

NOT DESIGNATED FOR PUBLICATION

No. 104,564

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEPHEN DWIGHT WILLIAMS,
Appellant.

MEMORANDUM OPINION

Appeal from Montgomery District Court; GARY HOUSE, judge. Opinion filed May 11, 2012.

Reversed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

David Maslen, assistant county attorney, and *Derek Schmidt*, attorney general, for appellees.

Before MALONE, P.J., PIERRON and BRUNS, JJ.

Per Curiam: After a bench trial, the district judge convicted Stephen Dwight Williams of driving under the influence, driving with a suspended license, and failure to stop after damaging property. The court initially released Williams on bond following his arrest, and his trial was set for a date within 180 days of his arraignment. But he subsequently violated the conditions of his release and was returned to jail for 108 days. Although he filed a motion to dismiss for a violation of the 90-day speedy-trial limit, the district court denied the motion. On appeal, Williams contends that the district court erred in denying his motion. Because the State has failed to establish by the preponderance of

to establish by the preponderance of the evidence why the 90-day limit was not applicable, we reverse Williams' convictions in this case.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of October 11, 2008, Williams was arrested for driving under the influence—after striking another vehicle outside a bar. At Williams' first appearance on October 14, 2008, the district court released him on bond. And at his arraignment on March 31, 2009, the parties agreed to a trial date of July 29, 2009, which was within the statutory speedy-trial deadline of 180 days.

On April 10, 2009, officers found Williams at a bar, which was a violation of the conditions of his release. Williams' bond was revoked at a hearing on April 13, 2009. The district court held another hearing on April 21, 2009, and ordered Williams to serve at least 33 days in jail as a "sanction" for violating the conditions of his release. The district court advised Williams that at the end of the 33-day period, he would again be eligible for release on bond—provided that he paid for and submitted to GPS alcohol monitoring.

Because Williams never paid for the monitoring, he remained in jail for 108 days awaiting trial. On July 21, 2009, Williams filed a motion to dismiss, alleging that the State had violated his statutory speedy-trial rights by failing to bring him to trial within 90 days. At a hearing held on July 27, 2009, the district judge denied the motion to dismiss, holding that the 33-day "sanction" did not count against the State for speedy-trial purposes and also that Williams had no basis to complain about a trial date he specifically requested. The district judge did, however, release Williams on bond again after the hearing.

Following a bench trial held on October 21, 2009, the district judge found Williams guilty of driving under the influence, driving with a suspended license, and

failure to stop after damaging property. Later, the court sentenced Williams to 12 months in jail, alcohol monitoring, a \$1,500 fine, and ordered him to pay restitution. Thereafter, Williams timely appealed.

ISSUES PRESENTED AND ANALYSIS

On appeal, Williams contends that the district court erred in denying his motion to dismiss because the State violated his statutory speedy-trial rights. We agree.

When the facts of a case are not in dispute, review of statutory speedy-trial issues and the interpretation of K.S.A. 22-3402 is a question of law over which appellate courts have unlimited review. See *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009); *State v. Butts*, 46 Kan. App. 2d 1074, 1089-90, 269 P.3d 862 (2012).

"Appellate courts exercise unlimited review over a district court's legal rulings regarding violations of a defendant's statutory right to a speedy trial. When the assessment of time under the speedy trial statute turns on a factual determination by the district court, however, an appellate court must determine whether the facts as found by the district court are supported by substantial competent evidence. The court then determines de novo whether those facts as a matter of law support the legal conclusion of the district court." *State v. Vaughn*, 288 Kan. 140, Syl. ¶ 1, 200 P.3d 446 (2009).

K.S.A. 22-3402 sets out the statutory limits related to a defendant's right to a speedy trial. Subsection (1) provides that a person who is "charged with a crime and held in jail solely by reason thereof" shall be discharged if he or she is not brought to trial within 90 days after the arraignment. In contrast, subsection (2) provides that "a person charged with a crime and held to answer on an appearance bond" must be brought to trial within 180 days of the arraignment. If the State fails to affirmatively afford a defendant these rights, it must dismiss all charges. K.S.A. 22-3402(1), (2); see *State v. Adams*, 283 Kan. 365, 368-9, 153 P.3d 512 (2007).

