IN THE COURT OF APPEALS OF IOWA

No. 16-0312
Filed November 22, 2017

DAVID W. DUNHAM,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla L. Schemmel, Judge.

David Dunham appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Windsor Heights, for appellant.

Thomas J. Miller, Attorney General, and Genevieve Reinkoester, Assistant Attorney General, for appellee State.

Considered by Vaitheswaran, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

MAHAN, Senior Judge.

David Dunham appeals from the denial of his application for postconviction relief (PCR), contending his plea counsel was ineffective in failing to file a motion to dismiss based upon a violation of the speedy indictment rule. His ineffectiveness claim fails, and we affirm.

We review ineffective-assistance-of-counsel claims de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To prevail on an ineffective-assistance-of-counsel claim, the applicant must prove both the following elements by a preponderance of the evidence: (1) counsel failed to perform an essential duty, and (2) prejudice resulted from counsel's failure. *Id.*

Dunham pled guilty to possession of a controlled substance (methamphetamine) with intent to deliver on February 15, 2013. Dunham maintains he was arrested on July 31, 2012, and the trial information was filed on September 20—more than forty-five days after arrest.[1] He asserts counsel was ineffective in failing to file a motion to dismiss and in allowing him to plead guilty. *See Ennenga*, 812 N.W.2d at 702 ("If [applicant's] attorney did not ensure that

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[1] Iowa Rule of Criminal Procedure 2.33(2)(a) provides:

> When an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.

Dunham relies on *State v. Wing*, 791 N.W.2d 243, 249 (Iowa 2010), and the factors discussed therein that the court found relevant to the determination of when a person has been arrested for speedy-indictment purposes.

We note *Wing* has been overruled recently:

> Arrest for the purposes of the speedy indictment rule requires the person to be taken into custody in the manner authorized by law. The manner of arrest includes taking the arrested person to a magistrate. *The rule is triggered from the time a person is taken into custody, but only when the arrest is completed by taking the person before a magistrate for an initial appearance.*

State v. Williams, 895 N.W.2d 856, 867 (Iowa 2017) (emphasis added).

the State abided by rule 2.33, and allowed his client to plead guilty to charges that could have been dismissed with prejudice, then he failed to perform an essential duty.")

Dunham was represented by two attorneys prior to pleading guilty. Both attorneys testified at the PCR hearing, and each indicated they did not believe Dunham was arrested the night of the traffic stop. His first attorney testified,

> When Mr. Dunham was stopped, he was stopped—he wasn't driving. The woman who was driving the car . . . was stopped for some kind of traffic violation. He was searched. They found some meth in a pocket. Later they searched a potato chip bag that he had, and it had an ounce or a little bit less than an ounce of methamphetamine in it.
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> They took him to Ankeny PD. He wanted to cooperate with Ankeny PD, and he gave a lengthy statement that was taped, and he filled out a statement that he was going to deliver that ounce of methamphetamine I think to—if memory serves me correctly, to Brandon Singleton, who is that officer from Des Moines that's gotten in trouble over the years for dealing drugs or using drugs while on duty.
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> He was never arrested that night on that. I don't think he was ever arrested on anything else, but someone else, one of the officers, would have to say about that. So he agreed to cooperate. They kind of detained him—and I'm going to put those words in quotes. The judge can see it and Mr. Heinicke and Mr. Taylor can see it—at his request because he didn't want anybody to think he was snitching or informing on everybody while he actually was.
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> I think they held him for a few hours and released him, is what happened. So there weren't any grounds to dismiss anything because he was supposed to be cooperating.

Dunham's second attorney acknowledged Dunham felt he had been arrested "for all of the charges at the time that he was arrested on the one that went to trial." However, the second attorney was of a different opinion as Dunham "agreed to talk to task force and/or did talk to task force and then was arrested a month later."

Dunham testified he was handcuffed and taken to the police department, where he was detained for several hours. He argued a reasonable person in his position would have believed an arrest occurred according to the facts in this case. Dunham also testified he was released and "given a citation for—I think it was for, like, simple possession, and they gave me a court date . . . August 4."

The record indicates Dunham provided cooperation on the night he was detained—which included making a written statement and discussing his supplier and buyers with the officers—and in exchange for this cooperation, the officers did not arrest him. A recording of Dunham's interview at the police department on July 31, 2012, shows Dunham asked the officers to write him a citation to conceal the fact that he was working as a police informant. Under these circumstances, Dunham cannot establish a motion to dismiss would have been granted. *See State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992) (finding no arrest occurred where the defendant chose to cooperate with law enforcement). Thus, he cannot show the failure to file a motion to dismiss prejudiced him, and his ineffectiveness claim fails. We therefore affirm the denial of his application for postconviction relief.

AFFIRMED.