

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1079 / 06-0708  
Filed March 28, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JOSEPH EDWARD HOLMES,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals his convictions on four counts of forgery. **AFFIRMED.**

Patricia Reynolds, Acting Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Charity McDonell and Kim Griffith, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Eisenhauer, J., and Brown, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**BROWN, S.J.****I. Background Facts & Proceedings**

On September 7, 2005, Joseph Holmes was charged by trial information with burglary in the third degree and four counts of forgery. He was arraigned on October 6, 2005. He did not waive his right to a speedy trial, and trial was set for November 15, 2005. Holmes was represented by Aaron Hawbaker.

At the final pretrial conference held on November 10, 2005, Holmes asked for the matter to be set for further proceedings because he planned to plead guilty. The case was then set for plea proceedings on January 5, 2006. No order for transportation was issued prior to the plea proceeding, so it was continued to January 26, 2006. Due to the unavailability of defense counsel, on defendant's request the plea proceeding was again continued to March 9, 2006.

On February 17, 2006, Holmes asked for the case to be set for trial. Trial was set for March 14, 2006. On March 6, 2006, the district court appointed new counsel, John Standafer, for defendant due to a possible conflict of interest by Hawbaker. The trial was continued until March 28, 2006, based on defendant's request.

Standafer filed a motion to dismiss on March 10, 2006, alleging Holmes's speedy trial rights had been violated. Holmes claimed he did not waive his speedy trial rights, and had not consented to have the case set for a guilty plea. Hawbaker testified he would not have set the case for plea proceedings without Holmes's consent. On March 27, 2006, the district court denied the motion to dismiss. The court found Hawbaker had set the matter for plea proceedings at

defendant's request. The court concluded there was no violation of defendant's speedy trial rights. At the conclusion of the hearing Holmes asked for an additional continuance, which was granted.

On March 31, 2006, Holmes signed a written waiver of his right to a speedy trial. The case was tried to the court, and on April 24, 2006, Holmes was found guilty of four counts of forgery. He pled guilty to being a habitual offender. Holmes was sentenced to a term of imprisonment between three to fifteen years on each count, all to run concurrently. Holmes appeals his convictions, claiming he received ineffective assistance of counsel.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 712 N.W.2d 121, 136 (Iowa 2006). We presume that counsel is competent and that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

## **III. Merits**

Holmes claims his original attorney should have filed a motion to dismiss on speedy trial grounds under Iowa Rule of Criminal Procedure 2.33(2)(b). The trial information against Holmes was filed on September 7, 2005. He claims he should have been tried within ninety days, which would be by December 6, 2005.

Holmes asserts he never waived his right to a speedy trial, and Hawbaker should have filed a motion to dismiss when the trial had not been held by December 6. He states the hearing for further plea proceedings should have been held by December 6.

In the alternative, Holmes asserts he received ineffective assistance because the motion to dismiss filed by his second counsel did not raise the proper grounds for dismissal. Holmes contends the relevant question was not whether he authorized a continuance, but whether the trial could have been held prior to December 6. Holmes asserts that if proper grounds had been raised the case against him would have been dismissed.

Rule 2.33(2)(b) provides:

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.

This rule also applies to charges brought by a trial information. Iowa R. Crim. P. 2.5(5); *State v. Clark*, 351 N.W.2d 532, 534 (Iowa 1984). Under rule 2.33(2)(b), 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) defendant's waiver of speedy trial, (2) delay attributable to the defendant, or (3) good cause for the delay. *State v. Campbell*, 714 N.W.2d 622, 627-28 (Iowa 2006).

When Holmes indicated on November 10, 2005, that he planned to plead guilty, and asked for the case to be set for further proceedings to enter a guilty

plea, he effectively waived his right to trial and his right to a speedy trial. See Iowa R. Crim. P. 2.8(2)(b)(4) (stating that when a defendant enters a guilty plea, the defendant waives the right to be tried by a jury); *State v. Belieu*, 314 N.W.2d 382, 384 (Iowa 1982) (noting that when defendant pled guilty, he waived his right to trial and his derivative right to a speedy trial). We have previously stated:

Once a defendant indicates the choice to forego trial by entering a guilty plea or advising the State that a plea of guilty is forthcoming, the case is removed from the trial calendar and the State discontinues trial preparations. There is little, if any, need for either the State or the defendant to prepare for trial.

*State v. Warmuth*, 532 N.W.2d 163, 166 (Iowa Ct. App. 1995).

When a defendant withdraws a guilty plea, the ninety-day speedy trial period commences anew. *Clark*, 351 N.W.2d at 535 (“[T]rial was timely because it was commenced within ninety days of withdrawal of the guilty plea.”); *Warmuth*, 532 N.W.2d at 166 (“We hold the right to speedy trial may be reinstated by the withdrawal of the guilty plea or by the court’s determination the guilty plea cannot be accepted.”). Here, on February 17, 2006, Holmes asked for the case to be set for trial, thus withdrawing his previous commitment to enter a guilty plea. A new ninety-day period began to run at that time, and the State had until May 18, 2006, to try Holmes. Holmes waived his right to a speedy trial on March 31, 2006, before the new speedy trial time period had run.

We conclude Holmes’s right to a speedy trial was not violated. He has not shown he received ineffective assistance of counsel due to counsels’ failure to file a motion to dismiss on speedy trial grounds. We affirm Holmes’s convictions.

**AFFIRMED.**