

No. 09-102144-A

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

**STATE OF KANSAS
Plaintiff-Appellee**

v.

**ANTHONY SCOTT GUERRERO
Defendant-Appellant**

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE EVELYN Z. WILSON, JUDGE
DISTRICT COURT CASE NO. 08-CR-445

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APPROVED
OCT 13 2009
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BY KPA S. Ct. Rule 6.10

FILED
OCT 13 2009
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CLERK OF APPELLATE COURTS

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NATURE OF THE CASE

Anthony Scott Guerrero appeals his conviction for endangering a child arguing that his statutory right to a speedy trial was violated and there was insufficient evidence to support his conviction.

STATEMENT OF THE ISSUES

- I. **GUERRERO'S STATUTORY RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.**
- II. **THERE WAS SUFFICIENT EVIDENCE TO CONVICT GUERRERO OF ENDANGERING A CHILD.**

STATEMENT OF THE FACTS

On February 17, 2007, Officer Hanika responded to a call regarding a domestic disturbance between Anthony Guerrero and Martha Hobbs. (R. III, 6-7.) While another officer was interviewing Hobbs, she learned that Hobb's daughter was locked in the basement. (R. III, 8.)

Upon investigation, Officer Hanika found that the basement door had been locked shut by a bungee cord. (R. III, 8.) Officer Hanika observed that the basement was dark with cement walls and floors, was kind of damp and cold, and only saw a mattress on the floor. (R. III, 9-10, 19.) However, Officer Hanika did not go all the way into the basement. (R. III, 17.)

Donnell Hobbs came out of the basement at the request of Officer Hanika. (R. III, 9, 46.) Officer Hanika observed that Donnell's hair was a mess and that she had on dirty clothes. She found Donnell to be very soft-spoken and hard to gather information from. (R. III, 11.)

Donnell told Officer Hanika that she did not know how long she had been locked in the basement, but that she had been locked in the basement on and off since Thanksgiving. She believed Guerrero was the one who locked her in the basement. (R. III, 11.)

No plumbing facilities were observed in the basement. When Officer Hanika asked Donnell about this, Donnell told her that she had to urinate and defecate in a bucket until the bucket was taken away and replaced with a cup. (R. III, 12.) Officer Hanika also observed another door out of the basement, besides the one locked by the bungee cord, but it was blocked by a pile of clothes. (R. III, 13.)

Officer Ludolph was assigned to follow-up on the case. (R. III, 20-21.) He spoke to Donnell on March 6, 2007, and Donnell told him that because of the lack of a bathroom she went to the bathroom in a bucket. (R. III, 22, 24-25.)

Officer Ludolph also got a search warrant to search the house. He entered the basement and confirmed that there was no place to go to the bathroom. He stated that the only plumbing was attached to the washer and dryer. He noticed that there were mattresses, a rack to hang clothes, and some desks in the basement area. (R. III, 24.) While there were some windows in the basement, they were covered with a board or not functioning so Donnell would not have been able to exit the basement through them. (R. III, 30-31.) Also, there were no smoke detectors, fire extinguishers or other safety equipment in the basement. (R. III, 31.)

During the investigation, Donnell also spoke with Gerald J. Baker, a social worker. Donnell told Baker that Guerrero locked her in the basement using the bungee cord. (R. III, 98.) She also told him she had to go to the bathroom in a bucket or a cup

and that she did not want to live in the basement because she did not feel safe. (R. III, 95-97.)

During the trial, Donnell testified that Guerrero was living with the family in February when she was locked in the basement, and had to use the bucket to go to the bathroom if the door was locked. (R. III, 50, 55.) She also testified that she could not always use the back door to get out because there was a key bolt on the door and she did not have the key. (R. III, 56.) She further testified that the basement was cold, but that she had a space heater. (R. III, 57.)

