IN THE COURT OF APPEALS OF IOWA

No. 0-078 / 08-1868
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ANTHONY RODRIGUEZ,
Defendant-Appellee.

Appeal from the Iowa District Court for Allamakee County, Richard D. Stochl and Margaret L. Lingreen, Judges.

The State appeals from a district court ruling denying its request for its own expert examination of the defendant and granting the defendant's motion to dismiss the criminal charges against him. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Christen Douglass, Mary Tabor, and Laura Roan, Assistant Attorneys General, and William Shafer, County Attorney, for appellant.

Judith O'Donohoe, Charles City, and Jeremiah White, West Union, for appellee.

Heard by Vogel, P.J., Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

The State was granted discretionary review of the district court's grant of the defendant's motion to dismiss the trial information on speedy trial grounds. Also on discretionary review is the issue of whether the State has the right to its own psychiatric evaluation of the defendant. We also consider the State's contention the district judge should have recused himself from the case. We reverse and remand.

I. Background Facts and Proceedings. On April 14, 2008, Anthony Rodriquez was charged with second-degree sexual abuse, willful injury, and domestic abuse assault. On April 28, 2008, Rodriguez filed a written arraignment and plea of not guilty. Because he did not waive his right to a speedy trial, trial was required to be held no later than July 13, 2008. A trial date was set for June 4, 2008.

On May 12, 2008, Rodriguez filed a limited waiver of speedy trial, demanding trial on or before September 1, 2008. The limited waiver of his rights was obtained due to difficulties in procuring the victim's deposition. The trial date was continued to August 13, 2008.

The victim was subpoenaed to give deposition testimony, but failed to appear at her June 18, 2008 deposition date. On June 25, 2008, Rodriguez filed a motion to dismiss on the grounds the State had insufficient evidence to support the charges against him. He alleged the victim, the sole witness in this matter, had failed to appear for her deposition, and had recanted, changed her story, or

directly denied any criminal wrongdoing by Rodriguez. Rodriguez filed a motion to compel discovery on July 3, 2008.

On July 15, 2008, Rodriguez filed a second limited waiver of speedy trial, demanding trial on or before October 1, 2008. The waiver was necessary to allow the court to consider a pending motion and to allow for additional discovery. Trial was rescheduled for September 13, 2008, and later was ordered to be held September 17, 2008.

On September 5, 2008, Rodriguez filed a motion to suppress and notice of alibi defense. At the September 8, 2008 pretrial conference, the court advised that the motion to suppress hearing could not be held until October and trial could not be set earlier than November 19, 2008. Rodriguez expressly requested and agreed to this delay. The hearing on the motion to suppress was scheduled for October 17, 2008, and trial was scheduled for November 19, 2008. When no judge was available for the October 17, 2008 hearing, it was rescheduled for November 10, 2008.

On October 30, 2008, and November 10, 2008, Rodriguez submitted psychological reports concerning his competence. At the suppression hearing, the State made a request to have Rodriguez evaluated by an expert of its own choosing. It filed a written request for such an evaluation one week later, on November 17, 2008, which the court denied. The State immediately filed a motion to reconsider and requested the November 19, 2008 trial be postponed to allow for discretionary review.

On November 19, 2008, the court denied the motion to reconsider but granted the request to postpone the trial, rescheduling it for December 17, 2008. The same day, Rodriguez filed a motion to dismiss for lack of speedy trial, which was set for hearing on December 12, 2008. However, the State's application for discretionary review was granted, staying the proceedings. A hearing was held on February 27, 2009, after Rodriguez's motion for a limited remand to allow the district court to consider the motion to dismiss was granted. The court entered its order dismissing the trial information on March 26, 2009. The State was granted discretionary review and the issues of both the mental health evaluation and dismissal were consolidated.

II. Speedy Trial. We first consider the State's argument that Rodriguez's motion to dismiss was improvidently granted. We review a trial court's ruling on a motion to dismiss based on speedy-trial grounds for an abuse of discretion. *State v. Winters*, 690 N.W.2d 903, 907 (Iowa 2005). The district court's discretion in ruling on such motions is narrow. *Id.*

Iowa Rule of Criminal Procedure 2.33(2)(*b*) states:

> If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Accordingly, a criminal charge not brought to trial within ninety days of indictment must be dismissed unless the State proves the defendant waived his right to a speedy trial, the delay is attributable to the defendant, or there is good cause for the delay. *Winters*, 690 N.W.2d at 908.

