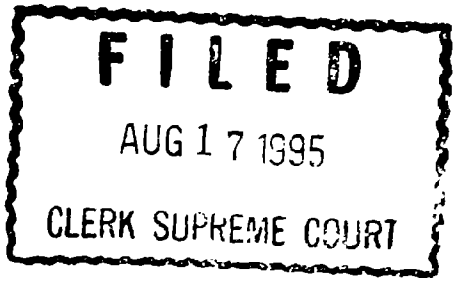
IN THE COURT OF APPEALS OF IOWA

No. 5-323 / 94-676



STATE OF IOWA,

Plaintiff-Appellee,

vs.

RONALD EUGENE VOWELS,

Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, R. David Fahey, Judge.

Ronald Eugene Vowels appeals the judgment and sentence entered upon his conviction, following jury trial, of delivery of a controlled substance. **AFFIRMED.**

Laura McLearn Krehbiel, Donnellson, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, David Andrusyk, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

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

CADY, J.

Ronald Vowels appeals the process by which he was found to be an habitual offender, and the enhanced sentence which resulted from that finding. He asserts the supplemental trial information charging him as an habitual offender did not comply with Iowa Rule of Criminal Procedure 6(5), and the district court should have dismissed it. He also claims the trial court erred in granting the State's motion to amend the trial information. We review the trial court's rulings for errors at law, Iowa R. App. P. 4, and affirm.

At 10:20 a.m. on December 3, 1993, the State filed a trial information charging Vowels with delivery of a schedule I controlled substance (marijuana). One minute later, the State filed a supplemental trial information accusing Vowels of being an habitual offender in violation of Iowa Code section 902.8 (1993).

At Vowels' December 7 arraignment, his counsel acknowledged receipt of both the trial information and the supplemental trial information.

On February 15, 1994, a jury found Vowels guilty of the offense of delivery. Vowels then moved to dismiss the supplemental trial information on the basis that it did not have minutes of evidence or a witness list attached, and it was not endorsed by a district court judge. The State resisted the motion, and the court took it under advisement.

On February 17, 1994, the State filed a motion to amend the trial information,

and on February 18 filed an amended trial information charging Vowels with delivery and accusing him of being an habitual offender. Also on February 18, the court denied Vowels' motion to dismiss the supplemental trial information and found the filing of the amended trial information rendered his motion moot.

Vowels was arraigned on the habitual offender charge on February 25, 1994, and orally objected to the amended trial information at this time. On March 2, 1994, Vowels made a formal motion to dismiss the amended information. The trial court overruled the motion and a jury trial on the habitual offender charge was held.

Vowels was found to be an habitual offender. The court sentenced him to a term of imprisonment not to exceed fifteen years.

Vowels appeals. He argues the district court erred in denying his motion to dismiss the supplemental trial information. Vowels concedes his motion to dismiss was untimely pursuant to Iowa Rule of Criminal Procedure 10(2-4); however, he urges his failure to object earlier to the supplemental trial information should not bar his claim on appeal because his sentence was void, his due process rights would be violated if his claim were barred, and case law and the Iowa Rules of Criminal Procedure do not dictate that his claim be barred.

Vowels further argues the district court erred in granting the State's motion to amend the trial information. He claims it was untimely pursuant to Iowa Rule of Criminal Procedure 4(8)(a) and did not meet the requirements of Iowa Rule of Criminal

Procedure 6(5). Vowels maintains he was prejudiced by the filing of the amended trial information because he was incarcerated throughout the proceedings and he had to choose between his right to fully defend himself and his right to a speedy trial.

I. Supplemental Trial Information

Iowa Rule of Criminal Procedure 6(5) provides the form for filing an indictment where the defendant may be subject to trial as an habitual offender. Under this rule two informations must be filed by the State. Iowa R. Crim. P. 6(5). The first must contain the charged offense and the allegations of the previous convictions. *Id.* The second or "supplemental information" is prepared for the trial of the current offense and excludes the habitual criminal allegations. *Id.*

In this case, the State filed a proper information charging delivery of a controlled substance but did not include the habitual criminal charge. At the same time, the State filed a supplemental information charging Vowels as an habitual offender. The supplemental information made no reference to the delivery charge, contained no minutes of evidence or witnesses names, and was not approved by the judge.

The State admits the habitual offender information was subject to challenge under rule 10(6)(c) due to its procedural defects. However, it asserts Vowels waived his challenge because he made his motion to dismiss after the verdict on the marijuana delivery charge.