After a bench trial, the district court found Guerrero guilty of endangering a child. (R. I, 76.) He was sentenced to a year in county jail. (R. I, 77.) He timely appeals. (R. I, 69.)

Additional facts will be discussed as needed.

ARGUMENTS AND AUTHORITIES

I. GUERRERO'S STATUTORY RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.

Guerrero argues his statutory right to a speedy trial was violated. Appellate courts exercise unlimited review over a district court's legal ruling regarding violations of a defendant's statutory right to a speedy trial. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009).

Guerrero waived arraignment on May 28, 2008, and effectively started his speedy trial clock. (R. I, 4.) Under K.S.A. 22-3402(2), the State was required to bring him to trial within 180 days of his arraignment unless the delay past the required 180 days was attributed to the defendant. While Guerrero is correct that the State brought him to trial

on December 3, 2008, 189 days after his arraignment, not all of the 189 days are attributable to the State. (R. I, 7.)

Guerrero's argument that his right to a speedy trial was violated is based a defense continuance that expanded the time period between September 26, 2008 and December 3, 2008. He argues that his waiver of a jury trial to request a bench trial on September 26, 2008, did not delay the speedy trial clock. (Appellant's Brief, 22; R. II, 11.) At the time of his waiver, he was scheduled for a jury trial on October 6, 2008. (R. II, 13-14.) Due to his waiver, the court set the case for a status docket on October 1, 2008. (R. II, 12, 14.) The status docket proceeding was not recorded, but, based upon the defense waiver, the trial was set for December 3, 2008. (R. I, 5-6.)

Contrary to Guerrero's assertion, it is clear that his waiver of his right to a jury trial caused delay. After all, the district court had to reset its schedule, reset the case for a docket, and then at the docket, reset the case for a bench trial. (R. IV, 10.) Therefore, the question becomes how much of the delay can be attributed to Guerrero.

K.S.A. 22-3402(3) controls what happens when a delay of a scheduled trial date is caused by the defendant. K.S.A. 22-3402(3) states: "(3) 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." Here, it is obvious that the request for a bench trial on September 26, 2008 delayed the originally scheduled trial date of October 6, 2008. Therefore, the trial had to be rescheduled within 90 days of the original trial deadline of November 24, 2008. Clearly the rescheduled date of December 3, 2008 was within the 90 day extension from

November 24, 2008. Thus, the district court properly ruled Guerrero's statutory right to a speedy trial was not violated.

However, Guerrero relies on *State v. Dreher*, 239 Kan. 259, 717 P.2d 1053 (1986), for support for his argument that the delay caused by his waiving his jury trial date to have his case tried before the court is not attributable to him. Yet, *Dreher* was decided when K.S.A. 22-3402(3) did not exist, and contrary to Guerrero's assertion, *Dreher* does not force this court to come to an opposite conclusion. In *Dreher*, the Kansas Supreme Court made it clear that the request for a jury trial caused delay that should be attributed to the defendant, but held that under the facts of the case, the entire delay between the request and the new trial could not be counted against the defendant because the defendant could have been tried within the speedy trial deadline. 239 Kan. at 261-62.

Again, when *Dreher* was decided K.S.A. 22-3402(3) did not exist. Rather the court was operating under the rule that only a reasonable time could be charged to the defendant. K.S.A. 22-3402(3) now demonstrates that the legislature considers a time period of 90 days to be a reasonable time attributable to the defendant if the defendant causes the delay of a scheduled trial. Therefore, in this case, there is no reason that the entire time period between September 26, 2008 and December 3, 2008 should not be attributed to Guerrero since his waiver of the scheduled jury trial caused the delay.

Furthermore, *Dreher* demonstrates that the request for a change of the factfinder causes delay that should be attributed to the defendant. While the *Dreher* court found the delay in the case to be unreasonable, in this case there is no evidence that the delay in this case was unreasonable. Even if this court somehow concludes that the entire time period

between September 26, 2008 and December 3, 2008 cannot be attributed to Guerrero, the State only needs to have a minimum of 9 days attributed to Guerrero to have tried Guerrero without violating his statutory right to speedy trial. Surely at least 9 days worth of delay was caused by Guerrero's request for a bench trial a week before the scheduled jury trial.

