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OCT 14 2015

No. 15-113923-A

HEATHER L. SMITH
CLERK OF APPELLATE COURTS

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

v.

AMY JEAN ROTH
Defendant-Appellee

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE NANCY PARRISH, JUDGE
DISTRICT COURT CASE NO. 14-CR-2711

Approved

OCT 14 2015

Attorney General of Kansas
BY NC S. Ct. Rule 6.10

Chadwick J. Taylor, #19591
District Attorney
Third Judicial District
Shawnee County Courthouse
200 S.E. 7th Street, Suite 214
Topeka, Kansas 66603
(785) 251-4330, Ext. 4330
(785) 291-4909 FAX
sncoda@snco.us

Attorney for Plaintiff- Appellant

TABLE OF CONTENTS

NATURE OF THE CASE1

STATEMENT OF THE ISSUE.....1

STATEMENT OF FACTS.....1

ARGUMENTS AND AUTHORITIES.....4

I. The district court erred in determining that there was not probable cause that Roth had the intent to permanently deprive Wal-Mart of her cart full of items and dismissing the case with prejudice.....4

A. Standard of Review4

State v. Bell, 259 Kan. 131, Syl. ¶ 5, 910 P.2d 205 (1996).....4

State v. Fredrick, 292 Kan. 169, 171, 251 P.3d 48 (2011) 4-5

State v. Washington, 293 Kan. 732, 733-34, 268 P.3d 475 (2012)..5

B. Analysis5

K.S.A. 22-2902(3).....5

State v. Valladarez, 288 Kan. 671, 677, 206 P.3d 879 (2009).....5

State v. Sherry, 233 Kan. 920, 935, 667 P.2d 367 (1983).....5

State v. Berg, 270 Kan. 237, 238, 13 P.3d 914 (2000)5

State v. Puckett, 240 Kan. 393, Syl. ¶ 1, 729 P.2d 458 (1986)5

State v. Bockert, 257 Kan. 488, 492, 893 P.2d 832 (1995).....5

State v. Sherry, 233 Kan. 920, 935, 667 P.2d 367 (1983).....5

State v. Berg, 270 Kan. 237, 238, 13 P.3d 914 (2000)5

State v. Washington, 293 Kan. 732, 733-34, 268 P.3d 475 (2012)..5

State v. Bell, 268 Kan. 764, 765, 1 P.3d 325 (2000).....6

| | |
|---|-------|
| <i>State v. Washington</i> , 293 Kan. 732, 733-34, 268 P.3d 475 (2012).. | 6 |
| <i>State v. Phelps</i> , 266 Kan. 185, 193, 967 P.2d 304 (1998) | 6 |
| <i>State v. Bell</i> , 268 Kan. 764, 765, 1 P.3d 325 (2000)..... | 6 |
| <i>State v. Hardy</i> , 51 Kan.App.2d 296, 347 P.3d 222 (2015) | 6 |
| <i>State v. Ralston</i> , 43 Kan.App.2d 353, 357, 225 P.3d 741 (2010), <i>rev. denied</i> 291 Kan. 916 (2011)..... | 8 |
| <i>State v. Ward</i> , 292 Kan. 541, 550, 256 P.3d 801 (2011), <i>cert. denied</i> 132 S.Ct. 1594 (2012)..... | 8-9 |
| <i>State v. Crouch & Reeder</i> , 230 Kan. 783, 788, 641 P.2d 394 (1982) | 9 |
| <i>State v. Winter</i> , 238 Kan. 530, 534, 712 P.2d 1228 (1986) | 9 |
| <i>State v. Clovis</i> , 248 Kan. 313, 331, 807 P.2d 127 (1991)..... | 9 |
| <i>State v. Davis</i> , 266 Kan. 638, 646, 972 P.2d 1099 (1999)..... | 9, 10 |
| <i>State v. Clovis</i> , 248 Kan. 313, 331, 807 P.2d 127 (1991)..... | 10 |
| <i>State v. Bolen</i> , 270 Kan. 337, 13 P.3d 1270 (2000)..... | 10 |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 12 |

NATURE OF THE CASE

The State charged Amy Jean Roth (Roth) with one count of theft - \$1,000 to \$24,999. A preliminary hearing was held and Roth was bound over on the charge. A few weeks after the preliminary hearing, Roth filed a motion to dismiss. Following a hearing, the district court granted the motion and dismissed the case with prejudice. The State now appeals the district court's order dismissing the case with prejudice.