In determining whether there is good cause for a delay, we focus only on one factor, the reason for the delay. *State v. Campbell*, 714 N.W.2d 622, 628 (Iowa 2006). The attending circumstances bear on that inquiry only to the extent they relate to the sufficiency of the reason itself. *Id.* A short period of delay or the absence of prejudice may be legitimate considerations but "only insofar as they affect the strength of the reason for delay." *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999) (quoting *State v. Petersen*, 288 N.W.2d 332, 335 (Iowa 1980)). In other words, "[i]f the reason for the delay is sufficient the other factors are not needed. If the reason for the delay is insufficient the other factors will not avail to avoid dismissal." *Id.*

In ruling on Rodriguez's motion to dismiss, the district court found that Rodriguez had filed the two written waivers of speedy trial extending the date to October 1, 2008 following promises made by the State, on which the State failed to deliver. As a result, the court held Rodriguez's waiver of his speedy trial right was not voluntarily made and "the indictment must be dismissed unless the State can show the delay since April 14, 2008, was attributable to the defendant or that good cause exists for the delay." The court then found that although "[s]ome parts of the delay since April 14, 2008, can be attributable to the Defendant," "the majority is attributable to the actions of the State." Finally, the court concluded that outside those limited delays attributable to the Rodriguez, "[t]here is no other good cause for delay that served as a matter of practical necessity to move the trial date beyond the ninety-day period required by the rule."

The State first disputes the district court's finding that Rodriguez did not voluntarily waive his right to a speedy trial. It cites the written waivers Rodriguez signed, which both state:

> I further understand that I am not compelled to sign this Waiver of Right to Speedy Trial unless I do so willingly and voluntarily. . . .
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> . . . .
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> I have signed this document knowingly and [v]oluntarily, absent the influence of coercion, promise, threats, duress, alcohol or drugs.

We find Rodriguez voluntarily waived his right to a speedy trial until the October 1, 2008 deadline. Both waivers clearly state they were being made voluntarily and in the absence of any promises. Furthermore, Rodriguez never alleged in the district court that his limited waivers were not voluntarily made. *See State v. Kluge*, 672 N.W.2d 506, 510 (Iowa Ct. App. 2003) (noting that although the defendant claimed on appeal he was forced by circumstances to waive his right to a speedy trial, "his tune below was different").

However, trial was not held prior to the October 1, 2008 date set forth in the second limited waiver of Rodriguez's speedy trial rights. At the September 9, 2008 pretrial conference, defense counsel stated, "At this point, I think we are going to waive speedy trial again. We would like to waive it for a period of six weeks, but that's negotiable if there can't be a trial within that six week period." Trial was rescheduled for November 19, 2008, based on the dates available. The court entered its order stating the trial was being rescheduled "by agreement."

Although acquiescence in the setting of a trial date alone is not a sufficient excuse for delay of trial, it is a factor that may be considered in determining whether a defendant has waived his speedy trial rights. *State v. Phelps*, 379 N.W.2d 384, 387 (Iowa Ct. App. 1985). Here, in addition to acquiescence in the setting of the trial date, we have counsel's statement that speedy trial rights were being waived once more. Even if Rodriguez did not waive his right to speedy trial beyond the October 1, 2008 deadline, we conclude the filing of a motion to suppress days before the September 8, 2008 pretrial conference necessitated the delay. A defendant may not actively or passively participate in the events that delay his trial and later take advantage of that delay to terminate the prosecution. *State v. Finn*, 469 N.W.2d 692, 692 (Iowa 1991).

We then must consider whether Rodriguez's speedy trial rights were violated when trial was not held on the rescheduled trial date of November 19, 2008. On November 10, 2008, the day of the suppression hearing, Rodriguez amended his motion to include a new ground for suppression. He alleged he did not have the mental capacity to waive his *Miranda* rights and in support of his claim stated an intent to present the testimony of a psychologist who evaluated him three days earlier without notice being given to the State. The State then requested an order allowing it to have Rodriguez undergo an evaluation by an expert of its own choosing in order to have an opportunity to rebut the expert psychological evidence proposed by Rodriguez. At that point, the court rescheduled the suppression hearing for November 19, 2008, and trial for November 20, 2008.

On November 13, 2008, the court denied the State's request for its own evaluation, on the grounds it was "without authority to compel Rodriguez to undergo a mental health examination at the State's request in the context of a Motion to Suppress." The State moved the court to reconsider its ruling on November 17, 2008, which the court denied the following day. At the November 19, 2008 hearing on the motion to suppress, the court granted the State's request to continue the trial to seek discretionary review of the order denying the request for a psychiatric evaluation. It is this continuance that caused trial to be delayed beyond the agreed-upon date.