However, even if this court attributes the more than 9 days of the time period from September 26, 2008 to December 3, 2008 to the State, Guerrero must be charged with the time attributed to his motion to dismiss based on Hobbs' acquittal under the same set of facts. After all, the time necessary to resolve a defendant's motion is properly charged to the defendant. *E.g. Vaughn*, 288 Kan. at 147. Therefore, the time period from the filing of Guerrero's motion to dismiss on September 9, 2008 until the motion hearing on his motion on September 26, 2008 is attributable to the defendant. Once this reasonable time period of 18 days is deducted from the 189 day total, it is clear that Guerrero was tried within the statutory speedy trial deadline.

II. THERE WAS SUFFICIENT EVIDENCE TO CONVICT GUERRERO OF ENDANGERING A CHILD.

"When the sufficiency of the evidence is challenged on appeal, this court must determine whether, after a review of all the evidence, viewed in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Murray*, 285 Kan. 503, 536, 174 P.3d 407 (2008). In making this determination, this court does not reassess the weight and credibility of the evidence presented at trial because the weighing of the credibility of the evidence is solely the job of the factfinder. See *Murray*, 285 Kan. at 540.

In order to prove the crime of endangering a child, the State was required to prove that Guerrero intentionally and unreasonably caused or permitted Donnell to be placed in a situation where her life, body, or health might be injured or endangered. K.S.A. 21-3608(a). Here, the State proved that Guerrero locked Donnell in the basement, without adequate access to a bathroom. (R. III, 11-12, 98.) Rather than being allowed to use the restroom, Donnell was forced to either use a bucket or a cup. (R. III, 12, 55, 95.) The basement was damp, cold, and had no plumbing other than the plumbing attached to the washer and dryer. (R. III, 1, 13, 24, 95.) The basement's source of heat was a space heater, and there was no working smoke detector in the basement during this period. (R. III, 31, 57.)

Based on the above proven facts, it is not speculation that Donnell's life and/or health were placed in danger. It cannot be questioned that forcing a child to use a bucket or cup as a bathroom in a cold basement without a sink to wash her hands endangers a child's health. Furthermore, being locked in a basement with no exit and a potentially dangerous object such as a space heater, but no smoke detector, would also jeopardize a child's life, body, and health. Therefore, Guerrero's conviction was proper in this case.

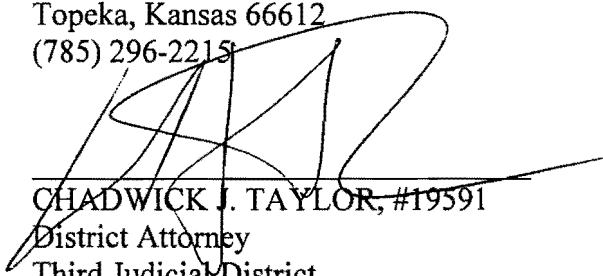
In his attempt to dispute the above facts, Guerrero points to testimony which conflicts with the above evidence, but reweighing the conflicting testimony is not the providence of this court. The district court clearly explained why it chose to believe some testimony and disregard other testimony. (R. III, 170-73.) This court cannot overturn the district court's weighing of the evidence. Therefore, when viewed in a light most favorable to the prosecution, there was sufficient evidence for the district court to find Guerrero was guilty of endangering a child, and his conviction should be affirmed.

CONCLUSION


For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Guerrero's conviction.

Respectfully submitted,

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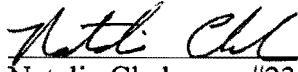
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 13th day of ~~September~~ ^{October}, 2009, to:

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and on that date the **original and sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.



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