STATEMENT OF THE ISSUE

- I. **The district court erred in determining that there was not probable cause that Roth had the intent to permanently deprive Wal-Mart of her cart full of items and dismissing the case with prejudice.**

STATEMENT OF THE FACTS

Roth was charged with one count of felony theft - \$1,000 to \$24,999. (R. I, 4-6.) At the preliminary hearing, the State called Rhonda Jamison (Jamison) to testify. Jamison testified that on October 16, 2014, she was working as an asset protection officer for Wal-Mart. (R. II, 4.) Jamison identified Roth in court and stated that her attention was drawn to Roth inside the store because Roth had an "unusually large amount of merchandise" in her cart stacked inside laundry baskets and reusable bags. (R. II, 5-6, 13.)

Jamison observed Roth place a set of sheets inside a reusable bag and zip it up. (R. II, 6, 14.) Jamison continued to watch Roth and saw her rearrange some of the bags inside her cart. (R. II, 9.) Eventually, Roth walked out the northeast doors without paying for any of the merchandise in the cart. (R. II, 9.) Roth was talking on her phone when she walked out the door. (R. II, 22.) The door greeter attempted to stop Roth and asked for her receipt, but Roth simply waived her hand and proceeded outside the store.

(R. II, 21-22.) Jamison testified that Roth did not have permission to leave the store without paying for the items. (R. II, 9.)

After Roth walked outside of the store, Jamison approached Roth and explained that she was an asset protection officer and that Roth needed to come back inside so they could discuss the items she did not pay for. (R. II, 9-10.) Roth told Jamison that she stepped outside so she could talk on the phone, got distracted, and forgot to pay for the items. (R. II, 23.) The total for all of the merchandise in the cart was approximately \$1,076.00. (R. II, 10.)

Roth called Officer Rex Vickers (Officer Vickers) to testify. Officer Vickers testified that he responded to a call regarding a shoplifting at Wal-Mart. (R. II, 30-31.) Officer Vickers interviewed Roth, who explained that she felt it was all a misunderstanding. (R. II, 32.) Roth told Officer Vickers that she was on the phone and stepped outside, with her cart full of items, to get better reception. (R. II, 33.) Roth intended to pay for the items, but forgot and stepped outside the store. (R. II, 33.) Officer Vickers then arrested Roth. (R. II, 35.) The district court bound Roth over on the felony theft charge. (R. II, 42.)

A few weeks after the preliminary hearing, Roth filed a motion to dismiss. (R. I, 9-10.) In the motion, defense counsel contended that she “should have called Ms. Roth to testify” at the preliminary hearing and that Roth’s testimony would provide additional evidence in support of the motion. (R. I, 9.)

A hearing was held on the motion to dismiss and Roth testified on her own behalf. At the beginning of the hearing, defense counsel indicated that the majority of the facts were not in dispute and that the only issue was whether Roth had the intent to

permanently deprive Wal-Mart of the property. (R. III, 5.) Roth testified that she was had several different orders that she was shopping for at Wal-Mart. (R. III, 13.) Roth was shopping for her own family, her mother, and crafts and supplies for her children's book fair at school. (R. III, 13-14.) Roth testified that while shopping she was talking on the phone about picking up some other items for the book fair. (R. III, 24.) Roth testified that she walked out the first set of doors in order to better hear her conversation on the phone. (R. III, 24.) Roth stated that she then walked through the second set of doors, unintentionally, without paying for the items in her cart. (R. III, 24.) Roth testified that it was her intention to pay for them items. (R. III, 24-25.) The State argued that Roth had previously been bound over for trial and the issues raised at this hearing were issues of fact, not legal issues why the case should be dismissed. (R. III, 48.)

