IN THE COURT OF APPEALS OF IOWA

No. 8-108 / 07-0833
Filed May 14, 2008

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ALEXANDER NELSON HUFFMAN,
Defendant-Appellee.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell, Judge.

The State appeals a dismissal of a trial information for violation of the speedy indictment rule. **AFFIRMED**.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Jesse Marzen, County Attorney, and David Kuehner, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Baker, JJ., decided by Miller, P.J., and Vaitheswaran, Eisenhauer, and Baker, JJ.

PER CURIAM

A complaint charging Alexander Huffman with third-degree harassment, a simple misdemeanor, was filed on December 6, 2006, and he was arrested on December 8, 2006. After Huffman's request for a jury trial was granted, the Floyd county attorney filed an amended complaint to charge first-degree harassment on February 5, 2007. On February 12, 2007, sixty-six days after Huffman's initial arrest, the trial information charging first-degree harassment was filed. Under Iowa Rule of Criminal Procedure 2.33(2)(*a*), "the court must order the prosecution to be dismissed, unless good cause to the contrary is shown" when an indictment or trial information is not brought within forty-five days of arrest for a "public offense." The district court granted the defendant's motion to dismiss on April 9, 2007, and the State appeals.

"When interpreting . . . the speedy indictment rule, we review for correction of errors at law." *State v. Rains*, 574 N.W.2d 904, 909 (Iowa 1998). The sole issue is when Huffman was "arrested" for a "public offense" for purposes of the speedy indictment rule.

The State does not rely on the good cause exception; rather, it contends the speedy indictment rule does not apply because the initial complaint was for a simple misdemeanor and it can therefore file a subsequent trial information charging an aggravated misdemeanor based on the same incident without violating the speedy indictment rule. Additionally, the State claims Huffman was not "arrested" for the purposes of the speedy indictment rule until February 12, when the trial information was filed. In support the State relies on three cases:

State v. Eichorn, 325 N.W.2d 95 (Iowa 1982), *State v. Sunclades*, 305 N.W.2d 491 (Iowa 1982), and *State v. Burton*, 231 N.W.2d 577 (Iowa 1975).

However, none of these cases deals with an enhancement of the original charge after an arrest; rather, they resolve issues concerning different criminal charges arising from the same incident. The fact separate charges and different offenses were involved is a key factor in each ruling. In *Burton*, the defendant was originally charged with burglary with aggravation and the State later initiated a charge for robbery with aggravation arising from the same incident. *Burton*, 231 N.W.2d at 578. The court rejected the defendant's claim the speedy indictment limitations "relating to the burglary charge were applicable to the separate robbery charge simply because both charges arose from the same episode." *Id*. Noting burglary and robbery "are separate and distinct offenses," the court concluded: "They are not the same offense." *Id*.

In *Sunclades*, a defendant was arrested for attempt to commit murder and was later charged with going armed with intent and assault while participating in a felony. *Sunclades*, 305 N.W.2d at 494.

> The plain language of [the speedy indictment rule] provides that the period of time during which an indictment must be returned commences when the defendant is arrested. Under the *Burton* standard the time period applies only to the "public offense" for which the defendant was arrested, rather than to all offenses arising from the same incident or episode. We thus conclude the [speedy indictment period] that commenced when the defendant was arrested for attempt to commit murder . . . *applied only to that charge and lesser-included offenses thereof*. It did not apply to the separate charges of going armed with intent and assault while participating in a felony.

Id. (citation omitted) (emphasis added).

The final case cited by the State also deals with separate charges and not an enhanced charge. In *Eichorn*, the court ruled the prosecutor could charge the defendant with burglary after the time for prosecution of robbery had expired. 325 N.W.2d at 96. "The two crimes are different. . . . We thus have *two different crimes in tandem*, growing out of a single state of facts." *Id*. (emphasis added). Noting the speedy indictment time runs from the time of arrest, the court considered the time of arrest issue when a defendant is already incarcerated:

> Under such facts we deem the time of arrest to be the time the new charge is filed. We do not think the officers should have to engage in an idle ceremony of releasing the accused into the street and then retrieving him into jail.

Id. at 96-97. Further, the court stated: "In [*State v. Combs*, 316 N.W.2d 880, 882 (Iowa 1982)] the prosecutor actually lost the first case after trial, but we permitted a second charge to be filed of a *different crime* based on the same event. *Eichorn,* 325 N.W.2d at 97 (emphasis added).

Eichorn held "when authorities bring a new charge against a person already in their custody, the time of arrest for purposes of [the speedy indictment rule] is deemed to be the time the new charge is filed." *State v. Boelman*, 330 N.W.2d 794, 795 (Iowa 1983). Therefore, substituting the "time of the new charge" for the statutory "time of arrest," as we are urged to do by the State, only occurs when the defendant is already in the custody of authorities[1] and the same authorities charge a different crime.

