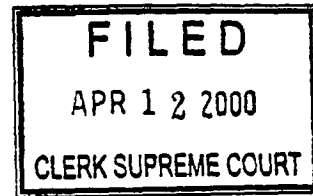


IN THE COURT OF APPEALS OF IOWA

No. 0-078 / 98-2182
Filed April 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD MILLSAP,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Defendant appeals the judgment and sentence entered following his conviction of simple assault. **AFFIRMED; REMANDED WITH DIRECTIONS.**

Cynthia Tofflemire, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristen Mueller, Assistant Attorney General, ~~John P. Sarcone~~, County Attorney, and Michael T. Hunter, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

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ZIMMER, J.

Richard Millsap appeals the judgment and sentence entered following his conviction of simple assault. We affirm.

On December 19, 1997, Millsap stole a TV/VCR from a Venture department store in Des Moines. Judy Leckwee and Michelle Bush, Venture employees, noticed Millsap pass through a register line with the merchandise without paying. Another employee, Pamela Lewis, alerted the store manager, Geoff Elliott, of the theft. Elliott followed Millsap out of the store in order to obtain his license plate number.

Elliott observed Millsap walk quickly toward his car and load the item into the vehicle. Elliott began writing down the plate number. Millsap accelerated and drove toward Elliott, who slipped and fell on the ice in an attempt to move out of the way. Leckwee and Lewis observed the events in the parking lot from inside the store and testified Millsap swerved at Elliott before leaving the lot.

A preliminary complaint issued and on January 20, 1998, Millsap turned himself in to police. He was charged by trial information with second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997) on March 6, 1998. On May 26, 1998, following Millsap's arrest for first-degree murder, the district court reset his bond from a \$32,500 surety bond to a cash bond. A separate \$500,000 bond was set for the murder charge. He remained in jail from that time until shortly after his acquittal on the murder charge. On September 29, 1998, Millsap posted the cash bond on the robbery charge. The State amended the charge on November 16, 1998, to first-degree robbery. His bond was again revoked on November 20, 1998, and he remained in jail until his sentencing.

Trial began on December 2, 1998, and the jury found Millsap guilty of the lesser-included offense of assault. On December 4, 1998, the district court sentenced Millsap to thirty days in jail but only gave credit for eighteen days served.

Millsap appeals, contending: (1) the charge should have been dismissed because he received neither a preliminary hearing nor an initial appearance; (2) his "untimely" arraignment serves as a basis for dismissal; (3) there was insufficient evidence to support the jury's finding of assault; and (4) he should have received credit for more than eighteen days.

1. Lack of Preliminary Hearing. On January 2, 1998, a preliminary complaint was presented to a judge alleging Millsap had committed the crime of first-degree robbery. A warrant issued and bond was set at \$32,500. Millsap turned himself in on January 20, 1998, and immediately posted the bond previously set. No formal initial appearance occurred, but Millsap was directed to appear on March 4, 1998. He waived preliminary hearing on March 4. Two days later the State filed the first trial information charging him with second-degree robbery. Millsap was arraigned on March 13, 1998.

Shortly before his December trial, he moved to dismiss the robbery charge on several grounds including his lack of preliminary hearing. The district court denied the motion. He now argues the robbery charge should have been dismissed pursuant to Iowa Rule of Criminal Procedure 2(4) because he did not receive a preliminary hearing or an initial appearance.

We find these arguments meritless. The underlying harm preliminary hearings and initial appearances protect against is illegal detention. See *State v. Brendeland*, 402 N.W.2d 444, 445 (Iowa 1987) (initial appearance); see also

State v. Rouse, 290 N.W.2d 911, 913 (Iowa 1980) (preliminary hearing), ~~superseded by rule on other grounds as stated in~~ *Ryan v. Arneson*, 422 N.W.2d 491, 494-95 (Iowa 1988). The remedy in such cases is habeas corpus, not dismissal of the charge. See Iowa R. Crim. P. 2(4) (omitting dismissal of charge as remedy for failure to give preliminary hearing); *Rouse*, 290 N.W.2d at 913; see also *State v. Montgomery*, 232 N.W.2d 525, 526 (Iowa 1975) (finding defendant charged by information not entitled to dismissal simply because no preliminary hearing received). Millsap was not jailed following arrest. He also waived his right to preliminary hearing. The trial information was timely filed on March 6, the forty-fifth day after his arrest, excluding the day of arrest. See Iowa R. Crim. P. 27(2)(a); *State v. Sheets*, 338 N.W.2d 886, 887 (Iowa 1983) (finding timely an indictment which was returned on forty-fifth day following arrest, excluding day of arrest in computation). We conclude Millsap suffered no prejudice from his failure to receive either a preliminary hearing or an initial appearance. See *Brendeland*, 402 N.W.2d at 445 (finding need for initial appearance obviated by fact that defendant not incarcerated after arrest).