The district court then granted Roth's motion to dismiss. (R. III, 51.) The district court stated:

Well, the motion to dismiss under K.S.A. 22-3208 was timely filed. The motion to dismiss, there's not a lot of guidance in the statute as to what the Court considers at that particular time. It doesn't narrow it to what the Court would consider on a motion to dismiss. Initially, there was no objection to the presenting of evidence today. Certainly, I don't know whether Mr. Kagay at this point in time is objecting to the presentation of evidence, but prior to any evidence being presented to the Court through the testimony of Miss Amy Roth and also the exhibits, there was no objection.

What the Court does determine at this point in time is sufficiency of the evidence and one of the elements that certainly has to be proved by the State, even at the probable cause level a the sufficiency of the evidence stage is the intent, whether the defendant intentionally exerted unauthorized control over property, in this case, the food and/or crafts or household items with the intention to permanently deprive the owner Wal-Mart.

While the Court did not believe that there was an issue of binding the defendant over after the preliminary hearing because the Court has to look

at the evidence in a light most favorable to the State, I think we have a different issue now when I've heard directly from the testimony. What I've heard directly from Miss Amy Roth regarding what was going on with her on that particular day and also what her intent was. Obviously her testimony was that she was distraught, distracted. She walks outside of Wal-Mart so that she can hear the person on the other line better, but that her intent was to make that payment of the items in her cart.

The Court at this time is going to grant the motion to dismiss. I don't believe that there is probable cause that the defendant did have the intent to permanently deprive Wal-Mart of the items in her cart on that particular day. So the Court at this time would dismiss the case with prejudice. (R. III, 49-51.)

The State now appeals the district court's order dismissing the case with prejudice. (R. I, 13-14.)

ARGUMENTS AND AUTHORITIES

I. The district court erred in determining that there was not probable cause that Roth had the intent to permanently deprive Wal-Mart of her cart full of items and dismissing the case with prejudice.

The district court erred in determining that there was not probable cause that Roth had the intent to permanently deprive Wal-Mart of her cart full of items and dismissing the case with prejudice. The evidence was sufficient to support a probable cause finding and to order Roth bound over for trial for felony theft. Moreover, the district court's dismissal with prejudice was an abuse of discretion.

Standard of Review

In appeals by the prosecution from an order discharging the defendant for lack of probable cause that a crime has been committed, this court follows the same standard for weighing the evidence as the judge at preliminary examination. This court is to conduct a de novo review of the evidence when considering the district court's probable cause finding. *State v. Bell*, 259 Kan. 131, Syl. ¶ 5, 910 P.2d 205 (1996); *State v. Fredrick*, 292

Kan. 169, 171, 251 P.3d 48 (2011); *State v. Washington*, 293 Kan. 732, 733-34, 268 P.3d 475 (2012). This court does not consider any of the factual findings the district court made.

Analysis

Under K.S.A. 22–2902(3), the magistrate at a preliminary hearing examines the evidence to determine (1) whether a crime has been committed and (2) whether there is probable cause to believe that the accused committed the crime. *State v. Valladarez*, 288 Kan. 671, 677, 206 P.3d 879 (2009). The evidence need not prove guilt beyond a reasonable doubt, only probable cause. *State v. Sherry*, 233 Kan. 920, 935, 667 P.2d 367 (1983).

“Probable cause at a preliminary examination signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.” *State v. Berg*, 270 Kan. 237, 238, 13 P.3d 914 (2000) (citing *State v. Puckett*, 240 Kan. 393, Syl. ¶ 1, 729 P.2d 458 [1986]). In determining if this standard is satisfied, the judge at a preliminary hearing must draw inferences favorable to the prosecution from the evidence presented and should not be concerned with sufficiency of the evidence to support a conviction. *State v. Bockert*, 257 Kan. 488, 492, 893 P.2d 832 (1995); *State v. Sherry*, 233 Kan. 920, 935, 667 P.2d 367 (1983).