Iowa Rules of Criminal Procedure 10(2)(b)and 10(3) state defenses and

objections based on defects in the information must be made prior to trial and failure to timely raise them constitutes waiver unless the trial court finds the defendant demonstrated good cause. Vowels did not file an objection prior to the trial on the delivery charge, but instead waited until after the verdict. Vowels also failed to offer a good cause explanation for the late filing of his motion. Under these circumstances, we conclude Vowels waived his objection to the habitual offender trial information. *See State v. Robinson*, 165 N.W.2d 802, 803 (Iowa 1969) (holding defendant who failed to file objections to habitual offender charge, until after he had been tried for breaking and entering, waived any objections to the information).

Moreover, we are satisfied that Vowels due process rights were not violated. Although, the information lacked minutes of evidence and a list of witnesses names, it was sufficient to place Vowels on notice that the State intended to prosecute him as an habitual offender. The habitual offender information was filed one minute after the information on the underlying charge, and it specifically listed the previous crimes the State intended to rely on. Vowels could not have mistaken the State's intent and was clearly on notice regarding the possible punishment. Vowels also had an opportunity to argue good cause for his late motion when he moved to dismiss the supplemental information.

II. Amendment of the Trial Information

Vowels contends the court erred in permitting the State to amend the

information. Specifically, he asserts the amendment was not timely under Iowa Rule of Criminal Procedure 4(8)(a); the rule established in *State v. Berney*, 378 N.W.2d 915 (Iowa 1985), should be overturned; and if the amendment was timely, he was prejudiced by the amendment. The State responds that Vowels failed to preserve error on these claims because his motion to dismiss the amended petition was based on different grounds then his appeal.

Vowels acknowledges he argued double jeopardy and speedy indictment issues at the hearing on the amended information and argues timeliness and prejudice on appeal. However, he asserts this should not effect our review because the trial court and the State were previously aware of his timeliness and prejudice objections. He made his timeliness argument in his motion to dismiss the supplemental information, and the same trial judge heard the motion to dismiss the supplemental information and the motion to dismiss the amended information.

Despite our reservations regarding error preservation, we will address the merits of the challenge. Iowa Rule of Criminal Procedure 4(8)(c) provides amendments to the information may be made on the state's motion "before or during the trial." In *Berney*, our supreme court construed "during the trial" to include the time following rendition of a verdict but preceding the court's entry of a judgment and final sentence, when the amendment pertains only to issues of punishment which may be imposed upon conviction. *Berney*, 378 N.W.2d at 919. Thus, the court held a trial information may

Vowels asserts the *Berney* interpretation of rule 4(8)(c) is unfair in circumstances such as his and should be overruled. He asserts it is not realistic to segregate issues of punishment from other portions of the trial, and the defendant's substantial rights are always prejudiced when the defendant cannot base his trial strategy on an accurate view of the punishment he may face if convicted.

Vowel's argument rests on the fact that defendant's may be unaware of the punishment they face, if the State is allowed to amend the information after the underlying offense is tried but before sentencing. We find Vowels own case undermines this premise. Although the information filed by the State was procedurally deficient, it clearly placed Vowels on notice that the State intended to prosecute him as an habitual offender. Vowels could not have mistaken the State's intent and was clearly on notice regarding the possible punishment.

Moreover, the *Berney* test requires a case-by-case inquiry on the issue of prejudice. *Id.* at 919. Therefore, if a defendant truly is taken by surprise or the information does not allege the charge, the court can consider this fact and rule appropriately. *See State v. Luckett*, 387 N.W.2d 298, 299 (Iowa 1986) (holding imposition of mandatory minimum sentence for use of firearm while participating in a forcible felony was error where trial information contained no allegation of firearm possession and there was no application to amend information to add such allegation).

Applying the two prongs of the *Berney* test to this case, we conclude the test has been satisfied. First, Iowa Code section 902.8 is a recidivist statute. It does not

define a separate crime, but is merely a predicate for enhanced punishment. *Id.; State v. Tobin*, 333 N.W.2d 842, 845 (Iowa 1983). Second, the State demonstrated Vowels suffered no prejudice. As previously indicated, the original trial information included an habitual offender allegation. The court gave Vowels adequate time to prepare for the hearing and he did not request a continuance.[1] At the hearing Vowels presented no witnesses, declined to cross-examine the State's witnesses, and did not assert a defense to the habitual offender charge. We conclude Vowels was not harmed by the amendment to the information preceding trial of the habitual offender issue.

AFFIRMED.

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[1]In his appeal Vowels argues he was required to choose between his right to a speedy trial and the ability to fully defend himself against the habitual offender charge. We note Iowa Rule of Criminal Procedure 27(2)(b), which governs speedy trials, is limited to "public offenses" and has no reference to hearings under section 902.8. *State v. Popes*, 290 N.W.2d 926, 927 (Iowa 1980)