Finally, defendant's assertion that rule 2(4)(e) provides for the remedy of dismissal in this case lacks merit. Subsection (e) contemplates a dismissal once a finding of no probable cause has been made at a preliminary hearing. It does not provide for this remedy in the absence of a preliminary hearing. We affirm the district court's denial of Millsap's motion to dismiss.

II. Timeliness of Arraignment. Millsap argues his arraignment on March 11, 1998,¹ was untimely as it came fifty days after his arrest. He asserts Iowa

¹ Actually, this date is incorrect. Millsap was arraigned on March 13, 1998.

Rule of Criminal Procedure 27(2)(a) requires that he be arraigned within forty-five days of arrest or his charge must be dismissed.

We find this argument completely meritless. As the State points out, Millsap erroneously attempts to apply the speedy indictment rule to his arraignment claim. Rule 27 is not applicable. Instead, Iowa Rule of Criminal Procedure 8 governs arraignments. That rule requires only that an arraignment be conducted "as soon as practicable." Iowa R. Crim. P. 8(1). Arraignment is a procedural right accorded defendants only *after* indictment or information. *Wright v. Denato*, 178 N.W.2d 339, 341 (Iowa 1970). Millsap's arraignment took place one week after the first trial information was filed. We find this delay was reasonable and does not warrant dismissal. We affirm the district court's denial of Millsap's motion to dismiss.

III. Sufficiency of the Evidence. Millsap challenges the sufficiency of the evidence for the intent element of assault. We review such claims for errors at law. *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). The standards applied in such a review are well-established:

The jury's findings of guilt are binding on appeal if supported by substantial evidence. . . . In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. . . . Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. . . .

State v. Query, 594 N.W.2d 438, 445 (Iowa App. 1999) (citations omitted). We do not make an independent determination of "whether the evidence established guilt beyond a reasonable doubt"; rather, we determine the legal sufficiency of the evidence to support the verdict. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994).

An assault occurs when, without justification, a person commits "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting or offensive, coupled with the apparent ability to execute the act." Iowa Code § 708.1(2). Assault is a general intent crime. *Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). "General intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result." *Id.*

Millsap argues the evidence did not show he intended to drive his vehicle at Elliott and his car could have skidded on the ice in the parking lot. Even if defendant failed to preserve error, as the State contends, we find substantial evidence supports the jury's verdict. Millsap observed Elliott trying to write down his plate number. He accelerated and drove directly at Elliott. Witnesses testified Millsap could have exited his parking space in many directions, including backing up, going straight forward or turning either way. However, he angled his car at Elliott and accelerated. Elliott feared injury—he felt prompted to jump out of the way of the oncoming car. This is substantial evidence that could convince a rational fact finder that the defendant was guilty beyond a reasonable doubt. We affirm Elliott's conviction of simple assault.

IV. Credit for Time Served. Millsap claims he should have been credited the full thirty days for time he served between May 27, 1998, when his robbery bond was revoked after his arrest for murder, and his release on September 29, 1998. We review sentencing matters for correction of errors at law. *State v. Edgington*, 601 N.W.2d 31, 32 (Iowa 1999).

Iowa Code section 903A.5 provides

... If an inmate was confined to a county jail or other correctional or mental facility at any time prior to sentencing, or after sentencing but prior to the case having been decided on appeal, because of failure to furnish bail or because of being charged with a nonbailable offense, the inmate shall be given credit for the days already served upon the term of the sentence.

"To be entitled to sentence credit for presentence time served, the defendant must have been detained for the offense of which he ultimately is convicted." *State v. Canas*, 571 N.W.2d 20, 24 (Iowa 1997). The State concedes Millsap should be given the full thirty days credit for time served. After his arrest for murder on May 26, 1998, Millsap's bond was revoked on the robbery charge and reset as a cash bond. He failed to post bail on the robbery charge until September 29, 1998. He is entitled to credit for this time.² We affirm the sentence but remand this case to the trial court to modify its judgment entry to include a statement of days credited to the defendant pursuant to section 903A.5. See *State v. Bean*, 474 N.W.2d 116, 122 (Iowa App. 1991) (remanding case where trial court failed to give defendant proper credit for time served).

AFFIRMED; REMANDED WITH DIRECTIONS.

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² Millsap also argues a defendant should be allowed to receive presentence credit for all time served when he or she is being held for two or more charges. We find this argument directly contrary to Iowa law. See, e.g., Iowa R. Crim. P. 24(1)(f); *State v. Orte*, 540 N.W.2d 435, 438 (Iowa 1995).