We conclude good cause existed to delay trial in this matter. Rodriguez waited until the day of the suppression hearing—nine days before trial—to amend his motion to suppress to include his lack of mental capacity as a factor affecting the voluntariness of his *Miranda* waiver as a ground for suppression. The State immediately moved for the independent psychiatric evaluation, which the court promptly denied. The State then moved to reconsider, which the court then denied before allowing the State to seek discretionary review. Given the fact that the issue is one of first impression in this jurisdiction, the discretionary review issue is substantial and fairly debatable as our supreme court's grant of the discretionary review shows. *See State v. Albertsen*, 228 N.W.2d 94, 97 (Iowa 1975) (holding good cause existed for delay in speedy trial where the State sought certiorari on a "substantial and fairly debatable" issue).

In granting Rodriguez's motion to dismiss, the district court also considered the delay that occurred after November 19, 2008. We conclude the

court exceeded its authority in so-doing. The limited remand was for the sole and limited purpose of ruling on Rodriguez's motion, a motion that claimed his speedy trial rights had been violated as of November 19, 2008. When a case is remanded for a limited purpose, the district court's authority extends only to that which is mandated by the appellate court. *State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001). Any action contrary to or beyond the scope of the mandate is null and void. *Id*.

We conclude the district court abused its discretion in granting Rodriguez's motion to dismiss based on a violation of his speedy trial rights. We reverse and remand this case for further proceedings.

III. Recusal. We next consider the State's contention Judge Stochl should have recused himself. The State claims Judge Stochl was unable to remain impartial due to the involvement of his former law partner, Judith O'Donohoe, in Rodriguez's defense.[1]

A trial judge's decision on the issue of recusal is reviewed for an abuse of discretion. *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). The substantial burden of showing grounds for recusal is on the party seeking recusal. *Id*. Only personal bias or prejudice stemming from an extrajudicial source and resulting in an opinion on the merits on some basis other than what the judge learned from participation in the case ranks as a disqualifying factor; judicial predilection does

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[1] The record appears to show that another member of the same law office was appointed to represent Rodriguez, Ms. O'Donohoe was never appointed, and that Ms. O'Donohoe nevertheless participated extensively in Rodriguez's defense in the trial court, and in this appeal.

not. *Id*. Actual prejudice must be shown before recusal is necessary. *Id*. The test is whether a reasonable person would question the judge's impartiality. *Id*.

The State never moved for Judge Stochl's recusal from the case. On appeal, it argues it had no way of knowing before Judge Stochl entered his ruling on the motion to dismiss that a serious defect in the proceeding would occur. It notes the Iowa Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding where the judge's impartiality might be questioned. *See In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998) (citing Iowa Code of Judicial Conduct Canon 3D(1) (1998)).

The difficulty in entertaining the State's claim without a motion for recusal having been made in the district court level is that there is no record by which we can substantiate the State's claims. *See In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007) (holding the lack of record regarding the judge's pretrial statements that allegedly demonstrated bias precluded a review of the recusal issue). The State cites nowhere in the record where evidence was presented regarding Judge Stochl's relationship with Ms. O'Donohoe. It is the State's duty to "provide a record on appeal affirmatively disclosing the alleged error relied upon." *Id.* (quoting *In re F.W.S.*, 698 N.W.2d 124, 135 (Iowa 2005)). Because no such record appears before us, we decline to address the merits of the issue on appeal.

***IV. State's Request for a Psychiatric Evaluation*.** Finally, we consider the State's argument that it is entitled to its own psychiatric evaluation of Rodriquez in order to have an opportunity to rebut the expert testimony he

intends to offer in support of his motion to suppress statements made following the waiver of his *Miranda* rights. He claims his waiver was not voluntarily given.

Iowa Code section 812.3(2) (2007) allows "[a]ny party . . . a separate psychiatric evaluation by a psychiatrist or licensed, doctorate-level psychologist of their own choosing" when a criminal defendant's competency to stand trial is in question. Additionally, Iowa Rule of Criminal Procedure 2.11(11)(*b*)(2) provides:

> When a defendant has given notice of the use of the defense of insanity or diminished responsibility and intends to call an expert witness or witnesses on that issue at trial the defendant shall, within the time provided for the filing of pre-trial motions, file written notice of the name of each such witness. Upon such notice or as otherwise appropriate the court may upon application order the examination of the defendant by a state-named expert or experts whose names shall be disclosed to the defendant prior to examination.

