NOT DESIGNATED FOR PUBLICATION

No. 99,651

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

MARK ANTHONY DOUGLAS, JR.,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; PAUL E. MILLER, judge. Opinion filed March 6, 2009. Affirmed.

Mellissa Rundus and *Bethany Fields*, assistant county attorneys, *Barry Wilkerson*, county attorney, and *Paul J. Morrison*, attorney general, for the appellant.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for the appellee.

Before HILL, P.J., PIERRON and CAPLINGER, JJ.

Per Curiam: On July 9, 2006, Mark Anthony Douglas, Jr. was arrested and released on bond. Subsequent to his arrest, on July 20, 2006, the State filed a

complaint/information, charging Douglas with five counts of aggravated assault, one count of criminal threats, and one count of criminal use of weapons.

On October 27, 2006, Douglas attended a hearing in which he waived his right to a preliminary hearing. From this waiver, the district magistrate judge bound Douglas over for trial and ordered him to appear for arraignment on November 13, 2006. On the same day, Douglas also entered into a plea agreement, agreeing to enter a plea of nolo contendere to two counts of aggravated assault. In exchange for his plea, the State agreed to dismiss the other five charges. On October 31, 2006, the State filed an information, recounting the charges filed against Douglas in its complaint/information.

On November 13, 2006, Judge Meryl D. Wilson conducted Douglas' plea hearing. At the plea hearing, Judge Wilson informed Douglas of the two counts filed against him from the plea agreement and called upon Douglas for his plea. Douglas pled no contest to both charges. However, after Douglas entered his plea, Judge Wilson realized that he knew both of the alleged victims. Due to this conflict, Judge Wilson allowed Douglas to withdraw his plea. Judge Wilson then recused himself from Douglas' case.

> "[Judge Wilson]: . . . [N]ow that I actually look at these names, I know both of these alleged victims. I don't believe it would be appropriate for me to handle any sentencing on this matter. I know them quite well, actually. So I can

go ahead and finish taking the plea if you would like to do that, and have it reassigned to one of the other judges for sentencing, or simply not accept the plea today, and take all of that up in front of the other--whatever judge.

. . . .

"[Defense counsel]: Your Honor, at this time after consulting with my client we will ask the Court to let him withdraw his plea at this time and get the case reassigned to another division.

"[Judge Wilson]: I will do that. For the record, based upon what I've stated I believe I have a conflict. I need to recuse on this matter. I will ask that [the chief judge] reassign this, and you can take up the plea when the Judge notifies you of your next appearance date."

On November 14, 2006, Judge Wilson made his request to the chief judge to reassign Douglas' case. In his letter, Judge Wilson reasoned: "I do not feel comfortable handling the case, as I am well acquainted with the victims." On November 29, 2006, the case was reassigned. Douglas' next appearance date was set for December 11, 2006.

On December 11, 2006, Douglas appeared before Judge David L. Stutzman However, before he could enter his plea, Judge Stutzman also stated that he believed he knew one of the victims. Because of this disclosure, Douglas requested his case be

reassigned to another judge. Judge Stutzman granted Douglas' request and set the case for hearing on December 18, 2006.

"[Judge Stutzman]: I see Judge Wilson's letter. It looks like one of the two victims he refers to I do know well. I believe I know that young man's parents. It's an acquaintance. It is not social friends or whatever. I want to disclose that and if it needs to be reassigned on that basis then I'll let counsel request. I don't think that I, based on what I see here at least, I don't think that I have a problem with going ahead. Like I said that I want to disclose that. I know--I'm looking at the address and looking at the name Frakes and I know the parents as well.

"[Defense counsel]: Your Honor, Mr. Douglas will request the Court to get this case reassigned. . . .

"[Judge Stutzman]: Alright. For docket purposes, I'll set this over a week to the 18th at 9:00 . . . .

. . . .

"[Judge Stutzman]: But what needs to happen between now and then is to--well I want to verify what I am thinking that I am seeing here. And if that's the request, and that's your request then, it will need to go back to [the chief judge]. Mr. Douglas, you need to stay in touch with [defense counsel] and make sure that he can reach you so that he can keep you up-to-date on when you need to be someplace and where.

"[State]: So is that an appearance next week or--

"[Judge Stutzman]: Well that's an appearance unless it is changed.

"[State]: Changed to Judge Miller."

On December 14, 2006, Judge Stutzman made his request to the chief judge to reassign Douglas' case. In his letter, Judge Stutzman stated: "[Douglas] requested reassignment after I disclosed that I believed that I was acquainted with the family of one of the victims. As I have enquired further, I am also acquainted with the victim himself through activities at church."

Following Judge Stutzman's request, the record does not reveal whether the case was reassigned. Likewise, the record fails to disclose whether a hearing was held on December 18, 2006, or continued. Nevertheless, it is undisputed that Douglas' next appearance date was never scheduled. As a result, on October 24, 2007, Douglas filed a motion to dismiss, alleging that his statutory and constitutional rights to a speedy trial had been violated.

