

IN THE COURT OF APPEALS OF IOWA

No. 9-833 / 08-1437
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARL DENSON MOSLEY JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

Defendant appeals from his convictions and sentences for second- and third-degree sexual abuse. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Earl Denson Mosley Jr., Coralville, appellant pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

This is Earl Mosley Jr.'s second appeal from his convictions and sentences for second- and third-degree sexual abuse. In this appeal, Mosley's primary challenge is to the district court's denial of his right to a speedy trial under Iowa Rule of Criminal Procedure 2.33(2)(b).

I. Prior Proceedings

In 2004, the State charged Mosley with two counts of second-degree sexual abuse and one count of third-degree sexual abuse. Mosley filed written waivers of his ninety-day and one-year speedy trial rights. The case proceeded to trial and a jury found him guilty as charged. On appeal, this court reversed Mosley's convictions and remanded for a new trial. *State v. Mosley*, No. 07-0138 (Iowa Ct. App. Feb. 13, 2008). *Procedendo* issued on March 18, 2008.

The district court scheduled Mosley's new trial for May 27, 2008. Following an unreported pretrial conference that Mosley attended, Mosley's attorney prepared an order indicating Mosley was not waiving his speedy trial rights.

At a second pretrial conference, which Mosley again attended, the State requested a continuance due to the unavailability of one of its witnesses. In support of its request, the State asserted that Mosley had "waived speedy trial. He has waived one year. This is a matter that[] was previously tried. It's back upon the reversal." Mosley's counsel responded: "We are ready to go to trial. . . . Mr. Mosley's been waiting for his opportunity for this retrial and he's been brought back and we are prepared to go to trial." The court granted the request for a continuance after noting that "[w]e only have one judge next week and I'm

already committed to a case . . . because of a speedy trial deadline and so it couldn't happen anyway." The court acknowledged Mosley's request that "the time associated with this continuance [be] charged to the State." An order prepared by the State following this hearing indicated Mosley had waived both his ninety-day and one-year speedy trial rights. This order did not address the district court's earlier finding that time was being charged to the State. Trial was postponed to June 3.

A third pretrial conference was held before the rescheduled trial date. The State moved for another continuance due to the continued unavailability of its witness. The district court granted the request over the objections of Mosley's attorney, and trial was postponed to June 10, with the time again charged to the State. A pretrial conference order, again prepared by the State, indicated that Mosley had waived his speedy trial rights.

A week before trial was slated to begin, Mosley sent a letter to the district court requesting that he be brought to trial within the ninety-day speedy-trial deadline. A subsequent pretrial conference order noted that Mosley had "reasserted speedy trial" but once again postponed the trial date to June 24 due to the continued unavailability of the State's witness.

On June 17, ninety-one days after procedendo issued, Mosley filed a motion to dismiss, claiming his ninety-day right to a speedy trial under Iowa Rule of Criminal Procedure 2.33(2)(b) had been violated. Following a hearing, the district court essentially adopted the State's arguments in resistance to the motion, stating:

This Court believes defendant was operating under the belief that his waiver of speedy trial filed before his first trial was still in effect and valid until he formally revoked that waiver on June [3]. He realized after June [3] that he could possibly avoid prosecution by claiming his waiver was no longer valid. This finding is bolstered by his acquiescence in the setting of trial after the 90 day period after issuance of procedendo. . . .

. . . Defendant waived his right to speedy trial through his reassertion on June [3], 2008. The 90 day limitation runs from that date.

. . . The Court further finds that good cause exists for the delay regardless of defendant's waiver. Even if defendant was truly standing on his right to be tried in 90 days of the issuance of procedendo, the preparation and presentation of orders on May 23 and May 30 confirming a waiver of speedy trial established a judicial and administrative belief that time was not of the essence. Neither he nor his counsel took any action to rebut the orders or seek their correction.

The court denied Mosley's motion to dismiss, and the case proceeded to a jury trial. Mosley was again found guilty on all three counts of sexual abuse. He appealed following imposition of his sentence.

II. Analysis

Mosley claims the district court erred in denying his motion to dismiss pursuant to rule 2.33(2)(b). That rule states:

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.

The rule has been interpreted to "require dismissal for failure to comply with the rule's ninety-day deadline unless the defendant has waived speedy trial, the delay is attributable to the defendant, or other 'good cause' exists for the delay." *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). The only two exceptions on which the district court relied were (A) waiver and (B) good cause.

As the court's ruling was based on its application of exceptions to the rule, our review is for an abuse of discretion. See *id.* (stating the trial court's "discretion to avoid dismissal under rule [2.33](2)(b) is circumscribed by the limited exceptions to the rule's mandate. So the question, ultimately, is whether the trial court properly exercised—or abused—its limited discretion under the rule" (internal citations omitted)).

A. Waiver. The question to be decided is whether Mosley waived his speedy trial rights on remand. In answering this question, both Mosley and the State focus on Mosley's waiver of his speedy trial rights in his first trial. Mosley asserts, "This case presents the unique question as to whether or not [his] prior waiver of speedy trial was still in effect following remand." The State asserts, "Mosley capitalized on the belief of the State and the court that his prior waiver remained in effect and used his belated reassertion of his speedy trial right to force the dismissal of the prosecution."

