

**IN THE COURT OF APPEALS OF IOWA**

No. 9-420 / 08-1048  
Filed July 22, 2009

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

**vs.**

**JASON ALLEN WING,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Hobart Darbyshire,  
Judge.

Jason Wing appeals from his conviction of possession of marijuana with  
intent to deliver. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney  
General, Michael J. Walton, County Attorney, and Robert Weinberg, Assistant  
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

On July 7, 2007, a detective from the Tactical Operations Bureau requested that Officer Brian Schertz perform a traffic stop on a vehicle to aid in a narcotics investigation. Schertz stopped the vehicle, driven by Brandi Basden, whose vehicle registration was expired. Jason Wing, the target of the narcotics investigation, was a passenger. Basden consented to Schertz's request to search the vehicle. Schertz asked that Basden and Wing stand on the sidewalk while he conducted the search.

In the trunk of the vehicle, Schertz discovered a cellular phone box containing a brick of marijuana in a plastic bag. Upon discovering the marijuana, Schertz placed Basden in the back of his patrol car.<sup>1</sup> Wing asked Schertz if he had found the marijuana, and Schertz responded that he had. Wing informed Schertz the marijuana was his. Schertz removed Basden from the patrol car and allowed her to drive away after the traffic stop was complete.

Schertz read Wing his *Miranda* rights, handcuffed him, and placed him in the back of the patrol car. Wing testified that he considered himself to be under arrest at this point. Schertz testified that he handcuffed Wing for officer safety purposes in case Wing tried to fight or run.

Around this time, Corporal Gilbert Proehl arrived at the scene. He asked Schertz to remove Wing's handcuffs. Wing agreed that Proehl could search his home. Accordingly, Proehl advised Schertz to transport Wing back to his

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<sup>1</sup> Schertz did not handcuff Basden or read her *Miranda* rights. She was in the patrol car for less than two minutes.

residence. Schertz asked Proehl for clarification as to whether Wing was under arrest at the time, and Proehl responded with a code fifty-nine, which meant that Wing was not under arrest. Neither officer ever informed Wing that he was or was not under arrest. The traffic stop took roughly twenty-five minutes, though Wing was handcuffed for only eleven minutes. The drive back to Wing's home took around five minutes.

Wing was cooperative while Proehl and Sergeant Kevin Smull searched his residence. Wing discussed with Proehl the possibility of helping with other drug investigations in the area. Once Wing informed Proehl he would be willing to help with other investigations, Proehl provided Wing an inventory of the items seized at his residence and gave Wing his phone number. Proehl instructed Wing to call him. After about half an hour, the officers left Wing's residence.

Roughly five months passed, and Wing did not call Proehl. Proehl filed a complaint on December 18, 2007. A trial information was filed January 11, 2008, charging Wing with possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d) (2007) and violation of the drug tax stamp act in Iowa Code section 453B.12. On February 20, 2008, Wing filed a motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.33(2)(a) (speedy indictment violation). On April 22, 2008, the district court denied Wing's motion to dismiss, finding that Wing had not been arrested on July 7, 2007. On April 28, 2008, after a stipulated trial on the minutes of testimony, the district court found Wing guilty of possession of marijuana with intent to deliver. The district court dismissed the tax stamp charge pursuant to a plea agreement. Wing appeals, arguing the district court erred in denying his motion to dismiss.

## II. Standard of Review

Our scope of review is for errors at law. *State v. Waters*, 515 N.W.2d 562, 566 (Iowa Ct. App. 1994). We are bound by the district court's findings of fact supported by sufficient evidence. *Id.*

## III. Speedy Indictment

Iowa Rule of Criminal Procedure 2.33(2)(a) provides that when an indictment is not found within forty-five days after arrest, "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." The State does not claim good cause or waiver here. The term "indictment" embraces the trial information. Iowa R. Crim. P. 2.5(5). Wing argues that because the trial information was filed more than forty-five days after his arrest, the district court should have dismissed the prosecution. The State argues that Wing was not arrested during his initial encounter with officers on July 7, 2007. The sole issue in this case is whether Wing was arrested at that time.

