encouraged the court's action. The court then modified its former dismissal to include the dismissal was in the interest of justice, and found to act otherwise would cause one of two parents to move out of a home where there are a number of children and it would serve no community purpose, be detrimental to the family situation and marriage, would deprive the children of an appropriate Christmas, and would not stand the test of trial. The court further noted even the law enforcement officers in attendance voluntarily commented affirmatively on the court's action. The trial court concluded the order by giving the State an opportunity to be heard on the matter.

An assistant county attorney then filed an affidavit stating she was on call on the weekend of December 17, 1994. She said she checked with the judge regarding the status of the case on the day before defendants made their initial appearances. She said the judge did not notify her he contemplated dismissing the cases. She

anticipated the court would determine probable cause and set the terms and conditions of the bond. After hearing, the judge overruled the State's motion to reinstate.

The trial court again ruled the dismissal was taken pursuant to rule 27.1. The court also found the county attorney's office voluntarily elected not to be present at the initial appearances and found if they had been present they would have had the opportunity to present reasons why the cases should not be dismissed. The court noted the county attorney's office took the position it was entitled to notice the court was contemplating dismissing the charges. Without addressing that issue, the court found the question moot and found the dismissal entered was a bar to further prosecution of the same offense under the language of rule 27.

On appeal, the State contends the district court abused its discretion under Iowa Rule of Criminal Procedure 27(1) in dismissing the domestic abuse complaints without giving the State an opportunity to be heard. No appellees' brief has been filed.

Rule 27(1) provides:

> The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

Iowa R. Crim. P. 27(1).

The State contends the dismissal was an abuse of discretion because (1) the State did not receive notice or have an opportunity to be heard, and (2) the dismissal was not proper considering the weight of the evidence and the nature of the crime.

The trial court is vested with the discretion to dismiss, upon its own motion, any pending criminal prosecution in the furtherance of justice. Iowa R. Crim. P. 27(1). This exercise of discretion is subject to only a limited review on appeal, not review de novo. *State v. Lundeen*, 297 N.W.2d 232, 235 (Iowa App. 1980). To secure reversal, the State must show the trial court abused its discretion. *Id.* To accord the trial court proper deference, we consider the trial court to be in as good or better position than the appellate court to make a determination in accordance with the demands of justice. *Id.*

No specific provision in rule 27(1) requires a trial court to give notice before entering a dismissal. However, in *State v. Brumage*, 435 N.W.2d 337, 340 (Iowa 1989), the court held the trial court's failure to afford the State an opportunity to present reasons why the case should not be dismissed was an abuse of its discretion. *See also Lundeen*, 297 N.W.2d at 235.

The State did not have notice the trial judge was going to dismiss the complaint. The fact the county attorney was aware of the initial appearance was not sufficient. *See State v. Ailts*, 433 N.W. 2d 765, 766-67 (Iowa App. 1988). While we agree the State should have had notice, the State had the opportunity to advance to the trial court its reasons for objecting to the dismissal, first, by its motion to reconsider,

and second, they had the opportunity to be heard orally on the motion to reconsider and to advance objections to the dismissal. Because the State had this opportunity to be heard and present its evidence, the failure of the trial court to give the State notice of the original hearing does not justify reversal.

The next question is whether the trial court was correct in dismissing the charges and ruling on the subsequent motion. The State contends the grounds the trial court relied on are erroneous. The State contends the trial court's decision the charges could not be reinstated is error. They contend only a proper dismissal bars another prosecution. They rely on *State v. Perry*, 440 N.W.2d 389, 392 (Iowa 1989) in support of this position. We agree with the State on this issue. When a charge has been dismissed erroneously before the defendant has been placed in jeopardy, the State may appeal and, if successful, may continue prosecution under the information filed. *Id.*; *State v. Soppe*, 374 N.W.2d 649, 651 (Iowa 1985). We need, therefore, decide whether the trial court abused its discretion.

A trial court's authority to dismiss under rule 27(1) is limited by the general phrase "in the furtherance of justice." *Brumage*, 435 N.W.2d at 340. Factors for a trial court to consider, though not limiting, are: (1) weight of the evidence of guilt or innocence; (2) nature of the crime involved; (3) whether defendant is or has been incarcerated awaiting trial; (4) whether defendant has been sentenced in a related or similar case; (5) length of such incarceration; (6) possibility of harassment; (7) likelihood of new or additional evidence at trial; (8) effect on the protection to society

in case defendant should actually be guilty; (9) probability of greater incarceration upon conviction of another offense; (10) defendant's prior record; (11) the purpose and effect of further punishment; and (12) any prejudice resulting to defendant by the passage of time. *Id.* at 341; *Lundeen*, 297 N.W.2d at 236. A court has broader discretion to dismiss a case in the furtherance of justice after the verdict than during the trial. *Brumage*, 435 N.W.2d at 341.

The trial court found the victims would not testify, the dismissal was in the family's interest and specifically in the children's interest, and the arresting officers approved.

The State advanced at the trial court level the trial court incorrectly dismissed for lack of prosecution witnesses, the trial court is not permitted to make this determination prior to presentation of the evidence, and there were two witnesses in addition to the victims. Error was preserved on these arguments.

The arresting officers did not see any physical abuse but relied on the statements of Ruthann she hit her husband in the chest and the statements of Jeffrey he picked Ruthann off the floor and pushed her against the wall. The only visible injury was redness on both victims' bodies. The policemen relied on the alleged perpetrators' confessions of guilt corroborated only by their call and body redness. The State did not argue at the trial court level this evidence would have supported a conviction.

The trial judge determined the family was best served by dismissal of the charges. We do not find the trial court abused its discretion. We affirm.

AFFIRMED.

Hayden, P.J., and Huitink, JJ., concur; Cady and Habhab, JJ., dissent.

CADY, J.

I respectfully dissent. I would conclude, for two reasons, the trial court abused its discretion by dismissing the charge. First, the court entered the dismissal without giving the State notice and opportunity to be heard. *See State v. Brumage*, 435 N.W.2d 337, 340-41 (Iowa 1989); *State v. Ailts*, 433 N.W.2d 765, 766-67 (Iowa App. 1988). Second, the dismissal was not "in the furtherance of justice." *See* Iowa R. Crim. P. 27 (1). To conclude otherwise marks a return to the archaic attitudes which have prevailed throughout most of civilization and helps explain why domestic abuse still remains dominant in our society today.