We are not convinced the prior waiver is relevant because "[w]hen a case on appeal is remanded, absent waiver of the right to a speedy trial, the period during which the defendant must be tried commences on the date procedendo issues." *State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981). In other words, Mosley's original waivers of his speedy trial rights applied to his first trial, which proceeded to conclusion. Once the case was remanded for a new trial, a new time frame began, with the starting date being the date procedendo issued. *Id.* ("Although, by its express terms, rule [2.33](2)(b) is applicable only to an original trial, we have applied the speedy trial time limitations to retrials in other contexts."); see also *State v. Zaehring*, 306 N.W.2d 792, 794-95 (Iowa 1981)

“We therefore hold as a rule of this court that a criminal case in which mistrial or remand has occurred on or after January 1, 1978, must be retried within 90 days after the mistrial or remand, if it is to be retried.”); *State v. Phelps*, 379 N.W.2d 384, 386 (Iowa Ct. App. 1985) (noting “a retrial of a case that had resulted in a mistrial involved the same speedy trial issues as would a case being brought on an initial indictment or information”). Mosley’s pre-remand speedy trial waivers no longer applied. See, e.g., *Luffred v. State*, 730 S.W.2d 759, 761 (Tex. Ct. App. 1987) (holding defendant’s speedy trial waiver before his first trial did not apply to case after remand). For that reason, we decline to consider those waivers. Instead, because Mosley’s speedy trial rights on remand began to run again after the issuance of procedendo, we will examine whether Mosley waived his speedy trial rights from that point forward.

The State concedes, as it must, that acquiescence in the setting of a trial date is not by itself a “sufficient excuse for delay of trial.” See *Phelps*, 379 N.W.2d at 387. The State argues, however, that Mosley also “creat[ed] or perpetuat[ed] a mistaken belief on the part of the prosecutor or the court about the status of a speedy trial waiver.” See *Zaehring*, 306 N.W.2d at 795 (authorizing consideration of acquiescence as one factor in the waiver analysis if sufficient additional circumstances are present to compel finding a waiver). We are not persuaded by this argument.

Although he was not required to do so, Mosley reasserted his right to a speedy trial at the first pretrial conference following remand. When the State sought postponements of the trial date, Mosley resisted, asserting at one point that he was “ready to go to trial” and “waiting for his opportunity for this retrial.”

While the State is correct that Mosley did not “even mention[] speedy trial when objecting to the rescheduled date,” he clearly indicated his desire to be brought to trial in a timely manner and he asked that the time be charged to the State. Notably, when the court stated time was being charged to the State, the prosecutor did not object; an objection would have been warranted because, if Mosley indeed waived his speedy trial rights, the allocation of time would have been immaterial. It is also notable that when the State persisted in its assertion that Mosley waived his speedy trial rights, Mosley himself wrote a letter to the court correcting that assumption. *Cf. State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991) (noting defendant could not “actively, or passively, participate in the events which delay his trial and then later take advantage of that delay to terminate the prosecution”); *State v. Gansz*, 403 N.W.2d 778, 780 (Iowa 1987) (noting defendant led the district court “to believe defendant’s speedy trial rights could properly be measured from the date of the filing of the new information” rather than from the date procedendo issued). Under these circumstances, we cannot conclude that Mosley waived his speedy trial rights.

B. Good Cause. Under our rule, “good cause ‘focuses on only one factor: the reason for delay.’” *Miller*, 637 N.W.2d at 205 (citations omitted). Other factors are important “‘if at all, only insofar as they bear on the sufficiency of the reason itself.’” *Id.* (citations omitted).

The district court premised its finding of good cause on the fact that neither Mosley nor his attorney took any action to rebut the pretrial conference orders prepared by the State, which indicated that Mosley had waived his speedy

trial rights.¹ We are not persuaded that Mosley's failure to challenge these orders amounted to good cause to waive the speedy trial deadlines because, as summarized above, Mosley resisted the requests for continuance that precipitated the orders and stood by his right to be timely tried.

III. Disposition

We conclude Mosley's speedy trial rights were violated. We further conclude the fact the delay was only eight days does not render the violation harmless. *Id.* (“[T]he question is not whether the delay was great or small, but whether the reason given justifies departure from the rule at all.”). Because we reverse on the speedy trial issue, we find it unnecessary to address the remaining issues raised by Mosley.

In keeping with the mandate of rule 2.33(2)(b), the charges against Mosley must be dismissed. *See id.* We therefore reverse the judgment entered upon Mosley's conviction and remand to the district court for dismissal of the trial information.

REVERSED AND REMANDED.

¹ The district court did not premise its good cause finding on the State's inability to procure a witness and, on appeal, the State does not rely on that inability. It is noteworthy that the witness who was the subject of the State's requests for continuances did not testify live at the second trial.