Even where the evidence is weak, the defendant should be bound over for trial if the evidence tends to disclose that the offense charged was committed and that the defendant committed it. *State v. Berg*, 270 Kan. 237, 238, 13 P.3d 914 (2000); see *State v. Washington*, 293 Kan. 732, 733-34, 268 P.3d 475 (2012). This court is obligated in cases where there is conflicting testimony at the preliminary hearing to accept that

version which is most favorable to the State. *State v. Bell*, 268 Kan. 764, 765, 1 P.3d 325 (2000).

Here, the State charged Roth with one count of felony theft, or theft of property having a value of at least \$1,000 but less than \$25,000. (R. I, 4-6.) For the State to establish probable cause that the crime was committed, the State must prove probable cause to believe that Roth obtained or exerted unauthorized control over property, with the value of at least \$1,000 but less than \$25,000, with the intent to permanently deprive Wal-Mart of the possession, use or benefit of Wal-Mart's property. K.S.A. 21-5801(a)(1).

In ruling on Roth's motion to dismiss, the district court was obligated to draw inferences favorable to the prosecution and should not be concerned with the sufficiency of the evidence to support a conviction. *State v. Washington*, 293 Kan. 732, 733-34, 268 P.3d 475 (2012). The only question for this court is "whether the evidence is sufficient to cause a person of ordinary prudence and caution to conscientiously ascertain a reasonable belief of the accused's guilt." *State v. Phelps*, 266 Kan. 185, 193, 967 P.2d 304 (1998). Again, any conflict in the evidence at a preliminary hearing must be resolved in the version most favorable to the prosecution. *State v. Bell*, 268 Kan. 764, 765, 1 P.3d 325 (2000); see also *State v. Hardy*, 51 Kan.App.2d 296, 347 P.3d 222 (2015) (holding that a hearing on a motion for self-defense immunity the district court must view the evidence in a light most favorable to the State and reversing the district court's dismissal of the complaint based on the defendant's motion).

That being said, this court should find that there was probable cause to believe that Roth intended to permanently deprive Wal-Mart of the property in the cart and there was probable cause to believe she committed the crime of felony theft.

The evidence showed that Jamison's attention was drawn to Roth due to the usually large amount of merchandise she had in her shopping cart. (R. II, 5-6, 13-15.) Roth's cart had two laundry baskets and several reusable bags with things in stacked in both the bags and baskets. (R. II, 6, 15.) This type of stacking and placing of merchandise inside the cart was something that she was trained to look for in asset protection. (R. II, 6.) Jamison observed Roth select a set of sheets, place it in a reusable bag, zip the bag shut, and place it on top of the cart. (R. II, 6-7, 14-15.) Jamison saw Roth by the self-checkout, then saw her get on her phone and look around. (R. II, 7.) Roth headed back toward the north doors, went into the garden center, circled around a couple aisles, and then stopped to rearrange the bags she placed in her cart. (R. II, 7.)

Roth then went past the pharmacy and out the northeast doors. (R. II, 9.) Jamison testified that, "[a]s [Roth] was leaving, the people greeter stopped and waived her down to get a receipt check." (R. II, 9, 21-22.) "[R]oth waived them off and went through the north doors." (R. II, 9.) When Jamison noticed that Roth was going to leave out the north doors, she contacted her asset protection manager. (R. II, 9, 21.) The asset protection manager was outside when Roth walked out of the doors. (R. II, 9, 21-22.) Roth did not have permission to take the items or fail to pay for the items.

Although Roth testified that she was distracted by talking on her phone and fully intended to pay for the items, the district court was required to resolve the conflicting evidence in the light most favorable to the State at this point during the proceedings.