On October 29, 2007, Judge Paul E. Miller conducted a hearing on Douglas' motion. In arguing against the dismissal, the State claimed that the speedy trial provisions did not apply, contending that Douglas had never been arraigned. For that reason, the State alleged that no prejudice occurred. The State asserted:

> "Your Honor, the State's position would be the defendant has not been prejudiced. This is not a speedy trial--the defendant was not waiting to go to trial, the defendant was waiting to enter the pleas pursuant to the agreement that he signed between himself and the State of Kansas. That an arraignment was set aside, another arraignment was--the date was rescheduled and that the defendant has never been arraigned."

In reviewing the parties' arguments, Judge Miller admitted that he was not aware until recently that he had been assigned Douglas' case but reasoned that it was ultimately the State's responsibility to ensure cases are finished within the statutory time frame. Finding that the hearing on November 13, 2006, qualified as Douglas' arraignment, which then triggered the beginning of the speedy trial time, Judge Miller granted Douglas' motion and dismissed Douglas' criminal case.

> "[Judge Miller]: . . . The operative date in this case by the Court's judgment was the 13th of November which triggered the beginning of the speedy trial time by the statute. Now this is a prime example of a case that has slipped through the

cracks. The last thing in the court file is a request dated December 14th by Judge Stutzman to me asking the case to be reassigned to Division 1 and I have a note on that letter suggesting for the clerk to do that. I didn't become aware of the fact that I had this case until about two weeks ago when somehow or another it came to my court reporter's attention that this case had slipped through the cracks. The important thing is it's up to the State and/or perhaps the Court to make sure that these cases got done within the statutory time frame. I'll find that the arraignment on the 13th of November of last year triggered the beginning of the speedy trial time, that the case is -- because the defendant withdrew his plea that all charges in the Information remained pending during that period of time. The file further reflects that this defendant was arrested on the 9th of July of 2006, and has had this case hanging over his head without being brought to trial for over 15 months. It's the Court's finding that the statutory time has been violated, and further from a constitutional standpoint the fact that this case has been pending since the 9th day of July and hasn't been brought to trial denies the defendant due process and I'll order that the Information [be] dismissed in its entirety. The defendant is free to go. Mr. Wilkerson, you certainly have your right to appeal."

On appeal, the State argues that the district court erred in granting Douglas' motion to dismiss. Primarily, the State contends that Douglas was never formally arraigned because the plea withdrawals at both of his plea hearings failed to meet the statutory definition of an arraignment. Because the State alleges that no arraignment occurred, the State claims that the 180-day speedy trial rule under K.S.A. 22-3402(2) never commenced. As an alternative argument, and for the first time on appeal, the State

further claims that the entire delay from the judges' recusals should be attributed to Douglas for it was he who requested the case be reassigned.

A claimed violation of the statutory right to speedy trial presents an issue of law over which the Kansas appellate courts have unlimited review. *State v. Brown*, 283 Kan. 658, 661, 157 P.3d 624 (2007).

K.S.A. 22-3402(2) governs the statutory right to speedy trial and provides in pertinent part:

> "If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within 180 days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (5)."

"The statutory time period for a speedy trial starts on the date of arraignment." *State v. Davis*, 277 Kan. 309, 331, 85 P.3d 1164 (2004).

There are two Kansas statutes that define arraignment. First, K.S.A. 22-3205(a) states:

> "Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead. Except as provided in subsection (b), if the crime charged is a felony, the defendant must be personally present for arraignment."

Second, K.S.A. 22-2202(3) defines arraignment to mean "the formal act of calling the defendant before a court having jurisdiction to impose sentence for the offense charged, informing the defendant of the offense with which the defendant is charged, and asking the defendant whether the defendant is guilty or not guilty."

In addition, our court has held that "the felony arraignment is to occur only after a preliminary hearing, as a result of which the defendant has been bound over for trial, and after the prosecutor has filed an information charging the crime for which defendant has been bound over. [Citations omitted.] A defendant may, of course, waive the preliminary hearing." *State v. Taylor*, 3 Kan. App. 2d 316, 319, 594 P.2d 262 (1979); see K.S.A. 22-3206.

In this case, Douglas' plea hearing on November 13, 2006, took place after he waived his right to a preliminary hearing. At this hearing, Judge Wilson informed Douglas of the substance of the two counts of aggravated assault he was pleading to and called for his plea. Under these facts, Judge Wilson's actions complied with K.S.A. 22-3205(a) and K.S.A. 22-2202(3), meaning that the hearing on November 13, 2006, qualified as Douglas' arraignment.

Contrary to the State's argument, Douglas' subsequent withdrawal of his plea did not nullify the otherwise valid November 13, 2006, arraignment. The plain language of K.S.A. 22-3205(a) and K.S.A. 22-2202(3) fails to disclose the State's alleged requirement that the defendant actually enter a plea. Instead, these statutes require that the district court only ask for the defendant's plea. See K.S.A. 22-3205(a) ("calling upon the defendant to plead thereto"); K.S.A. 22-2202(3) ("asking the defendant whether the defendant is guilty or not guilty"). Therefore, we find that Douglas was formally arraigned at the November 13, 2006, plea hearing.