The Kansas Supreme Court held that K.S.A. 22-3402 provides "an unexcused trial delay of 180 days establishes the outside limit during which time the [State] must bring [a] defendant to trial in any event." *State v. Welch*, 212 Kan. 180, 184, 509 P.2d 1125 (1973). And a defendant must spend at least 90 unexcused days in jail after arraignment before he or she is entitled to discharge for a statutory speedy-trial violation. 212 Kan. at 184. In *Welch*, the defendant did not spend over 90 days in jail as a result of unexcused delays charged to the State, so his statutory speedy-trial rights were not violated. 212 Kan. at 185-86.

Here, on October 14, 2008, the court initially released Williams on bond. Although a trial date was set by agreement of the parties at the arraignment on March 31, 2009, Williams was not in custody at the time. But he was returned to custody on April 10, 2009, and remained in jail for the next 108 days awaiting trial. The State failed to show by a preponderance of the evidence of the evidence that any of these days were chargeable to Williams.

Delays resulting from the application or fault of the defendant do not count against the State for speedy-trial purposes. See K.S.A. 22-3402(1), (2). But the State has the burden to establish by a preponderance of the evidence that the delay should be charged to a defendant. See *State v. Cellier*, 263 Kan. 54, 69, 948 P.2d 616 (1997) (where a statute does not provide for an evidentiary standard, the implicit evidentiary standard is a preponderance of the evidence); *State v. Gore*, No. 97,380, 2011 WL 3891840, at *1, *5-6 (Kan. App. 2011) (unpublished opinion) (finding the State has the burden of proof to establish by a preponderance of the evidence that a defendant is brought to trial within the time specified by K.S.A. 22-3402), *pet. for rev.* filed October 3, 2011 (pending).

From our review of the record in the present case, we find that the State has failed to meet its burden. The determination of whether a defendant is in jail solely on the charges in a particular case turns on whether something other than the charges themselves

mandate that the defendant be in custody. See *State v. Montes-Mata*, 292 Kan. 367, 369-71, 253 P.3d 354 (2011). In other words, a normal bond revocation does not result in time spent in jail other than on the charges.

Although the district court referred to 33 days of Williams' jail time as a "sanction" at the bond revocation hearing, there is nothing in the record to indicate that there was a finding of contempt. And the State does not argue that Williams was also incarcerated on other charges. Moreover, it appears that Williams was ultimately given credit for the 33 days on his sentence in this case. Thus, the State has failed to establish that Williams was not in jail for 108 days "solely by reason" of the charges in this case.

"[A] defendant, by his or her conduct, may waive the statutory right to a speedy trial." *State v. Brown*, 249 Kan. 698, 704, 823 P.2d 190 (1991). Moreover, delays that result from the court's accommodation of a defendant count against the defendant. See *State v. Southard*, 261 Kan. 744, 748-79, 933 P.2d 730 (1997). But a defendant has no duty to take affirmative action to see that his or her right to a speedy trial is protected. *Vaughn*, 288 Kan. at 144.

In the present case, although Williams' attorney requested a July trial date at his arraignment, Williams was not in jail at that time, and we do not find sufficient evidence in the record to establish that Williams waived his right to a speedy trial. As such, when Williams was placed back into jail for violating his conditions of release, the State could only leave him in jail for 90 days in the absence of another charge or another adequate excuse. Finally, although the State argues that the rationale expressed in K.S.A. 22-3402(4) should be applied, we find that it is not applicable under the circumstances presented in this case.

Accordingly, because the State has failed to come forward with evidence to establish that Williams ever waived his right to a speedy trial and there is not sufficient

evidence in the record to show that the time in excess of 90 days should be charged to him, we conclude that his convictions in this case must be reversed.

Reversed.