Because Rodriguez amended his motion to suppress on the day of the hearing on the motion, the State was unable to file a written request for its own evaluation. Instead, the State presented its argument in favor of the request at the hearing and in a written communication sent later the same day. It argued in part that it would be "prejudicial and unfair" to allow the defendant to use testimony of an expert on the issue of his mental capacity to waive his *Miranda* rights without allowing the State the opportunity to rebut such testimony through an examination of the defendant by an expert of its own choosing. In its order denying the State's request, the district court stated:

> The State does not identify any statute or Rule of Criminal Procedure to support its request. The State refers the Court to five cases to support its position. Those cases are distinguishable from the instant case.
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> The cases cited by the State generally involved Defendants who claimed to be incompetent to stand trial or who claimed the

> defense of insanity or diminished responsibility. Iowa Code chapter 812 addresses a Defendant's competency to stand trial. It provides the parties can secure independent psychological evaluations of a Defendant. Rule of Criminal Procedure 2.11 allows the State to secure an independent examination of a Defendant who has given notice of insanity or diminished capacity as a defense.
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> . . . .
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> In the instant case, Defendant has not asserted he is incompetent to proceed to trial, nor has he given notice of defenses of diminished responsibility or insanity. . . . [T]he Court is without authority to compel the Defendant to undergo a mental examination at the State's request in the context of a Motion to Suppress.

The State then filed a motion to reconsider, arguing rule 2.11(11)(*b*)(2) grants the court discretion to order an independent expert examination. The State also asserted, "Fundamental fairness requires the State to be permitted the opportunity to rebut the Defendant's claims at suppression hearing." The State cited *People v. Brock*, 633 N.E.2d 735, 742-43 (Ill. Ct. App. 1992), which held that where a defendant offered expert testimony at a suppression hearing in support of his claim he was unable to comprehend his *Miranda* rights, the State should be allowed to rebut such evidence through the testimony of a psychiatrist who had examined the defendant at the State's request.

In its order denying the State's motion to reconsider, the district court held:

> Defendant has not asserted a defense of diminished responsibility, nor is his competency to proceed to trial at issue. At issue, in Defendant's Motion to Suppress, is his waiver of Miranda rights and voluntariness of statements given <u>when questioned about the crime</u> (emphasis added). These issues are different from whether the Defendant was able to form the requisite specific intent at the time of the criminal act (diminished responsibility) and whether the Defendant appreciates the charge, understands the proceedings or can assist effectively in his defense during the prosecution (competency). Different points in time are involved in those issues.

> This Court continues to hold it is without authority to compel the Defendant to undergo a mental examination at the State's request in the context of a motion to suppress.

This ruling addressed only the claims related to rule 2.11(11)(*b*) and chapter 812. The court did not address the State's reasserted claim that fundamental fairness nevertheless required that it be allowed an examination by an expert of its own choosing.

We review the district court's interpretation of our rules of criminal procedure for correction of errors at law. *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005). We review constitutional issues de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In doing so, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.*

The State argues the court has the power to grant its request for its own psychiatric examination of Rodriguez because rule 2.11(11)(*b*)(2) authorizes such an examination upon notice or "as otherwise appropriate." The State claims the use of the phrase "otherwise appropriate" in the rule contemplates situations in which such an expert examination is available other than those in which a defendant gives notice of an insanity or diminished responsibility defense.

We disagree with the State's claim that a right to its own psychiatric evaluation under the facts of this case is authorized by the Iowa Rules of Criminal Procedure. Rule 2.11(11)(*b*) is captioned "*Insanity and diminished responsibility.*" The first subpart of the rule sets out the requirements for a defendant wishing to assert either defense. The second subpart, captioned "*State's right to expert examination*" deals with the notice a defendant must give

the State regarding the use of an expert witness to be called "on that issue at trial" and further provides the circumstances in which the State may secure examination of the defendant by state-named experts in response to that proposed expert testimony. The term "otherwise appropriate" does not contemplate situations other than those involving the insanity or diminished responsibility defenses, cases in which the State could seek its own expert examination of a defendant.

The State claims the court has the power to order the sought examination under the general provision contained in rule 2.35(2), which states, "If no procedure is specifically prescribed by these rules or by statute, the court may proceed in any lawful manner not inconsistent therewith." The State also claims Iowa Rule of Civil Procedure 1.515, which allows the court to order a party to submit to a mental examination when the party's mental condition is "in controversy," applies here because rule 1.101 states the Iowa Rules of Civil Procedure "shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not affected hereby provide different procedure in particular courts or cases."[2] Neither of these arguments was advanced to the district court. Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008). Because these

[2] We note that the Iowa Rules of Civil Procedure have no applicability in criminal cases, unless made applicable by statute. *State v. Wise*, 697 N.W.2d 489, 492 (Iowa Ct. App. 2005).

arguments were not made to the district court, we will not address them on appeal.

