IN THE COURT OF APPEALS OF IOWA

No. 6-247 / 05-1201
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ANTHONY WALKER STURGELL,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II, District Associate Judge.

The State appeals from the order dismissing the charges of second-degree harassment against Anthony Sturgell. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

On September 3, 2004, police arrested Anthony Sturgell for assault causing injury, in violation of Iowa Code section 708.1 (2003). He was arraigned and released on bail the same morning. Fifty-five days later, on October 28, 2004, the State charged Sturgell with second-degree harassment, in violation of sections 708.7(1)(b) and 708.8(3). Sturgell immediately moved to dismiss, asserting that his statutory right to a speedy indictment was violated. *See* Iowa R. Crim. P. 2.33(2)(*a*) (requiring an indictment/trial information to be filed within forty-five days of arrest). The court concluded "[t]here is no question that the 'speedy indictment' requirements of [Iowa] Rule [of Criminal Procedure] 2.33(2)(*a*) were not satisfied . . . ." It therefore ordered that "in the interests of justice, this case should be dismissed."

The State sought and was granted discretionary review of this order. In this appeal, it claims (1) the court erred in concluding rule 2.33(2)(*a*) required dismissal and (2) the court abused its discretion in dismissing the case "in the interests of justice." Sturgell does not argue on appeal that the dismissal can be affirmed as a proper application of the speedy indictment rule. Iowa R. Crim. P. 2.33(2)(*a*). In fact, his concession that "harassment is not an included offense of assault" is an express declaration that such a basis for dismissal was improper. We therefore conclude the court erred in dismissing the case based on a violation of the speedy indictment rule.

Thus, the dismissal can only be sustained if it was appropriate under the "in-the-interests-of-justice" language articulated by the district court. We review

this issue for an abuse of discretion. *State v. Henderson,* 537 N.W.2d 763, 765-66 (Iowa 1995). Rule 2.33(1) provides:

> 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 therefore 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).

The charge against Sturgell should not have been dismissed under this rule. First, although a dismissal under rule 2.33(1) will be upheld in the absence of a showing of an abuse of discretion, the district court does not have discretion on questions of law underlying the dismissal. *State v. Edwards,* 279 N.W.2d 9, 10 (Iowa 1979) (applying the former rule 27.1). Here, the court was clearly mistaken to the extent it concluded that second-degree harassment was a lesser-included offense of assault causing injury. *See State v. Sunclades*, 305 N.W.2d 491, 494 (Iowa 1981) (concluding the forty-five-day speedy indictment period that commenced when defendant was arrested applied only to that particular charge and lesser-included offenses thereof, rather than to all offenses arising from the same incident or episode).

Moreover, although rule 2.33(1) does not specifically require notice to the State of an intent to dismiss, our supreme court has judicially imposed such a requirement. *State v. Brumage,* 435 N.W.2d 337, 340 (Iowa 1989) (holding that the trial court's failure to afford the State an opportunity to present reason why the case should not be dismissed was an abuse of its discretion). The State

must be afforded "a fair opportunity . . . to present its case." *In re Judges of the Municipal Court,* 256 Iowa 1135, 1137, 130 N.W.2d 553, 555 (1964). In arguing the motion to dismiss, the parties focused exclusively on the lesser-included offense issue. There was no indication the court intended to exercise its discretion under rule 2.33(1) to dismiss the State's case. Thus, the State was never provided the opportunity to argue that the interests of justice did not warrant dismissal.

Finally, by its terms, the rule requires the court to state on the record its reasons for dismissing. The two reasons given by the court for its decision to dismiss were (1) that the speedy indictment rule was violated and (2) that "it is not consistent with a sense of justice to allow the State to charge a different offense, provable by the same facts, in order to avoid the [speedy indictment rule]." Both of these stated reasons implicate rule 2.33(1) and its application to the facts of this case. As the trial court's position was an incorrect application of the speedy indictment rule, neither reason is sufficient to support dismissal. We therefore reverse the dismissal order and remand for further proceedings.

REVERSED AND REMANDED.