IN THE COURT OF APPEALS OF IOWA

No. 0-941 / 10-0038
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DIANE MICHELLE PRESTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee (order dismissing first prosecution) and James Birkenholz (motion to dismiss second prosecution), District Associate Judges.

Diane Michelle Preston appeals from the judgment and sentence entered following her conviction for operating while intoxicated, second offense. **REVERSED.**

Scott A. Michels, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

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

EISENHAUER, J.

Diane Michelle Preston appeals from the judgment and sentence entered following her conviction for operating while intoxicated, second offense, an aggravated misdemeanor. She contends the State could not re-file the charges against her in this second prosecution because the first prosecution was dismissed with prejudice. She also contends her rights to speedy indictment and due process were violated, and the second prosecution is barred by the doctrine of estoppel by acquiescence.

I. Background Facts and Proceedings. On October 22, 2008, Preston was involved in a two-car accident. She was transported to the hospital by members of the Des Moines Fire Department Medic Squad 9, where Des Moines Police Officer Ben Ihde obtained a urine sample. On December 5, 2008, after receiving the results of the urinalysis, Preston was cited for operating while intoxicated, second offense. A trial information charging her with operating while intoxicated, second offense, was filed on January 9, 2009. Trial was set for May 11, 2009.

On April 9, 2009, Preston filed a motion to suppress the results of her urinalysis, alleging the officer who obtained her urine sample did not meet the requirements of Iowa Code section 321J.6 (2007) when he invoked implied consent and obtained the sample. The State did not resist the motion. On May 6, 2009, five days before trial, the district court entered its order suppressing the results. The State filed its notice not to prosecute the following day "due to lack of evidence." On the bottom of the same form as the notice was the order to

dismiss the case without prejudice. It appears the district court signed and filed the order the same day the notice was received.

On June 25, 2009, the State asked Officer Idhe for the names of members of the Des Moines Fire Department Medic Squad 9 members who responded to the scene of Preston's accident. The officer provided the names later that same day. On July 31, 2009, the State again filed charges of operating while intoxicated, second offense against Preston. The information listed the same witnesses as were listed in the first prosecution, but added members of the medic squad.

On October 16, 2009, Preston filed a motion to dismiss, alleging: (1) her right to a speedy indictment pursuant to Iowa Rule of Criminal Procedure 2.33(2)(a) had been violated, (2) the dismissal of the first prosecution was with prejudice, (3) the second prosecution was barred by the doctrine of estoppel by acquiescence, (4) her due process rights were violated, and (5) prosecutorial misconduct. Following a hearing on November 20, 2009, the district court denied Preston's motion on all grounds.

II. Dismissal of the First Prosecution. Iowa Rule of Criminal Procedure 2.33(1) sets forth the circumstances by which a prosecutor may elect to dismiss a pending criminal charge.

> The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

Iowa R. Crim. P. 2.33(1). Preston argues the State should be barred from further prosecution of her operating while intoxicated charge because it failed to provide a specific reason why the dismissal was in furtherance of justice, and because the court failed to make a specific finding in that regard.

In reviewing the dismissal, our inquiry is two-fold. *State v. Taeger*, 781 N.W.2d 560, 564 (Iowa 2010). First, we must ascertain whether the statement of reasons for dismissal complied with the rule. *Id.* This component is a question of law. *Id.* If we conclude the stated reasons are legally sufficient to grant a dismissal under the rule, the second question we must address is whether the dismissal was "in the furtherance of justice." *Id.* This second component is reviewable for an abuse of discretion. *Id.* An abuse of discretion is not found unless the defendant shows the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id.*

Our supreme court has established some basic parameters with regard to rule 2.33(1). First, a district court may overrule a motion to dismiss filed by the State where there has been an abuse of prosecutorial discretion, where the dismissal is sought in bad faith, or where dismissal is sought on grounds far afield the law or facts even if innocently motivated. *Id.* at 566. Second, more than a cursory explanation for the dismissal is required to satisfy the rule. *Id.* With regard to this second requirement, our supreme court stated:

> For a court to properly exercise its discretion under rule 2.33(1) the State must offer "a more substantial record than [a] bare motion. In making a motion to dismiss, therefore, "the State must provide appropriate and sufficient reasons for the dismissal." Adequately stating the grounds for dismissal also allows for appellate review of

> a district court's decision to grant or deny the dismissal. An appellate court cannot evaluate whether a district court properly exercised its discretion without a record of the grounds on which such discretion was exercised.

Id. (citations omitted).

The prosecutor filed a notice of intent not to prosecute, which states with respect to its reason for dismissal: "[T]he County Attorney, after examination of the records, talking to the witnesses and taking all things into consideration, declines to prosecute due to lack of evidence." The accompanying order of dismissal simply states, "IT IS HEREBY ORDERED THAT PLAINTIFF'S MOTION TO DISMISS IS HEREBY SUSTAINED WITHOUT PREJUDICE." Preston argues these statements are inadequate to show the dismissal was in furtherance of justice.

The State argues the chronology of events—the filing of the notice of intent not to prosecute coming on the heels of the court's grant of Preston's motion to suppress—demonstrates why the "lack of evidence" reason was sufficient under rule 2.33(1). Suppression of the results of the chemical test foreclosed on the State's plan to prosecute Preston under the section 321J.1(1)(b) alternative of operating while intoxicated. The proof required to obtain a conviction under the section 321J.1(1)(a) alternative was substantially different and required the State to locate witnesses to prove Preston was under the influence of alcohol.

We conclude the record was insufficient to allow the court to exercise its discretion or to allow this court to review the district court's exercise of discretion. The notice of intent not to prosecute simply indicates the State declined to

prosecute due to a lack of evidence. It does not contain a statement the dismissal is in furtherance of justice. Although our supreme court has previously stated that "furtherance of justice" under rule 2.33(1) includes "facilitating the State in gathering evidence, procuring witnesses, or plea bargaining," *State v. Fisher*, 351 N.W.2d 798, 801 (Iowa 1984), the prosecutor did not state his intent to gather additional evidence or procure additional witnesses. And while the attached order indicates dismissal is without prejudice, the notice itself fails to seek dismissal without prejudice.

Although the State argues the context of the case demonstrate facts upon which the court could determine the dismissal was in furtherance of justice, there are also facts by which it could be found the State did not wish to seek additional charges against Preston: the prosecutor did not resist the motion to suppress and then sought dismissal without asking for dismissal without prejudice. Nor should we be required to review the entire record to make such a determination. *See State v. Cooper*, 403 N.W.2d 800, 802 (Iowa 1987) (holding "courts should not be forced to rely on *post hoc* attempts at divining the district court's motivation from the entirety of the record in order to determine if the district court abused its discretion"). "To answer the abuse of discretion question, an appellate court needs to know why a trial court acted in the way that it did, not why it might have done so." *Id.* The fact no hearing was held on the matter and the order granting the dismissal gives no reasons for the dismissal hinders our review. *Cf. Traeger*, 781 N.W.2d at 563, 567 (considering the reasons given by the State and the defendant's resistance at the hearing on the State's motion to

dismiss). Because rule 2.33(1)'s requirement of stating the reasons for dismissal in the order was not met, a dismissal without prejudice could not be granted. *See State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008). Accordingly, we reverse the district court order denying Preston's motion to dismiss the charges against her in the second operating while intoxicated prosecution.

REVERSED.