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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 8, 1983

vs.)

GARY R. GRIMME,) 3-16 / 68550

Defendant-Appellant.)

Appeal from Dubuque District Court - Alan L. Pearson, District Associate Judge.

Defendant appeals his conviction of willful disturbance in violation of Iowa Code section 718.3. REVERSED AND REMANDED.

John R. Becker, Dubuque, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Johnson, J., takes no part.

PER CURIAM

Defendant appeals his conviction of willful disturbance in violation of Iowa Code section 718.3. He asserts that the trial court abused its discretion in overruling his motion to take depositions by refusing, in effect, to extend the time for taking depositions. He also claims there was insufficient evidence in the record to support the jury's verdict. We reverse and remand for a new trial.

Defendant was charged with willful disturbance following an incident in which he pushed the county personnel director through a door into the room where the county board of supervisors was holding a meeting. He then struck the director and yelled obscenities at the supervisors.

After the information was filed, defendant, a resident of Dubuque, was determined to be indigent and counsel was appointed to represent him. Prior to arraignment and for the entire thirty-day period following arraignment within which a criminal defendant may take depositions as a matter of right (Iowa R. Crim. P. 12(5); now Rule 12(6)), defendant was represented by counsel from Dyersville, located approximately twenty-five miles from Dubuque. Defendant met with appointed counsel only at the time of his arraignment on December 23, 1981, and asserts that he had no means of transportation to Dyersville. On February 1, 1982, counsel from Dyersville was permitted to withdraw and new counsel was appointed in order to enable defendant to see and speak with an attorney whose office was in Dubuque. On February 16, the day before trial commenced, the trial court overruled a motion to take depositions filed earlier that day but noted that it was filed promptly from the point of view of newly appointed counsel. Defendant was found guilty by the jury and he was sentenced to sixty days in the county jail, forty days of which was suspended. This appeal followed.

At all relevant times, Iowa R. Crim. P. 12(5) required that depositions taken by a criminal defendant of the State's witnesses must be taken within thirty days

after arraignment "unless the period for taking is extended by the court for good cause shown." Defendant argues that good cause exists in this case to extend the time for taking depositions since, by the time he was appointed counsel to whom he had ready access, the thirty-day period of then Rule 12(5) had expired.

Discovery questions such as this are left to the sound discretion of the trial court and we will not interfere with its discretion unless that discretion has been abused. State v. Gates, 306 N.W.2d 720, 725 (Iowa 1981). We conclude in this case that the trial court abused its discretion in denying defendant's motion to take depositions after the expiration of the thirty-day period. The State does not seriously contest defendant's claim that his indigency prevented him from contacting his first court-appointed counsel in Dyersville. By the time Dubuque counsel was appointed, the thirty days from arraignment had expired. The trial court admitted that the motion to take depositions was filed "promptly" from the point of view of defendant's second court-appointed attorney. Defendant therefore showed good cause for extending the time for taking depositions. His motion to take depositions, therefore, should have been granted; the trial court abused its discretion in ruling to the contrary.

Defendant's conviction is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent.

The trial court denied defendant's motion to take depositions noting that "the motion to take depositions is the defendant's responsibility. The fact that the case has been pending and the defendant has been represented by counsel throughout the time indicates to the court that the motion is not made in a timely fas[hion]." I agree with the trial court's ruling.

The record demonstrates that defendant has recently been convicted of a felony. Accordingly, he is familiar with the justice system. Despite this fact he refuses to respect court dates and procedures. This is evidenced by his refusal to cooperate with his first court-appointed attorney. This attorney withdrew because defendant failed to respond to his letters and phone calls and made absolutely no effort to inform the attorney of his whereabouts or to be available for trial preparation. The case was originally set for trial on January 17, 1981. It was continued and reset for February 1, 1982.

On that day the jury was empaneled but defendant failed to appear. He was arrested for his failure to appear, but was subsequently released on bond. A new trial date was set for February 16th. On February 1st, his attorney was allowed to withdraw and new counsel was appointed.

His second attorney was in charge of the case for more than two weeks and never motioned for a continuance in order to take depositions and prepare for trial until February 16th, the day before trial. In his motion, defendant sought to depose six witnesses which the State had named in its minutes of testimony. The State had notified defendant that those six witnesses would be called to testify at trial a full week before defendant's motion was made.

The period for taking depositions may be extended for "good cause shown." I find no good cause for the failure to appropriately prepare for trial in the instant

case. I would not permit the court system to be "used" in the manner attempted by defendant. I cannot hold that the court abused its discretion in reaching a similar conclusion. There is an abuse of discretion only when it is "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982)(quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)). Having found no such abuse, I would affirm the conviction.