To determine whether an arrest occurred, we must consider relevant statutory authority. Iowa Code section 804.5 defines "arrest" as "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." Iowa Code section 804.14, entitled "Manner of making arrest," states:

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 . . . .

Previous cases are also instructive in determining what constitutes an arrest. “[A]n arrest can occur without the police specifically informing the arrestee of their intention to arrest.” *State v. Delockroy*, 559 N.W.2d 43, 45 (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.” *Id.* at 46. In examining the surrounding circumstances, “we look to determine if the facts reveal an assertion of authority and purpose to arrest, together with a submission of the arrestee.” *Id.* “[T]he mere submission to authority does not constitute an arrest.” *Id.* at 45. “The court looks to whether the officers had a ‘purpose to arrest’ or whether a reasonable person would have believed otherwise.” *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997). However, “an arrest does not necessarily take place because a reasonable person in the same or similar circumstances would not believe he or she was free to leave.” *Delockroy*, 559 N.W.2d at 45. Whether a defendant was handcuffed can be considered in determining whether an arrest was made. *Dennison*, 571 N.W.2d at 495. “The lack of booking or charges being filed does not necessarily mandate a finding of no arrest.” *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998). “[W]hether a defendant was ‘arrested’ is determined on a case-by-case basis. There is no bright-line rule or test.” *Dennison*, 571 N.W.2d at 495.

An initial encounter with law enforcement authorities is not deemed to be an arrest when the individual is given a choice between cooperating as a confidential informant or being taken into custody and charged. See *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992). In *Johnson-Hugi*, the defendant sold drugs to an undercover officer. *Id.* at 599. Officers confronted

the defendant in her home and offered her a choice of either cooperating and acting as a confidential informant or being arrested for delivering a controlled substance. *Id.* at 600. Not surprisingly, the defendant decided to cooperate and assist the officers. *Id.* The officers then patted down Johnson-Hugi and transported her to an Iowa highway patrol station. *Id.* While at the station, the officers read her *Miranda* rights. *Id.* The Iowa Supreme Court found that officers had not arrested the defendant, but rather presented her “with the alternative of either cooperating as a confidential informant or being arrested, and her decision to cooperate as an informant necessarily precluded the possibility of there being an ‘arrest.’” *Id.* at 601. “Thus, the police did not transport [the defendant] to the station for the purpose of an arrest, but to complete paperwork concerning her decision to cooperate. It was a voluntary meeting with police, initiated by the defendant’s decision to cooperate.” *Delockroy*, 559 N.W.2d at 45.

This court considered factually similar circumstances in *State v. Smith*, 552 N.W.2d 163 (Iowa Ct. App. 1996), and distinguishing circumstances in the companion case of *State v. Delockroy*, 559 N.W.2d 43 (Iowa Ct. App. 1996). Officers discovered drugs and drug paraphernalia when they executed a search warrant on the home shared by Smith and Delockroy. *Delockroy*, 559 N.W.2d at 44. Smith asked what type of charges he was facing and if there was anything he could do to help himself. *Id.* Delockroy was in the room during Smith’s conversation with the officers, but she did not participate in the discussion. *Id.* An officer informed Smith of the charges and stated he would be taken to the sheriff’s office “to discuss the matter.” *Id.* Both Smith and Delockroy were handcuffed and transported to the sheriff’s investigative offices, where the

handcuffs were removed. *Id.* Officers separated the two defendants and read each *Miranda* warnings. *Id.* Neither was informed that he or she was under arrest. *Id.*

Smith and Delockroy remained at the sheriff's office for "several hours." *Smith*, 552 N.W.2d at 164. While at the sheriff's office, Smith entered into a cooperation agreement allowing him leniency and offering a reduced charge for Delockroy in exchange for Smith's information about local drug traffic. *Id.* Smith did not provide useful information, and he and Delockroy were both charged several months later. Both moved to dismiss the charges against them under the speedy indictment provision of the Iowa Rules of Criminal Procedure, now rule 2.33. This court reached different conclusions in the two cases, based upon the negotiation of a cooperation agreement.