In addition to the situations set forth by rule and statute, the State argues the court has the power to grant its motion for its own evaluation as a matter of fundamental fairness where, as here, a defendant puts his mental state in issue for a suppression hearing by alleging he lacked the mental capacity to waive his *Miranda* rights and intends to buttress his claim with expert psychological evidence.

Our supreme court has recognized "[t]he State and defendant are equally entitled to a fair trial." *State v. Wright*, 203 N.W.2d 247, 251 (Iowa 1972). On appeal, the State argues that even in the absence of a specific rule of criminal procedure that allows the State its own psychiatric evaluation under the circumstances before us, the court has the inherent power to order such an examination as a matter of fundamental fairness. It notes that prior to the adoption of rules of criminal procedure providing for State-initiated mental examinations when the accused raises an insanity or diminished responsibility defense, our supreme court recognized the court's inherent power to order such examinations. *State v. Seehan*, 258 N.W.2d 374, 377-78 (Iowa 1977). Quoting the United States Court of Appeals for the Eighth Circuit, the *Seehan* court used the following rationale:

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, as it does with the competency issue in the case . . . and yet is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is

> the most trustworthy means of attempting to meet that burden. Yet that is precisely what the defense claims is appropriate here.

Id. at 377 (quoting *Pope v. United States*, 372 F.2d 710, 720-21 (8th Cir. 1967)).

The issue of whether the State is entitled to its own psychiatric evaluation of a defendant as a matter of fundamental fairness where the defendant has placed his mental state at issue in the context of a motion to suppress and intends to present expert testimony on the issue is one of first impression in this state. However, other jurisdictions have answered the question affirmatively. *See State v. Davis*, 610 So.2d 33, 34 (Fla. Dist. Ct. App. 1992) (finding the situation in which a defendant put his mental health at issue by claiming his confession was involuntarily given due to mental health issues to be akin to that of an insanity defense and therefore such defendant could be compelled to submit to a psychiatric examination by court-appointed psychiatrists); *People v. Brock*, 633 N.E.2d 735, 742 (Ill. App. Ct. 1992) (holding that as a matter of fundamental fairness the State was allowed to rebut the defendant's expert psychological evidence where the defendant alleged that his diminished intellectual capacity prevented him from comprehending the full import of his *Miranda* rights); *Powell v. Graham*, 185 S.W.3d 624, 632 (Ky. 2006) ("[F]undamental fairness demands that a defendant's decision to place an issue in controversy subjects that claim to the rigors of the adversarial process. To hold otherwise would give criminal defendants a distinct and undeserved advantage when raising issues of mental health outside of the area of competency to stand trial."); *State v. Verret*, 960 So.2d 208, 214-16 (La. Ct. App. 2007) (holding the trial court did not abuse its discretion in ordering a defendant

to undergo psychological evaluation by a State expert where the defendant had moved to suppress his confession alleging he did not have the mental capacity to voluntarily waive his *Miranda* rights, a matter of fundamental fairness even though there was no statutory authority for such an examination); *Commonwealth v. Ostrander*, 805 N.E.2d 497, 504-06 (Mass. 2004) (holding that where a defendant places his mental ability to voluntarily waive his *Miranda* rights at issue, he or she may be required to submit to an examination so the Commonwealth may rebut the defendant's expert testimony on the subject).

The State bears the burden of proof to show Rodriguez voluntarily, knowingly, and intelligently waived his *Miranda* rights. *State v. Ortiz*, 766 N.W.2d 244, 249 (Iowa 2009). To allow Rodriguez to present expert evidence—at State expense—to prove his rights were not voluntarily waived, while denying the State the right to independently examine him to rebut the expert evidence while shouldering the burden of proof, is fundamentally unfair.

We hold that where a defendant puts his or her mental health at issue in the context of a motion to suppress evidence and intends to present expert opinion evidence on the issue, the State is entitled to an independent psychiatric examination of the defendant as a matter of fundamental fairness. Accordingly, we reverse not only the district court's ruling in favor of Rodriguez on his motion to dismiss, but also the district court's ruling denying the State's motion for an independent psychiatric evaluation of Rodriguez. The case is remanded to the district court for further proceedings.

REVERSED AND REMANDED.