IN THE COURT OF APPEALS OF IOWA

No. 2-145 / 11-1209
Filed March 28, 2012

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JEFFREY DAVID ROGERS JR.,
Defendant-Appellee.

Appeal from the Iowa District Court for Washington County, James Q. Blomgren, Judge.

The State appeals a district court ruling dismissing the trial information against defendant as untimely. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Larry Brock, County Attorney, and Shawn Showers, Assistant County Attorney, for appellant.

Jeffrey L. Powell of Tindal Law Office, P.C., Washington, for appellee.

Considered by Eisenhauer, C.J., Bower, J., and Mahan, S.J.* Mullins, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings

At 10:54 p.m. on June 27, 2010, investigator Chad Ellis of the Washington County Sheriff's Office received a call about a stabbing incident in Ainsworth, Iowa. The victim of the stabbing was Robert Creamer. Creamer's girlfriend told officers that Creamer had been stabbed in a vehicle owned by Michael Overhulser.

Deputy Eric Weber found Overhulser in his vehicle driving in a rural area of Washington County. Ellis soon arrived at the scene. Overhulser told the officers he spent the evening with his step-brother, Jeffrey Rogers. Ellis spoke to Rogers on the telephone in an attempt to confirm Overhulser's statements. After the call, Overhulser consented to a search of his vehicle. Officers found drops of blood on the passenger side of the car. Overhulser then stated that he and Rogers had picked up Creamer and driven out to a rural area.

Unexpected and uninvited, Rogers and his girlfriend, Ana Farrier, arrived at the scene. Farrier was asked to return to her vehicle, and she did so. Deputy Weber conducted a pat-down search of Rogers. Rogers asked, "Am I under arrest?" and Ellis replied, "Do you see any handcuffs on you?" Rogers asked if he needed an attorney. Ellis reminded Rogers he had come to the scene voluntarily, but told Rogers he could get an attorney if he wanted one. After some discussion, Rogers was placed in handcuffs. Rogers asked why he was being arrested, and received no response. Ellis testified Rogers was placed in handcuffs "to keep him detained at the scene, because the way he was at the

scene, his demeanor, it was two deputies, two other male subjects, so basically just to keep the scene safe."

Ellis asked for a caged patrol car to be sent out. He stated he wanted the vehicle there in case they needed it. He also testified the lights on this type of vehicle were better than those on the unmarked police cars they had there. There is no evidence that the caged police car was actually used.

After Rogers was placed in handcuffs, he was placed in a patrol vehicle. Ellis then called the county attorney to seek advice. The county attorney told him to let Rogers, Farrier, and Overhulser go. Rogers was released from the handcuffs. The officers requested Rogers and Overhulser provide them with their pants and shoes, and they complied. The officers also asked them to go to the sheriff's office to wait until they were able to obtain a search warrant for the home of Rogers and Farrier. Farrier drove Rogers and Overhulser to the sheriff's office in her vehicle, and then later drove them home.

The blood spots found in Overhulser's car were sent to the Division of Criminal Investigation for testing. Ellis received the test results on October 29, 2010. A complaint against Rogers was filed on January 24, 2011. A trial information charging him with willful injury resulting in serious injury, in violation of Iowa Code section 708.4(1) (2009), was filed on January 28, 2011.

On April 1, 2011, Rogers filed a motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.33(2)(*a*), claiming he had been arrested on June 27, 2010, and the State had violated the speedy indictment rule. A hearing was held on May 16, 2011. Ellis testified as outlined above. Farrier testified she heard Ellis tell Rogers he was under arrest at the time he was placed in handcuffs.

The district court granted the motion to dismiss, finding, "The defendant was specifically advised by the police officer initially that handcuffs were an indication of arrest and then was later placed in handcuffs." The court found Farrier was not a credible witness. The court concluded, however, that the facts in this case would have led a reasonable person in the position of Rogers to believe he had been arrested. The State appeals the district court decision granting the motion to dismiss.

II. Standard of Review

In issues involving speedy indictment and speedy trial, our review is for the correction of errors at law. *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). We are bound by the district court's factual findings if they are supported by substantial evidence. *State v. Hart*, 703 N.W.2d 768, 771 (Iowa Ct. App. 2005).

III. Merits

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.

This rule reflects "the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties." Iowa R. Crim. P. 2.33(2). The rule "assure[s] the prompt administration of justice while allowing an accused to timely prepare and present his or her defense." *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011).

The term "indictment" as used in rule 2.33(2)(*a*) includes a trial information. *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998). The definition of

"arrest" as used in the rule is governed by chapter 804, especially sections 804.5 and 804.14. *State v. Dennison*, 571 N.W.2d 492, 494 (Iowa 1997). Section 804.5 provides, "Arrest is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Additionally, section 804.14 provides:

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, ...