We conclude the State is not charging Huffman with a different crime. All crimes in Iowa are statutory and public offenses are defined by a description of

[1] Huffman had posted bond and was not incarcerated at the time the State filed the trial information charging first-degree harassment.

the acts constituting the offense. *State v. Wallace*, 259 Iowa 765, 772, 145 N.W.2d 615, 620 (Iowa 1966). Iowa Code section 708.7(1)(a) (2005) defines harassment and specifies the acts constituting the offense: "A person commits harassment when, with intent to intimidate, annoy, or alarm another person, the person does any of the following:" (1) communicates without legitimate purpose in a manner likely to cause annoyance/harm; (2) places simulated explosives; (3) orders merchandise/services without knowledge/consent; or (4) makes false reports to law enforcement.[2] The next statutory subsections, 708.7(2), (3), and (4), classify the offense of harassment specified in subsection 708.7(1) into first-degree harassment,[3] second-degree harassment,[4] and third degree harassment.

The complaint leading to Huffman's arrest for third-degree harassment specified a violation of subsection (4), which provides only: "Any other act of harassment is harassment in the third degree. Harassment in the third degree is a simple misdemeanor." Iowa Code § 708.7(4). Clearly, to understand the offense described in subsection 708.7(4), reference must be made to the "base prohibition" detailed above and established in Iowa Code section 708.7(1). *See State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997) (holding Iowa Code section 124.401(1) contains the base prohibition against drug trafficking and subsequent code sections identifying the felony class (C or B) involve the same offense "but with a larger amount of drugs involved resulting in a potentially more severe

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[2] Iowa Code section 708.7(1)(b) defines harassment where *personal contact* is intended to threaten, intimidate, or alarm another. (emphasis added).

[3] First-degree harassment is an aggravated misdemeanor and involves "a threat to commit a forcible felony" or three or more previous harassment convictions within ten years. Iowa Code § 708.7(2).

[4] Second-degree harassment is a serious misdemeanor and involves "a threat to commit bodily injury" or two harassment convictions within ten years. Iowa Code § 708.7(3).

sentence"). Therefore, "the degree of the offense denotes a division or classification of one specific offense into grades" and specifying a different degree does not change the offense into a new and different offense. *State v. Garr*, 461 N.W.2d 171, 174-75 (Iowa 1990) ("[D]efendant was only charged with one crime, theft. The degree of theft was a classification within that one offense; it was not a different offense."). *See State v. Grindele*, 577 N.W.2d 858, 860 (Iowa Ct. App. 1998) (noting *Garr* "expressly distinguished the offense of theft defined in section 714.2(1) from the degrees of theft specified in section 714.2(2)").

From the time of his arrest, Huffman was only charged with one crime, harassment, as detailed in 708.7(1)(a). The later enhancement from simple misdemeanor harassment in subsection 708.7(4) to first-degree harassment in subsection 708.7(2) does not involve a different offense. In fact, the State's filing requesting permission to amend the charges to first-degree harassment recognizes the base prohibition of harassment is described in section 708.7(1)(a) by stating: "in violation of Code Sections 708.7(1)(a)(1) and 708.7(2)."

Support for our conclusion is found in the recent Iowa Supreme Court decision, *State v. Abrahamson*, 746 N.W.2d 270 (Iowa 2008), where the court rejected the State's argument the appropriate analysis for speedy trial "same offense" issues requires a "same elements" analysis. *Id.* at 276. The *Abrahamson* court concluded the legislature's prohibition of drug conspiracies and other drug trafficking offenses in a single code section, 124.401(1), shows separate counts of manufacturing and conspiracy, charged under section 124.401(1) and arising from a common set of facts, are a single offense for

speedy trial purposes. *Id.* at 275-76. Likewise, the legislature's prohibition of harassment in a single code section, 708.7(1)(a), shows different degrees of harassment, charged under 708.7(1)(a) and arising from a common set of facts, are one offense for speedy indictment purposes.

Therefore, we hold the speedy indictment period commenced upon Huffman's arrest for the charge of third-degree harassment and became applicable when the State enhanced the harassment offense by amending to charge first-degree harassment. The State's amendment did not charge Huffman with a different crime. The district court correctly dismissed the case after determining the State did not file its trial information within the forty-five day time period required under our rules. *See State v. Abrahamson*, 746 N.W.2d at 273 (holding a violation requires an "absolute dismissal, a discharge with prejudice, prohibiting reinstatement or refilling").

We recognize the speedy indictment rule does not apply to simple misdemeanor prosecutions. *See* Iowa Code § 801.4(8); Iowa Rule Crim. P. 2.33(2)(*a*). However, under the circumstances of this case, where the State amended its complaint to charge an aggravated misdemeanor and where we have decided the arrest for the purpose of the speedy indictment rule occurred on December 8, 2006, the district court correctly dismissed the proceedings.

AFFIRMED.