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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-599 / 90-0661

STATE OF IOWA,

Appellant,

vs.

JONATHAN WARD ELLIS,

Appellee.

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Appeal from the Iowa District Court for Wright County, Newt Draheim, Judge.

The State appeals the district court's dismissal of an OWI charge for denial of the defendant's right to speedy trial under Iowa R. Crim. P. 27(2)(c). **REVERSED AND REMANDED FOR TRIAL.**

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Lee Poppen, Wright County Attorney, Mary Schlicher, Assistant County Attorney, for appellant.

Robert W. Brinton, of Brinton & Bordwell, Clarion, for appellee.

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

PER CURIAM

Justice G. King Thompson, who later served as Chief Justice of the Iowa Supreme Court, once began a criminal decision:

> A story widely told among lawyers concerns the trial judge who, being advised that his proposed ruling upon a matter then before him was directly contrary to holdings of the court of last resort of his state, said: "Did they say that? Well, they are going to have to say it again." It appears that this is not merely an old lawyers' tale. Such things do happen. The learned trial court, in the matter now before us, criticized our previous decisions upon a crucial point there involved, announced its entire disagreement, and in effect overruled them. We have read with care the court's opinion and reasoning as set out in the record before us; but we are not convinced. We have arrived at the point of saying it again.

State v. Eichler, 248 Iowa 1267, 1269, 83 N.W.2d 576, 577 (1957).

Our review in this case is on errors of law. Iowa R. App. P. 4. Two issues are raised on appeal. First, did the trial court err in dismissing based on the lack of a speedy trial under Iowa R. Crim. P. 27(2)(c)? Second, did the trial court err in ruling double jeopardy had attached due to its trial on the merits?

We have reviewed the decision of the trial court. We reverse and remand for trial on the merits.

I. Speedy Trial

A. The First Appeal. Jonathan Ellis was charged with third offense OWI in October 1987. He moved to suppress evidence obtained from the stop of his car. The trial

court sustained this motion and suppressed the evidence. The State was granted discretionary review of the suppression order. In October 1988 this court reversed the suppression order and remanded the case to district court. State v. Ellis, No. 8-491 / 87-1775 (Iowa App. Oct. 20, 1988). Procedendo issued on November 17, 1988.

B. The Second Appeal. In the meantime, on November 1, 1988, Ellis filed a motion in district court and requested the case be dismissed for failure to provide a speedy trial. A hearing on that motion and trial on the merits was held November 9, 1988. However, no judgment was rendered.

In January 1989 the trial court entered an order sustaining Ellis's motion to dismiss for want of a speedy trial under Iowa R. Crim. P. 27(2)(b). The State appealed this dismissal. This was the second appeal in this case. State v. Ellis, No. 9-542 / 89-220 (Iowa App. Jan. 25, 1990).

In resolving the second appeal, we held Ellis had not been denied his right to be tried within ninety days after indictment under Iowa R. Crim. P. 27(2)(b). Ellis, slip op. at 3, 5. We noted the State's first appeal stayed the criminal prosecution. Id. at 2. We held the State had timely filed its brief in the first appeal and had not been the cause of any undue delay in that appeal. Id. at 3, 5. We accordingly reversed the trial court on that issue.

Id. However, the trial court did not rule whether Ellis had been denied his right to a speedy trial within one year under Iowa R. Crim. P. 27(2)(c). Id. at 5. We therefore remanded the case to the trial court for a ruling on that issue. Id. at 6.

C. **The Third Appeal.** Upon this second remand, the trial court denied the State's request for an extension of the one-year time limit of rule 27(2)(c). The trial court therefore dismissed the charge. The trial court held the State had failed to file its brief in a timely fashion in the first appeal. Due to this delay occasioned by the State, the trial court held there was no good cause for an extension of the one-year time limit of rule 27(2)(c).

The State has now filed the present appeal (its third) from the trial court's order dismissing the charge for denial of defendant's right to a speedy trial under rule 27(2)(c).

