

IN THE COURT OF APPEALS OF IOWA

No. 0-642 / 10-0165
Filed September 22, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MICHAEL LARONE MCCULLOUGH,
Defendant-Appellee.

Appeal from the Iowa District Court for Allamakee County, John Bauercamper, Judge.

The State appeals the district court's dismissal of McCullough's trial information for violation of the speedy trial rule. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Mary Jane White, County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant State Appellate Defender, for appellee.

Considered Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

The State appeals the district court's order finding a speedy trial violation and dismissing the charges against Michael McCullough. We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

On February 18, 2009, McCullough was charged by trial information with sexual abuse and burglary. At his February 23 arraignment, McCullough demanded a speedy trial. Subsequently, the court set trial for May 13, 2009. No one disputes this date meets the speedy trial provisions. McCullough remained in custody during the proceedings described below.

On May 12, the day before trial, defense counsel filed a section 812.3 application requesting the court "suspend further criminal proceedings for a psychiatric evaluation." Iowa Code section 812.3(1) (2009) provides:

If at any stage of a criminal proceeding the . . . defendant's attorney, upon application to the court, alleges specific facts showing that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court shall suspend further proceedings and determine if probable cause exists to sustain the allegations.

After a telephonic hearing with both attorneys, the court's May 12 order cancelled the trial, taxed the delay "to the defendant under the speedy trial rule," and stayed all proceedings because it found McCullough appeared to be suffering from a mental disorder preventing him from assisting effectively in his defense. See *id.* § 812.3(2) (stating "upon a finding of probable cause sustaining the allegations, the court shall suspend further criminal proceedings"). The order

stated a separate order for a psychiatric exam would issue “after counsel for both parties has had a chance to determine where and with what medical professionals such an examination may be promptly scheduled.” The prosecutor and defense counsel agreed to a competency evaluation at the “Oakdale Facility.” On May 13, 2009, the court ordered McCullough transported to the Oakdale Facility and ordered “[t]he attorneys for both sides shall confer with each other and the facility to obtain an appointment date.”

While the case was stayed, McCullough sent letters received by the court on May 15 and June 4, asserting his rights to a speedy trial. In June 2009, McCullough was transported to the Oakdale Facility. On August 21, 2009, Oakdale staff informed the court it did not have the personnel to evaluate McCullough. On August 24, the court set an August 31 hearing “to review the status of the Court-Ordered competency evaluation and whether a substitute evaluator needs to be appointed.” Also on August 24, Oakdale staff indicated they were working on getting a psychiatrist to prepare the competency opinion “sometime in the next several months.”

On August 31, 2009, the court reset the competency review hearing to September 28, “because the Oakdale evaluation is not yet done.” On September 28, the parties *jointly moved for a continuance* because the Oakdale evaluation had not been completed. The court granted the continuance, set an October 12 review hearing, and ordered Oakdale staff to “provide competency report or report advising when competency report will be available prior to [October 12].”

During this time, the prosecutor provided defense counsel with contact information for an alternate doctor who could perform a competency evaluation. Defense counsel attempted to contact the doctor and eventually spoke to him on October 5, 2009. Defense counsel then received an e-mail stating the alternate doctor would need three to four weeks to complete an evaluation. Defense counsel did not switch the evaluation to the alternate doctor.

On October 12, 2009, Oakdale staff filed a letter with the court stating McCullough had one person ahead of him in the testing process, then McCullough would be tested and results would be expected in three to four weeks. Based on this letter, the court continued the competency evaluation review to November 9. On November 9, the hearing was reset for December 7, 2009.

On December 2, 2009, Oakdale staff filed a report concluding McCullough was competent to stand trial. On December 7, the court received a letter from McCullough arguing his rights to speedy trial had been violated. After the December 7 hearing, the court found McCullough competent to stand trial and ruled: "The stay order in this case is lifted." The court set trial for January 6, 2010. Further, "[t]his order makes no ruling on the question of whether defendant's speedy trial rights have been violated, and he retains the right to pursue any remedy he may have related thereto."

The next day, on December 8, 2009, the court received a letter from McCullough asserting his rights to a speedy trial had been violated and stating he wanted a different attorney. The court set a hearing on McCullough's request to

change attorneys for December 14. On December 10, the court received another letter from McCullough asserting his rights to a speedy trial had been violated. The court elected to treat McCullough's letters as a motion to dismiss and set a hearing on the speedy-trial issue for December 21, 2009.

On December 14, the court appointed new counsel and on December 21, the court found a speedy-trial violation and dismissed the charges. This appeal followed.

