IN THE COURT OF APPEALS OF IOWA

No. 0-974 / 09-1493
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTINE ANN SCHNECK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce Zager (motion to dismiss) and Jon Fister (trial), Judges.

Schneck appeals her convictions on drug charges. **AFFIRMED.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

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

EISENHAUER, J.

Christina Schneck appeals her drug convictions alleging the court should have granted her motion to dismiss for pre-accusatorial delay. We affirm.

I. Background Facts and Proceedings.

In April 2007, Ryan Bellis, an undercover police officer assigned to the Tri-County Drug Enforcement Task Force, was told by a confidential informant (CI) that sixteen-year-old Trisha Schneck was selling marijuana with her mother, defendant Schneck. Bellis observed the CI on the telephone with Trisha setting up a controlled buy of marijuana. On April 25, 2007, Bellis and the CI successfully completed the controlled buy and purchased marijuana from defendant Schneck (delivery case). At Schneck's direction, Trisha retrieved and cut the drugs.

In May 2007, Bellis called Schneck to ask about purchasing more marijuana and Schneck stated she had it for sale at her house. On May 4, 2007, Bellis obtained a search warrant for Schneck's house for items related to the use, sale, and distribution of marijuana. During the search conducted by other officers, a large amount of marijuana was discovered and Schneck was arrested. Schneck was willing to cooperate with the police as they attempted to discover her supplier, but Trisha refused to assist the police.

Shortly after the May arrest, Officer Bellis spoke with the prosecuting attorney about filing charges and learned Trisha was in the hospital. Officer Bellis was told to hold off on charging the April 2007 delivery case because both Trisha and her mother were involved.

On May 15, 2007, the State charged Schneck with conspiracy to distribute marijuana, use of person under age eighteen in drug trade, and drug tax stamp violation (conspiracy case). All the counts of Schneck's conspiracy case specifically identified May 4, 2007 as the date of the activities forming the basis for the charges against her. The April 2007 controlled-buy actions (delivery case) were not charged.

On August 9, 2007, Schneck pled guilty in the conspiracy case. On September 27, 2007, Schneck was sentenced to ten years for use of a person under age eighteen in drug trade and five years on each of the other two counts. The court ordered Shneck's sentences to run concurrently. The court suspended the sentences and ordered probation for not less than two and no more than five years.

In July of 2008, the confidential informant told Officer Bellis:

> Schneck and her daughter were still receiving quarters to half pounds of marijuana every other week. . . . Schneck specifically directed [the CI] to supply the daughter with methamphetamine so she does not get taken advantage of [by] the real nasty dealers.

Also in July 2008, Officer Bellis talked to Trisha and told her the [delivery] case from last April was still open and he was still looking at charging that case if she did not cooperate. Officer Bellis did not talk to Schneck directly, but told Trisha "to speak with her mother, let her know that her mother and [Trisha] both had charges pending."

In July 2008, Officer Bellis obtained an arrest warrant for Schneck for delivery of marijuana within 1000 feet of a school based on the earlier controlled buy. On August 18, 2008, Officer Bellis arrested Trisha after a traffic stop.

Trisha was allowed to call her mother and Schneck came to the scene. When Schneck arrived, she provided consent to search her vehicle. The officer searching Schneck's vehicle discovered cut tinfoil in the ashtray consistent with methamphetamine use. Trisha and Schneck next consented to a search of their new residence. Additional burnt tinfoil was found in Schneck's bedroom.

On August 28, 2008, the State filed a four-count trial information against Trisha and Schneck: Count I (Schneck) delivery of marijuana within 1000 feet of a school on April 25, 2007; Count II (Trisha) delivery of marijuana on April 25, 2007; Count III (Schneck and Trisha) drug stamp tax violation on April 25, 2007; and Count IV (Schneck) possession of methamphetamine on August 18, 2008 and being a second offender due to the September 2007 conspiracy conviction.

On October 1, 2008, the court held a hearing on Schneck's motion to dismiss alleging pre-accusatorial delay. Officer Bellis testified:

> Q. I'm sorry, explain to me after you knew there were charges pending in May of 2007 against her why you held off on the additional charges. . . . A. Again, it's common practice at the office. We do that on a lot of occasions so at a later date we can approach these individuals, let them think about it. After they've had time to think about it, they may change their mind and want to cooperate if they know what's pending.
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> Q. Well, there were charges pending against her, why wouldn't you talk to her then? A. I believe officers at the search warrant did attempt to speak with [Schneck]. The daughter was extremely uncooperative and was unwilling to cooperate. Therefore, if they weren't—both not on board, it was not going to work. It's a safety issue at that point in time.
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> Q. Well, [Schneck] talked to officers and she was willing to cooperate, wasn't she, at that time? A. I believe [Schneck] was willing to cooperate, but her daughter was not willing at that point in time.

> Q. And so because her daughter was unwilling to cooperate, that's why you delayed and held these other charges [delivery] over her head? A. Yes.
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> Q. And that was to gain some kind of tactical advantage to use on her to try and get her maybe to cooperate, correct? A. Possibly.
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> Q. And a tactical advantage would come out of that because she'd already had one conviction and now she might have another conviction if she didn't cooperate? . . . A. Correct.
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> Q. Correct. Because she'd be in a worse position with two convictions hanging over her head, correct? A. Well, obviously, yes.
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> Q. And that played a role in your decision as to waiting, right? A. It would be an incentive for them to cooperate, yes.
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> Q. And that also played a role in why you delayed in filing these second charges, correct? A. Initially, yes.
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> Q. Well, not initially. I'm talking about after the first conviction, you wanted to withhold the other charges so that now she'd have a conviction already on her and she'd be facing additional charges if she didn't cooperate. A. Well, there's no harm in holding off on those charges. It's almost a benefit to them. Okay? You give them an opportunity to cooperate, to hold off on those charges, so I don't see—you know, the point of an ongoing investigation, in doing this type of stuff, is to help our narcotics investigations out.
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> Q. Well . . . . A. It would be pointless to charge them with both of those initially and then not have any opportunity to, you know, wait to go talk to them in the end.
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> . . . .
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> Q. Just so I'm clear, part of the reason to hold off would be tactically you'd be better off with her having one conviction and being worried about getting a second, correct? A. I wouldn't say worried. I don't want to go and scare people. But it's an incentive for them to cooperate, to help themselves from being charged, yes.