The State contends its request for an extension of the one-year time limit under Iowa R. Crim. P. 27(2)(c) should have been granted. The State argues its successful appeal of the suppression order (the first appeal) constituted good cause for an extension of the one-year time limit.

The State also contends the trial court erred by holding it had failed to file its brief in a timely fashion in its first appeal. This factual question was resolved favorably to the State in the second appeal. The State argues our ruling in the second appeal became the "law of

the case." The trial court is therefore precluded from later finding an unreasonable delay by the State in prosecuting the first appeal.

We have read all the pertinent decisions in this case. We observe the trial court relies on the identical reasoning in dismissing this case under 27(2)(c) as it utilized in its prior dismissal under 27(2)(b). We overturned its ruling in that prior decision. Our opinion in that second appeal constituted the law of the case. The trial court may not nullify the rationale of our previous ruling.

As stated so well by Justice Thompson: "We have read with care the court's opinion and reasoning set out in the record before us; but we are not convinced. We have arrived at the point of saying it again." We determine Ellis has not been denied his right to a speedy trial under Iowa R. Crim. P. 27(2)(c). The State is entitled to an extension of the one-year speedy trial deadline for the period this case has been on appeal. Trial should begin as soon as possible to expedite this matter.

We reverse the trial court on this issue.

II. Double Jeopardy

This issue is raised on appeal by Ellis. The State answers in its reply brief. Therefore, we determine the issue is properly before us.

The trial court found double jeopardy had attached due to the trial to the court on November 9, 1988. The trial court heard the case on that date, but it did not render a judgment. The problem arises in that the clerk of the supreme court did not issue procedendo returning jurisdiction to the trial court after the second appeal until November 17, 1988. Thus, when the trial court conducted the trial, it did not have jurisdiction of the case.

Ellis contends because of the trial held November 9, 1988, double jeopardy has attached. We disagree.

Iowa R. App. P. 2(b) states: "The order granting such [interlocutory] appeal ... shall stay further proceedings below ... "

> When appeal is taken, all power of the court below over the parties and subject-matter is lost until the cause, or some part thereof, is remanded back, by order of this court [procedendo under Iowa R. App. P. 29], for its further action.

Dunton v. McCook, 120 Iowa 444, 447, 94 N.W. 942, 943 (1903); see also Kern v. Woodbury County, 234 Iowa 1321, 1323, 14 N.W.2d 687, 688 (1944) (quoting Duncan).

The clerk of the supreme court issues a procedendo to the trial court no sooner than "twenty-one days after an opinion of the Court of Appeals is filed," unless otherwise ordered. Iowa R. App. P. 29.

> [The procedendo] is the formal advice and order of the appellate court whereby its judgment is communicated to the lower court; its official directive. It is in the nature of a special unlimited power of attorney by which authority and jurisdiction are granted to the lower court to take such steps as are directed.

> ... its office is to communicate the decision and directions of the appellate court to the [trial] court, and to return to the court below the proceedings which have been brought up by the appeal; and, except as the mandate itself may otherwise provide or require, on its issuance or filing in the [trial] court, that court is reinvested with jurisdiction.

5B C.J.S. Appeal & Error § 1958 (1958) (emphasis added).

Procedendo returning jurisdiction to the district court was not issued until November 17, 1988. Therefore, the district court was without jurisdiction to try the case on November 9, 1988. As the district court was without jurisdiction, its trial on that date was a nullity. Thus, no double jeopardy could attach, as Ellis was not "put in jeopardy of life or limb." U.S. Const. amend. 5. Any judgment of the district court would have been without effect, as it had no jurisdiction. State v. Jamison, 104 Iowa 343, 344-45, 73 N.W. 831 (1898).

We reverse the district court on this issue.

REVERSED AND REMANDED FOR TRIAL.

Oxberger, C.J., and Hayden, J., concur; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur in the result only.