We also must consider the State's argument that the entire delay from the recusals should be attributed to Douglas. As a preliminary matter, it is important to note that the State failed to raise the argument to the district court that the entire delay from the judges' recusals due to conflicts with Douglas' case should be attributed to the Douglas. Rather,

in the lower court, the State relied upon the sole argument that Douglas' statutory right to a speedy trial was not violated because Douglas was never arraigned. Generally, issues not raised before the trial court cannot be raised on appeal. *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007). However, the State's newly asserted theory could be considered an exception to the general rule because it appears to involve only a question of law arising on proved or admitted facts and is finally determinative of the case. See *State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 (2008).

In this case, the record on appeal demonstrates that far more than 180 days passed before Douglas filed his motion to dismiss on October 24, 2007. It was more like 334 days. Thus, when determining whether Douglas' speedy trial period was violated, at issue is whether the entire delay stemming from the judges' recusals due to conflicts should be attributed to him. Delays which result from the defendant's application or fault are not counted in computing the statutory period. *Brown*, 283 Kan. at 662.

> "Although it is the State's obligation to ensure that the accused is brought to trial within the applicable speedy trial period, delays which result from the defendant's application or fault are not counted in computing the statutory period. [Citation omitted.] Such delays include those which result from a continuance granted at the request of the defendant. A defendant, by requesting or acquiescing in the grant of a continuance, waives the statutory right to a speedy trial. [Citation omitted.]" *Brown*, 283 Kan. at 662.

For support of its proposition that this time should be attributed to Douglas, the State cites to *State v. Smith*, 271 Kan. 666, 24 P.3d 727 (2002). In *Smith*, the defendant filed a motion to recuse the judge. Seventy-four days passed between the time the defendant filed the motion to recuse and upon which time the motion was ruled. But, because the district court found the time frame to be "'patently unreasonable,'" it only attributed 30 days of that time to the defendant. The district court determined the 30 days was a reasonable time to take to process the defendant's motions. On appeal, the Kansas Supreme Court upheld the district court's ruling: "Here, a 30-day delay was attributed to the consideration of Smith's motion to recuse. Smith fails to show that this length of time was unreasonable. See *State v. Southard*, 261 Kan. 744, 748, 933 P.2d 730 (1997) (a 28-day delay was reasonably charged to the defendant based on his filing a motion to suppress)." 271 Kan. at 682.

In this case, it is questionable whether Douglas' request for reassignment should be attributed to him. Judge Wilson and Judge Stutzman informed Douglas and verified later that a conflict existed. On its face, it would be illogical to attribute this time to Douglas; however, there is no case law to support or dismiss this proposition. On the other hand, because Douglas had already signed a plea agreement with the State but wanted a new judge in which to enter said plea, it is plausible that the delay could be seen as a result of the defendant's application. See *Brown*, 283 Kan. at 665 ("[A] trial continuance granted

to a defendant for any reason stops the speedy trial clock. This includes not only continuances granted for 'good cause,' but also any delay caused by the defendant, whether or not such delay was necessary, for a legitimate purpose, or a meritorious reason.").

Notwithstanding either interpretation, it is clear that the legislature did not intend for the entire delay to be attributed to Douglas. K.S.A. 22-3402(3) states: "If any trial scheduled within the time limitation prescribed by subsection (1) or (2) is delayed by the application of or at the request of the defendant, the trial shall be rescheduled within 90 days of the original trial deadline." Our Supreme Court has interpreted this subsection as being "aimed at placing a duty on the court and the State to restart the speedy trial clock which has been stopped by the application or fault of the defendant and to reset the trial date within a specific time period." *Brown*, 283 Kan. at 667.

To resolve this issue, we apply the rationale in *Smith*, 271 Kan. at 682. Like the trial court in *Smith*, only time that reasonably reflects reassignment of a judge should be seen as being attributable to Douglas. Here, Douglas notes that the time it took from his first plea hearing to the second plea hearing in which the recusal of Judge Wilson and reassignment to Judge Stutzman was 28 days, not including holidays. Adding 28 days to the second plea hearing, which occurred on December 11, 2006, and attributing this time

to Douglas, the State had the obligation to restart the speedy trial clock and to reset the trial or plea hearing.

Our courts have held that it is the State's obligation to ensure the accused is provided with a speedy trial and that the defendant is not required to take any affirmative action to see this right is observed. See *Davis*, 277 Kan. at 331. Thus, even if we apply *Smith* as the State requests and attribute part of the delay to Douglas, Douglas' statutory right to a speedy trial would still have been violated. Attributing the reasonable time it takes to reassign the case to a new judge and schedule a new hearing, 9 months passed before the State revisited Douglas' case. Consequently, the district court was correct in dismissing this case based on statutory speedy trial grounds.

Because the district court did not commit any error in dismissing this case based on statutory speedy trial grounds, this court need not address whether Douglas' constitutional speedy trial rights were violated. Under these facts, it is questionable that they were.

Affirmed.