II. Speedy Trial.

The State argues McCullough'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.*

Under Iowa Rules of Criminal Procedure 2.5(5), 2.33(2)(b) (2009),¹ if a defendant's trial does not start within ninety days after the filing of the charging instrument, the charge must be dismissed unless the State proves: (1) the defendant's waiver of speedy trial, (2) the delay is attributable to the defendant, or (3) good cause exists for the delay. *State v. Campbell*, 714 N.W.2d 622, 627-28 (Iowa 2006). "The burden of proving an exception . . . rests squarely with the State." *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). Waiver is not at issue on this appeal.

¹ We need not address McCullough's constitutional claims because we "have repeatedly observed that [rule 2.33(2)(b)] is more stringent than its constitutional counterpart." *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001).

In determining whether the delay is attributable to the defendant, we note 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. Orte*, 541 N.W.2d 895, 898 (Iowa Ct. App. 1995). In determining whether there is good cause for a delay, we focus only on one factor, the reason for the delay. *Campbell*, 714 N.W.2d at 628. In resolving speedy-trial issues, our Supreme Court has instructed:

In considering whether a delay of trial beyond the ninety-day period . . . warrants dismissal of the prosecution, we do not deem it appropriate to identify a certain number of days relative to events that are believed to have impeded the progress of the case, attribute those events to the defendant or to other good cause, and then extend the speedy-trial deadline by a like number of days. Evaluation of the delay may not be made in such a mechanical fashion because it is not accurate to assume that pretrial events consuming a measurable amount of time will force a delay in the trial of a like amount of time. *The decisive inquiry in these matters should be whether events that impeded the progress of the case and were attributable to the defendant or to some other good cause for delay served as a matter of practical necessity to move the trial date beyond the ninety-day period required by the rule.*

Id. (emphasis added).

In granting the motion to dismiss, the court ruled: “It was apparent to counsel for both parties by August or September that [Oakdale] would not produce a timely evaluation. No good cause appears as to why another option was not pursued.” The court denied the State’s motion to reconsider, stating:

The court finds the prosecutor did encourage former defense counsel . . . to obtain a different mental health expert to evaluate the defendant after it was apparent that any evaluation by . . . Oakdale would not be timely completed.

However, the court believes that all of the facts support its ruling. The legal issue is not what former defense counsel . . . did or did not do. It is the State’s responsibility to bring the defendant

to trial promptly under the speedy trial rules which implement an accused's constitutional due process rights.

We conclude the court abused its discretion because the delay, under these facts, was "attributable to the defendant" due to: (1) defense counsel's motion for a psychiatric evaluation on the eve of trial, (2) the court specifically taxing the delay to the defendant when granting defense counsel's motion, (3) defense counsel's September 28th motion for a continuance, and (4) defense counsel's failure to employ an alternative doctor for the defense-originated evaluation. McCullough must accept the consequences of his own motion for an evaluation made on the eve of trial and taxed to him, the consequences of his own motion for a continuance when the Oakdale Facility failed to conduct a prompt evaluation, and the consequences of the passage of time necessary for the Oakdale Facility to conduct the evaluation when he failed to engage an alternative doctor. See *Orte*, 541 N.W.2d at 898 (stating a defendant must accept the passage of time necessary for action on his own motion). The facts of this case support the State's claim the delay is attributable to McCullough.

We also find good cause exists for the delay under Iowa Code section 812.4(1), which provides: "speedy trial shall be tolled until the court finds the defendant competent to stand trial." Accordingly, speedy trial was indisputably tolled from the May 12, 2009 defense motion to the December 7, 2009 court finding of competency. This statutory tolling is mandatory and beyond the direct control of the prosecutor.

We recognize Iowa law provides: "A hearing shall be held within fourteen days of the arrival of the person at a psychiatric facility for the performance of the

evaluation” Iowa Code § 812.4(1). However, the statute does not state that if a hearing is not held, the tolling period ends and the time begins to run again for speedy trial purposes. Rather, the statute provides the end of the tolling period occurs when the court finds the defendant competent. See *id.* Therefore, the provision tolling speedy trial extends as long as competency is an issue, notwithstanding the fourteen-day hearing provision. See *United States v. McGhee*, 532 F.3d 733, 737 (8th Cir. 2008) (holding tolling provision excludes any time spent on a competency evaluation, whether reasonable or unreasonable); *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001) (holding provisions tolling speedy trial extend as long as competency is an issue, even if the competency evaluation is filed in violation of a statutory deadline); *State v. Palmer*, 702 N.E.2d 72, 74 (Ohio 1998) (holding tolling of speedy trial continues until the trial court makes a competency determination and “cannot be cut short by an examiner’s failure to file a competency report within the prescribed time frame”).

Under the circumstances, the district court abused its discretion in granting McCullough's motion to dismiss based on a violation of his speedy trial rights. We reverse and remand for further proceedings.

REVERSED AND REMANDED.