Not all seizures by law enforcement officers, however, must meet the strict conditions of section 804.14 in order to constitute an arrest. *State v. Wing*, 791 N.W.2d 243, 248 (Iowa 2010). The Iowa Supreme Court has recently determined:

> When an arresting officer does not follow the protocol for arrest outlined in section 804.14 and does not provide any explicit statements indicating that he or she is or is not attempting to effect an arrest, we think the soundest approach is to determine whether a reasonable person in the defendant's position would have believed an arrest occurred, including whether the arresting officer manifested a purpose to arrest.

Id. at 249. Whether a person has been "arrested" for purposes of rule 2.33(2)(*a*) must be determined on a case-by-case basis. *Dennison*, 571 N.W.2d at 495.

In determining whether there has been an "arrest" for purposes of rule 2.33(2)(*a*) it is helpful to consider prior case law. *Id.* at 494. One of the factors to be considered is what the suspect was told or not told about his arrest status. *See Wing*, 791 N.W.2d at 248. "We also consider whether a person has been handcuffed or booked, but neither of these factors is determinative." *Id.* The failure to file charges does not necessarily mean there has been no arrest.

Dennison, 571 N.W.2d at 495. Additionally, the mere submission to authority does not constitute an arrest, but it is a factor to be considered. *Rains*, 574 N.W.2d at 910.

The State claims the district court erred by finding Rogers had been arrested on June 27, 2010, thus triggering the forty-five day provision in rule 2.33(2)(*a*). It points out that Rogers was not told he had been arrested, he was not transported to the sheriff's office, no charging instrument was filed, and he was not booked into jail. The State asserts Rogers was briefly detained and handcuffed for officer safety, but was allowed to leave the scene in his girlfriend's vehicle. The State contends the district court erred by dismissing the trial information charging Rogers in this case.

The district court found Farrier's testimony was not credible, and therefore, there are no credible explicit statements that the officers told Rogers he had been arrested. In this situation, we must look to the surrounding circumstances to determine whether a reasonable person in the position of Rogers would have believed he had been arrested. *See State v. Delockroy*, 559 N.W.2d 43, 46 (Iowa Ct. App. 1996) ("In the absence of explicit statements by police, we must consider the remaining surrounding circumstances to determine whether an arrest occurred.").

After the pat-down search, when Rogers asked whether he was under arrest, Ellis replied, "Do you see any handcuffs on you?," thus giving Rogers the impression that if he had been in handcuffs he would have been arrested. Soon thereafter, Rogers was placed in handcuffs. While Ellis testified Rogers was handcuffed for officer safety, an officer's subjective intent is not dispositive. *See*

Wing, 791 N.W.2d at 251 (noting the subjective intent of officers was not controlling in determining whether a reasonable person in the defendant's position would have believed he had been arrested). Additionally, when the handcuffs were placed on Rogers, he asked, "What am I being arrested for?," which shows he believed he had been arrested. The officers did not deny that Rogers had been arrested.

We also consider whether the officers "manifested a purpose to arrest." *See id.* at 249. The officers' subjective intent is not controlling, and instead we consider whether the officers had exerted their authority, "objectively evidencing a purpose to arrest." *See id.* at 252. An additional factor is whether Rogers submitted to their authority. *See id.* Here, the officers exerted their authority by placing Rogers in handcuffs, searching him, and placing him in the back of an official vehicle.[1] The evidence shows that after the handcuffs were removed, the officers continued to exercise authority by asking Rogers for his pants and shoes.[2] Also, the officers asked Rogers to wait at the sheriff's office while they obtained a search warrant. Rogers submitted by complying with the officers' requests.

We note that Rogers was not informed of his Miranda rights, he was not transported in a police vehicle to the sheriff's office, and he was not placed in jail. Considering all of the surrounding circumstances, however, including the specific statements made at the scene, we conclude a reasonable person in the position

[1] On appeal, Rogers makes much of the fact Ellis ordered a caged patrol car. There is no evidence, however, that it was used at the scene. The evidence may be relevant to the issue of Ellis's subjective intent, but as noted above, this is not controlling.

[2] Rogers was not wearing a shirt at the time.

of Rogers would have believed he had been arrested at the time he was handcuffed, searched, and placed in the back of a police vehicle. Once Rogers was "arrested" the officers did not have the ability to "unarrest" him based on the discussion with the county attorney. *See State v. Davis*, 525 N.W.2d 837, 839 (Iowa 1994).

We find no error in the district court's conclusion that more than forty-five days had passed between the date Rogers was arrested on June 27, 2010, and the date the trial information was filed on January 28, 2011. The failure to comply with rule 2.33(2)(*a*) requires absolute dismissal of a charge. *Utter*, 803 N.W.2d at 853.

We affirm the decision of the district court dismissing the case against Rogers.

AFFIRMED.