

IN THE COURT OF APPEALS OF IOWA

No. 3-394 / 02-1329
Filed August 13, 2003

STATE OF IOWA,
Plaintiff-Appellant,

vs.

KENT CLARENCE HENRIKSEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Audubon County, Gordon C. Abel,
Judge.

Following the grant of discretionary review, the State requests reversal of
the district court ruling granting defendant's motion for suppression of evidence.

REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, Mary Tabor and Karen Doland,
Assistant Attorneys General, and Francine Andersen, County Attorney, for
appellant.

Marcus Gross of Kohorst, Early, Gross & Louis, Harlan, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Following the grant of discretionary review, the State requests reversal of the district court's ruling granting defendant's motion for suppression of evidence. Because Kent Henriksen failed to timely file his motion to suppress and made no effort to show good cause, we find the argument raised in his motion was waived. Accordingly, we reverse the ruling and remand the case to the district court.

In the trial information filed on March 19, 2002, Henriksen was charged with possession of methamphetamine in violation of Iowa Code section 124.401(5) (Supp. 2001); possession of marijuana in violation of section 124.401(5); and unlawful possession of prescription drugs in violation of section 155A.21. Henriksen entered his written arraignment and plea of not guilty on March 21, 2002. On May 8, 2002, forty-eight days later, Henriksen filed a motion to suppress all evidence seized by the State, alleging the search warrant was issued without probable cause. The State filed a resistance on the grounds that the suppression motion was untimely filed and the search warrant was supported by probable cause. Following hearing, the district court sustained Henriksen's motion on the merits but never addressed the issue of untimely filing. Our supreme court granted the State's request for discretionary review on November 14, 2002.

A motion to suppress must be made within forty days of arraignment. Iowa R. Crim. P. 2.11(4). "Failure of the defendant to timely raise defenses or objections . . . which must be made prior to trial under this rule shall constitute waiver thereof" Iowa R. Crim. P. 2.11(3). The only exception to this rule is

if good cause can be shown by the defendant for the motion's lateness and such good cause is accepted by the district court. *Id.* Here, the State resisted the motion at the district court level as untimely. Further, Henriksen made no effort to show good cause to excuse his untimely motion.

This case suffers from a serious procedural defect. The motion to suppress was filed forty-eight days after arraignment and, therefore, eight days after the deadline outlined in rule 2.11(4). The State objected to the late filing in a written resistance filed in district court. However, the district court did not rule on the untimeliness issue. Further, no good case was ever shown by Henriksen for his late filing, and a good cause determination was never made by the court pursuant to rule 2.11(3). Thus, Henriksen's failure to timely file his motion to suppress constituted a waiver. *State v. Ball*, 600 N.W.2d 602, 604 (Iowa 1999). Our supreme court has found waivers even when the State did not resist the motion in district court. *Id.*; see also *State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997); *State v. McCowen*, 297 N.W.2d 226, 227-28 (Iowa 1980). The instant case is even stronger because the State did resist the motion as untimely at the district court level.

This case is similar to *State v. Terry*. In *Terry*, defendant filed his suppression motion fifty-seven days after his arraignment. *Terry*, 569 N.W.2d at 368. The motion was late, and the defendant did not show good cause to excuse the untimely filing. *Id.* For these reasons the motion was deemed waived even though the State did not resist the motion as untimely. *Id.* The court reasoned: "even though the state did not resist the motion in the district court as untimely

and unexcused for good cause, we will uphold the ruling on the admissibility of the evidence on this or any other ground appearing in the record, whether urged or not.” *Id.*¹

In the instant case, the State did resist the motion to suppress as untimely. We note it is of no consequence that the State did not mention the issue of the untimeliness at the hearing. Since Henriksen failed to show good cause as required by rule 2.11(3), we find the argument raised in his motion was waived and, therefore, we do not reach the merits. Accordingly, we reverse the ruling and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

¹ The ruling in the present case does not conflict with *DeVoss v. State*, 648 N.W.2d 56 (Iowa 2002).