Smith argued his case was distinguishable from *Johnson-Hugi* because he did not enter into a cooperation agreement until after he had been handcuffed and transported to the law enforcement center whereas Johnson-Hugi entered into the cooperation agreement before any such intrusive actions were taken. *Id.* at 166; *See also Johnson-Hugi*, 484 N.W.2d at 600. In finding no arrest had taken place, this court stated, "We agree with defendant there are factual differences [between his case and *Johnson-Hugi*] but note the trial court found here the transportation to and holding at the law enforcement center were incidental to the [cooperation] agreement." *Smith*, 552 N.W.2d at 166.

In deciding *Delockroy*, this court stated:

Smith's own invitation to enter into a cooperation agreement made while Smith was still in his home and prior to any intrusive police action rendered Smith's subsequent transportation to the

courthouse incidental to the later agreement. Although the possibility of an arrest existed when Smith was taken from his home by police, the expectations of an agreement were sufficient to preclude a reasonable belief an arrest had taken place.

*Delockroy*, 559 N.W.2d at 45. However, in *Delockroy*, we considered the same law enforcement actions used against Smith and found that Delockroy had been arrested because she did not negotiate a cooperation agreement. *Id.* This court distinguished *Smith*, stating, “Unlike *Smith*, Delockroy was not seeking to negotiate a deal to preclude an arrest and there was no exchange between the officers and Delockroy to support a reasonable expectation her arrest would be delayed.” *Id.* at 45-46. At the sheriff’s office, Smith took control of his situation by negotiating a deal in exchange for his cooperation, and we found no arrest occurred; Delockroy did not trade leniency for cooperation and was found to be under arrest. *Id.* at 46; *Smith*, 552 N.W.2d at 166.

Our supreme court recognized that a cooperation agreement affects the analysis of arrest factors in *Johnson-Hugi*:

Law enforcement authorities must be accorded latitude in procuring the non-volunteer assistance of private citizens to serve as confidential informants in combating crime. If every such action were deemed to be an ‘arrest’ for purposes of rule [2.33(2)(a)], the time within which authorities could use informants to obtain information would be substantially limited. We refuse to hamstring law enforcement authorities by such a rule.

*Johnson-Hugi*, 484 N.W.2d at 602.

After a review of the surrounding circumstances here in light of the precedents discussed previously, we believe the district court correctly concluded Wing was not arrested. A single officer first encountered Wing in the context of a traffic stop. Although Wing was handcuffed after admitting ownership of

marijuana, his handcuffs were removed after a second officer arrived at the scene. The officer transported Wing to his home after Wing consented to a search. Neither officer told Wing he was under arrest, and he was not charged with any crime or issued any citation. The second officer, Proehl, simply gave Wing his phone number and asked Wing to call him pursuant to their cooperation agreement.

Further, the record shows the officers did not have a purpose to arrest Wing. At the scene of the traffic stop, Proehl informed Schertz that Wing was not under arrest “for now, until he decides what he wants to do.” Thus, Proehl’s decision to transport Wing to his house was not for the purpose of arrest, but for investigative purposes in which Wing was cooperating. *See Dennison*, 571 N.W.2d at 497 (finding detention for investigative purposes does not constitute an arrest). As in *Smith and Johnson-Hugi*, Wing’s cooperation with officers, along with the other circumstances of his treatment by the officers, precluded a reasonable belief that he had been arrested. The district court properly denied Wing’s motion to dismiss.

Because we find Wing properly preserved his claim in his motion to dismiss, we decline to address his alternative claim of ineffective assistance of counsel.

**AFFIRMED.**