In October 2008, the district court denied Schneck's motion to dismiss.

After a bench trial in July 2009, the court found Schneck guilty and ruled:

> Finally, but no less important, the minutes of testimony in [the prior conspiracy case] prove that the controlled buy and delivery in this case were not in furtherance of the conspiracy charged in that case. The investigative reports of [four officers] conclusively establish that the agreement between [Schneck] and her daughter was that [Schneck] would buy marijuana from a supplier and provide it to her daughter who would sell it to her

> friends. The marijuana delivered to the undercover officer on April 24 was delivered to him directly by [Schneck]. It was not sold to him by [Schneck's] daughter pursuant to the agreement which formed the basis of the [May 2007] conspiracy [charge] . . . .

In September 2009, the court sentenced Schneck to concurrent sentences: five years for delivery of marijuana within 1000 feet of a public school, five years for tax stamp violation, and two years for possession of methamphetamine, second offender. The court suspended the sentences and ordered probation for not less than two and no more than five years.

On December 30, 2009, Schneck's probation officers reported:

> Since [Schneck's] placement on supervised probation, [she] has been more than compliant. [Schneck] completed her substance abuse evaluation and has maintained her sobriety. [Schneck] has paid off her fines and fees and will continue to be supervised in the [delivery case] until 09/28/14. Therefore, the [Department] of Correctional Services respectfully recommends [Schneck] be discharged early from the [conspiracy case].

On February 24, 2010, the court discharged Schneck from her conspiracy case's probation.

Schneck appeals arguing the court erred in failing to grant her motion to dismiss for pre-accusatorial delay.

II. Due Process.

Schneck claims her constitutional due process rights were violated by the State's pre-indictment delay. We review her constitutional due process claims de novo. *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa Ct. App. 1997).

While there "is no constitutional right to be arrested and charged at the precise moment probable cause comes into existence," we recognize due process rights are *implicated* if the State "delays filing charges to intentionally

'gain a tactical advantage over the accused.'" *State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996) (quoting *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468, 481 (1971)). "These rights are violated if the actual prejudice to the defendant in view of the length and reasons for the delay offends the 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Edwards*, 571 N.W.2d at 501 (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049, 52 L. Ed. 2d 752 (1977)).

In 2003, the Iowa Supreme Court reformulated the test we use to determine a due process violation for prosecutorial delay. *See State v. Brown*, 656 N.W.2d 355, 363 n. 6 (Iowa 2003). The court merged the principles of "heavy" burden and "actual" prejudice into the new test while moving actual prejudice to the prerequisite/first element in a court's analysis. *Id*. The test now states:

> To prevail on a claim that such a delay violated due process, a defendant has the heavy burden of proving both (1) the defendant's defense suffered *actual* prejudice due to a delay in prosecution and (2) the delay causing such prejudice was unreasonable.

Id. at 363. Once actual prejudice is established, "the inquiry turns to the reasons for the delay, which are then balanced against the demonstrated prejudice." *Edwards*, 571 N.W.2d at 501. "If prejudice is not established, our inquiry ends." *Id*.

Actual prejudice, not mere speculation is required, and we employ a stringent standard. *Id*. "To establish actual prejudice, 'a defendant must show loss of evidence or testimony has meaningfully impaired his ability to present a

defense.'" *Brown*, 656 N.W.2d at 363 (quoting *Edwards*, 571 N.W.2d at 501) (stating generalized claims of prejudice are not sufficient).

Schneck cannot show her defense suffered *actual* prejudice due to a delay in prosecution. She points to no difficulty in presenting a defense and the witnesses were available and no evidence was lost. Schneck argues she is prejudiced because "having one case involving felony convictions is better than two," suggesting if the delivery and conspiracy cases had been filed together all potential sentences would have run concurrently. In other words, she could have completed her probation sooner. However, the two felony convictions here were based on Schneck's felonious activities on two separate dates. Therefore, the fact the convictions arise from two cases instead of one does not prove actual prejudice. The sentences she received for separate criminal acts on separate dates cannot establish the prejudice contemplated by *Brown*, 656 N.W.2d at 363. *See United States v. Brockman*, 183 F. 3d 891 (8th Cir. 1999) (increased sentencing exposure resulting from delay did not implicate defendant's due process rights); *United States v. Martinez*, 77 F. 3d. 332, 336-37 (9th Cir. 1996) (any sentencing prejudice caused by pre-indictment delay is too speculative to implicate a due process right).

We acknowledge some appeal to Schneck's argument that the delay was intended to hold a "'club' over the defendant," *Lovasco*, 431 U.S. at 797 n.19, 97 S. Ct. at 2052 n.19, 52 L. Ed. 2d at 763 n.19, but conclude Schneck has failed to satisfy her heavy burden to prove actual prejudice. Our inquiry, therefore, ends and it is unnecessary for us to further examine the reasons for the delay. The

district court properly denied the motion to dismiss based on a violation of due process.

AFFIRMED.