

**IN THE COURT OF APPEALS OF IOWA**

No. 9-962 / 09-0068  
Filed January 22, 2010

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

**vs.**

**DENNIS JAMES SHARKEY JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Dubuque County, Randal J. Nigg,  
District Associate Judge.

Dennis Sharkey Jr. appeals following his conviction of two counts of  
leaving the scene of an accident. **AFFIRMED IN PART AND REMANDED WITH  
DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney  
General, Ralph Potter, County Attorney, and James Whalen, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

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

On May 8, 2005, April Shannon was driving her car with her brother, Alex, in the passenger seat. As she was driving, April was forced off the road by Dennis Sharkey Jr., who had been attempting to pass her in a no-passing zone and pulled sharply in front of her to avoid hitting an oncoming car. Sharkey's maneuver caused April to lose control of her car, which left the road and rolled several times before it stopped upside down. Sharkey did not stop or return to the scene of the accident.

After an investigation, Sharkey was arrested and charged with two counts of leaving the scene of an accident in violation of Iowa Code section 321.261 (2005).<sup>1</sup> Sharkey appeared at his arraignment on May 23, 2005, without counsel, so the court continued the arraignment until June 6, 2005. For reasons not clear from the record, arraignment was moved to June 7, 2005. The court mailed Sharkey an order to appear for arraignment at this time, but Sharkey did not appear. Accordingly, the district court issued a warrant for Sharkey's arrest.

On September 7, 2005, Sharkey was arrested and appeared before the court, again without an attorney. The court scheduled arraignment for September 15, 2005. Sharkey appeared again without counsel, so the court rescheduled arraignment for September 26, 2005. On September 19, 2005, the court issued an arrest warrant for Sharkey for violating pretrial release conditions. Sharkey was arrested on the warrant and was finally arraigned on September 28,

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<sup>1</sup> Though the trial information also charged Sharkey with violation of Iowa Code section 321.263, that charge was dropped, and Sharkey was only convicted and sentenced on two counts of violation of section 321.261.

2005. The parties agreed that this date would start the ninety-day speedy trial deadline. The court set trial for November 28, 2005.

Trial remained set for November 28, 2005, with the last trial date for speedy trial purposes being December 14, 2005. However, Sharkey's counsel filed a motion to continue trial on November 28, 2005, the morning of the scheduled trial, because he received a new plea offer from the county attorney and had been unable to contact the defendant "in a timely manner in order to discuss the new offer." The district court granted the motion, set the final pretrial conference for December 1, 2005, and reset trial for December 5, 2005, again noting the same speedy trial deadline.

On December 1, 2005, the district court filed an order resetting the final pretrial conference for January 12, 2006, and trial for January 23, 2006. The order stated that the case was not ready for trial and that speedy trial was waived. However, there is no transcript reflecting an oral waiver and no signed waiver of a right to speedy trial in the record.

Sharkey failed to appear for his pretrial conference, so the district court issued a warrant for his arrest. After roughly seventeen months, Sharkey was arrested in June of 2007. Trial was ultimately held on September 17, 2007. A jury convicted Sharkey of two counts of failure to stop a motor vehicle at the scene of an accident, one count for failing to stop for April and the other for failing to stop for Alex.

After Sharkey failed to appear for sentencing, on January 8, 2008, the district court issued a warrant for his arrest. Sharkey was arrested December 1, 2008, and a sentencing hearing was held on December 17, 2008. On December

19, 2008, the district court issued a ruling on adjudication of law point for sentencing finding Sharkey should not have been convicted of two counts of failing to stop at the scene based on the fact that two people were present in the other vehicle. Accordingly, the district court merged the sentences on the two convictions.

Sharkey now appeals, arguing: (1) the district court erred in failing to merge the two convictions for leaving the scene of an accident, although the court did merge the sentences; and (2) his trial counsel was ineffective for failing to move to dismiss his case on speedy trial grounds.

## **II. Standard of Review**

We review Sharkey's merger claim for correction of errors at law. Iowa R. App. P. 6.907 (2009). We review his ineffective assistance claim de novo. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

## **III. Merger of Convictions**

Sharkey argues that the district court's failure to merge his convictions violates the Double Jeopardy Clause of the United States Constitution as well as Iowa Code section 701.9, which codifies the double jeopardy protection. We agree with Sharkey, and the State concedes, that the district court erred in failing to merge the two judgments in this case. The district court erroneously interpreted Iowa Code section 321.261 when it allowed the State to charge Sharkey with two violations of this section. Section 321.261 states, "The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close as possible . . . ." We find that the plain and clear language of this statute requires

that a driver involved in an accident stop at or near the scene of the accident. Thus, the driver either stops and complies with the statute, or does not stop and violates the statute. Just as the driver cannot stop multiple times in order to comply with the statute for each passenger in the car, the driver cannot fail to stop multiple times and be charged with multiple violations of the statute. The act of failing to stop can only occur once regardless of the number of victims involved in the accident. Thus, Sharkey could only properly be charged and convicted of one violation of section 321.261 stemming from this single accident.

The district court properly concluded in its ruling on adjudication of law points that Sharkey should have been charged with only one count of failing to stop at the scene. Though the district court merged the two sentences, it failed to merge the two convictions for both counts of violating section 321.261. Accordingly, we remand for the district court to strike one of Sharkey's two convictions for violating section 321.261.

#### **IV. Ineffective Assistance**

Sharkey argues his trial counsel was ineffective for failing to move to dismiss his case on speedy trial grounds. To prevail on a claim of ineffective assistance, Sharkey must prove that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590

(Iowa 1997). “[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims.” *Biddle*, 652 N.W.2d at 203.

Iowa Rule of Criminal Procedure 2.33(2)(b) requires the State to bring a defendant to trial within ninety days after he or she has been indicted. Failure to comply with the ninety-day rule requires dismissal unless: (1) the defendant has waived speedy trial; (2) the delay is attributable to the defendant; or (3) other good cause explains the delay. *State v. Campbell*, 714 N.W.2d 622, 627-28 (Iowa 2006). The parties agree that Sharkey was not tried within the speedy trial deadline.

The State argues that Sharkey waived speedy trial, as evidenced by the district court’s order indicating speedy trial was waived and resetting trial after the speedy trial deadline. Sharkey asserts that he did not waive his right to a speedy trial. The State argues in the alternative that Sharkey’s counsel’s request for a continuance because of his lack of contact with Sharkey constituted good cause for not complying with the speedy trial deadline. “Good cause, under our rule, focuses on only one factor: the reason for the delay.” *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999) (internal quotations omitted).

The record is unclear as to the reason for delay and as to whether there was a waiver of speedy trial. Accordingly, we conclude the record before us is inadequate to address Sharkey’s claim of ineffective assistance on direct appeal. We therefore decline to rule on the issue of ineffective assistance in this direct

appeal and preserve it for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

**AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.**