

IN THE COURT OF APPEALS OF IOWA

No. 7-143 / 06-0884

Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL C. MOREHEAD,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Michael C. Morehead appeals his conviction of six counts of forgery.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendant-appellant, Michael C. Morehead, was convicted of six counts of forgery, in violation of Iowa Code section 715A.2 (2003). On appeal, Morehead contends the matter should be dismissed because he was denied his right to a speedy trial when the State failed to bring him to trial within one year of his arraignment. We affirm.

BACKGROUND. Over the course of three visits to the SuperValue in Waterloo, Iowa, the defendant cashed six checks later determined to be forged. The defendant was charged with six counts of forgery, and on February 22, 2005, the defendant was arraigned. The defendant waived his right to be tried in ninety days. A trial date was set several times and continued at least once at defendant's request.

On January 26, 2006, a trial date was set for February 7, 2006. On the State's motion the trial was twice continued because the State contended the victim, who the State identified as a key witness, was in Pakistan.

The record shows that on February 2, 2006, the State delivered a subpoena to the Black Hawk County Sheriff for service on the witness. On February 3, the subpoena was returned stating the witness was out of the country until February 27. On February 6, three days after the subpoena was returned, the State made an oral motion to continue the trial. The State informed the court they had just learned the witness was in Pakistan and would not return until February 27 contingent on the plane schedules. The State asked the trial be set for March 7, 2006.

In arguing for the continuance the prosecutor said the witness was key because (1) he owned the store where the checks were cashed, (2) he took some of the checks, (3) he had talked to the defendant, (4) the defendant had repaid him, (5) and the witness owned a business in the area and would return. Defense counsel did not refute the State's position that the absent witness was a key witness. In resisting the motion, counsel noted that while his client had agreed to waive his right to a speedy trial within ninety days, he had not waived his right to trial within one year as required by Iowa Rule of Criminal Procedure 2.33.2(c).¹

The trial was continued until March 7, 2006. The court found an essential witness was not available, and the State had shown good cause for the continuance. The court also ordered "that no additional continuances will be granted to the State for reasons of witness unavailability."

On March 7, 2006, the State requested another continuance before a second judge. The court was told the key witness was yet in Pakistan, and attempts to contact him were unsuccessful, but he was to return in two weeks. While resisting the motion, defense counsel did not dispute the State's contention the witness was a key witness. Counsel first contended that the earlier judge's order was the law of the case, and no further continuances could be granted. Counsel also argued his client was prejudiced by further delay as it would be the fourth time he had to subpoena defense witnesses.

¹ Iowa Rule of Criminal Procedure 2.33.2(c) provides that "All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to rule 2.8 unless an extension is granted by the court, upon a showing of good cause."

The district court, “with reluctance,” found good cause and rescheduled the trial for March 21, 2006, and again provided no further continuances would be granted.

The key witness was not available on March 21 and the case went forward after the district court ruled adversely on defendant’s motion to dismiss for failing to bring him to trial in a one year period. The defendant was found guilty.

The standard of review for a motion to dismiss based on a speedy-trial ground is articulated in *State v. Winters*, 690 N.W.2d 903, 907 (Iowa 2005) (citations omitted):

We review a trial court’s ruling on a motion to dismiss based on speedy-trial grounds for an abuse of discretion. When speedy trial grounds are at issue, however, the discretion given to the district court narrows. The discretion to avoid dismissal in a criminal case is limited to the exceptional circumstance where the State carries its burden of showing good cause for the delay.

LAW OF THE CASE. We first address the defendant’s contention that the first judge’s order granting a continuance and determining that no further continuances would be granted is the law of the case, and therefore, the second continuance should not have been granted.

“The doctrine of the law of the case represents the practice of courts to refuse to reconsider what has once been decided.” *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 596 N.W.2d 532, 537 (Iowa 1999) (quoting *State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987)). The law of the case doctrine does not apply if the facts before the court upon the second trial are materially different from those present in the first case. *Grosvenor*, 402 N.W.2d at 405. A judge’s prior ruling does not become the law of the case so as to preclude either that judge or another judge of the same court from changing it before final

judgment. See *Ahls v. Sherwood/Division of Harsco Corp.*, 473 N.W.2d 619, 624 (Iowa 1991). The first continuance was not a final judgment. We affirm on this issue.

GOOD CAUSE. Given that defendant has not waived the one-year rule and has strongly objected to a trial date being set beyond that time, only a strong reason would justify a departure from mandate of rule 2.33.2(c). See *State v. Miller*, 637 N.W.2d 201, 205-206 (Iowa 2001). Good cause focuses on only one factor that is the reason for the delay. *Winters*, 690 N.W.2d at 907.

The attending circumstances bear on the inquiry only to the extent they relate directly to the sufficiency of the reason itself. Surrounding circumstances include: (1) the length of the delay, (2) whether the defendant asserted his or her right to a speedy trial, and (3) whether prejudice resulted from the delay. If the reason for the delay is insufficient, the other factors will not avail to avoid dismissal.

Id. (citing *State v. Nelson*, 600 N.W.2d 598, 600, 602 n.2 (Iowa 1999)).

Did the absence of the alleged key witness from the country justify a continuance beyond the expiration of the one-year period? There is authority for denying a motion to dismiss where a witness is unavailable until after the expiration of the deadline for a speedy trial. See *State v. Peterson*, 288 N.W.2d 332, 335 (Iowa 1980). Though hindsight proved the witness was neither key nor necessary, we look at what was before the district court at the time the motions were ruled on.

The prosecutor told the court the witness was key. The defendant did not challenge or refute the prosecutor's contention. We do not believe either judge abused his or her discretion in sustaining the motions for continuance (1) where the court was told was a key witness was out of the country, (2) the witness

owned a business in Waterloo and it was anticipated he would return, (3) and the trial was continued only until the time the witness was projected to return to the area.

AFFIRMED.