FILED
DEC 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-626 / 92-701

STATE OF IOWA,

Appellant,

vs.

JIMMIE LEE MURPHY,

Appellee.

Appeal from the Iowa District Court for Buchanan County, William G. Klotzbach, Judge.

The State appeals from the district court's order which sustained the defendant's motion to dismiss based on speedy trial grounds. **AFFIRMED.**

Bonnie J. Campbell, Attorney General; Roxann M. Ryan, Deputy Attorney General; and Allen W. VanderHart, County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellee.

Heard by Donielson, P.J., Sackett, J., and Perkins, S.J.*

*Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

The State appeals from the district court's order sustaining the defendant's motion to dismiss based on speedy trial grounds.

On January 17, 1992, the State charged Jimmie Lee Murphy with possession of burglar's tools and attempted burglary in the second degree. The case was scheduled for trial on March 11, 1992, and then continued by the State to April 15, 1992, the eighty-ninth day after the State filed the trial information.

However, on April 15, the clerk made an error in summoning the jurors. The clerk had excused thirty-five potential jurors who had requested to be excused, while the court had only granted twelve of the requests. Because Murphy was a member of a distinct minority group, the district court asked if counsel was concerned about whether the remaining jurors represented a fair cross-section of the community. Murphy contended the summoned jury panel was not comprised of a fair cross-section of the community. However, Murphy also argued any continuance would violate his right to a speedy trial. The court continued the trial until April 22, in order for a fair cross-section of the community to be summoned as jurors.

On April 20, ninety-four days following the filing of the trial information, Murphy filed a motion to dismiss based upon speedy trial grounds. The district court sustained the motion and the State now appeals.

Iowa Rule of Criminal Procedure 27(2)(b) 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.

Iowa R. Crim. P. 27(2)(b). If trial is not commenced within the ninety day period, 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. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983).

Review of the district court's determination of whether there was good cause for the delay is not de novo. Id. The district court's findings of fact are binding by the appellate court if supported by substantial evidence. Id.

In determining whether "good cause" exists for the delay, four factors must be analyzed: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right to speedy trial, and (4) any prejudice resulting from the delay. State v. Todd, 468 N.W.2d 462, 470 (Iowa 1991) (citing State v. Petersen, 288 N.W.2d 332, 334 (Iowa 1980). "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." State v. Hines, 225 N.W.2d 156, 160-61 (Iowa 1975) (emphasis added). See also Bond, 340 N.W.2d at 279.

We find substantial evidence that the State did not establish "good cause" for the delay in Murphy's trial. It was the State who moved to continue the trial from March 11, 1992 to April 15, 1992, the eighty-ninth day from the filing of the trial information. While the error concerning the jury panel was the fault of the clerk of court, the clerk's error would have been easily curable had the State not continued the trial until the last possible moment. As a result of these factors, Murphy was required, by no fault of his own, to chose between waiving his right to a speedy trial and waiving his right to have a jury panel which represented a fair cross-section of the community. See Iowa R. Crim. P. 27(b)(2); State v. Watkins, 463 N.W.2d 411, 414 (Iowa 1990).

However, the State also contends Murphy's request to have a jury panel which represented a fair cross-section of the community resulted in the delay, and therefore the reason for the delay should be directly attributed to Murphy. We do not agree. This is not a case where the delay was caused by some wrongdoing of the defendant. Cf. State v. Zaehringer, 306 N.W.2d 792, 793 (Iowa 1981) (defendant expressly waived his right to speedy trial, and contributed to much of the delay in his retrial); State v. Brandt, 253 N.W.2d 253, 258 (Iowa 1977) (defendant could have been tried within the statutory speedy trial period if he had not disappeared).

The State did not establish good cause for the delay in Murphy's trial. While the delay was not entirely the fault of the State, none of the reasons leading to the delay can be attributed to Murphy. We will not penalize this defendant for asserting both his right to a speedy trial and his right to a fair cross-section of the community in the jury panel, and we will not require him to chose between these rights. We find there was substantial evidence to support the district court's decision to sustain Murphy's motion to dismiss.

The costs of this appeal are taxed to the State.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.