The evidence presented by the State that Roth had an unusually large amount of merchandise in her cart, some of which she concealed inside a zipped up reusable bag before she walked out both sets of doors and simply waived off the greeter who asked her for her receipt and kept walking at least 30 feet past the doors into the parking lot was sufficient to cause a person of ordinary prudence and caution to conscientiously ascertain a reasonable belief that Roth intended to permanently deprive Wal-Mart of this property. The fact that Roth testified that she did not intend to steal the cart full of items, but in fact intended to buy them and was simply distracted while talking on the phone does not lead to the conclusion of no probable cause, but is instead conflicting evidence that must be resolved in the version most favorable to the prosecution.

Roth had a viable defense that could have been presented to the trier of fact at a trial. During trial the trier of fact would then weigh the credibility of Roth and determine whether she was guilty of felony theft beyond a reasonable doubt. The district court erred when it did not draw reasonable inferences favorable to the State. The evidence was sufficient to support a probable cause finding and to order Roth bound over for trial. Thus, the district court erred in dismissing the case and it should have proceeded to trial.

Additionally, the district court abused its discretion when it dismissed the case with prejudice. On appeal, “[a] district court’s ruling on a defendant’s motion to dismiss criminal charges with prejudice is reviewed under an abuse of discretion standard.” *State v. Ralston*, 43 Kan.App.2d 353, 357, 225 P.3d 741 (2010), *rev. denied* 291 Kan. 916 (2011). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of

fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Our Supreme Court recognized that in a proper case, a trial court has the power to dismiss a criminal complaint with prejudice if the interests of justice require such action. *State v. Crouch & Reeder*, 230 Kan. 783, 788, 641 P.2d 394 (1982). However, such power should be exercised with great caution and only in cases where no other remedy would protect against abuse. 230 Kan. at 788.

Dismissal with prejudice should only be used in extreme circumstances. *State v. Winter*, 238 Kan. 530, 534, 712 P.2d 1228 (1986); *State v. Clovis*, 248 Kan. 313, 331, 807 P.2d 127 (1991). Dismissal of charges oftentimes punishes the public rather than the prosecutor and creates a windfall for the defendant. *State v. Davis*, 266 Kan. 638, 646, 972 P.2d 1099 (1999). Where there has been no showing that the defendant suffered actual prejudice as a result of a prosecutor's misconduct, and alternative means of sanctioning the prosecutor exist for the violation, dismissal of pending charges with prejudice may constitute an abuse of discretion by the trial court. 266 Kan. at 646.

There has been no showing in this case that the defendant suffered actual prejudice as a result of the proceedings in this case. The record shows no explanation for the district court's dismissal with prejudice. No prejudice appears and an alternative sanction could have been effective. This was not an extreme circumstance in which a dismissal with prejudice was appropriate, especially in light of the previous cases on this issue.

In *State v. Davis*, 266 Kan. 638, 646, 972 P.2d 1099 (1999), the prosecutor blatantly and repeatedly refused on the record to comply with the district court's

discovery order. Nevertheless, our Supreme Court found that dismissal with prejudice to be an inappropriate sanction and an abuse of discretion where other sanctions as a contempt order were available to enforce compliance. 266 Kan. at 646-47.

In *State v. Clovis*, 248 Kan. 313, 331, 807 P.2d 127 (1991), our Supreme Court found that the dismissal of two counts in an indictment with prejudice was not an abuse of discretion where the State had continuously refused to comply with a discovery order and no other sanction would have accomplished the objective. This is the type of extreme circumstance that has been acknowledged by our Court as an appropriate circumstance to dismiss a case with prejudice.

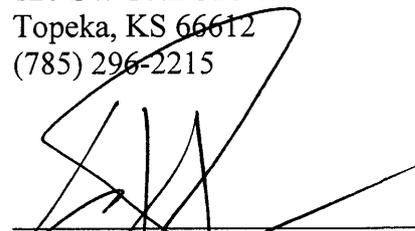
Here, the State did not blatantly refuse to comply with any of the district court's orders or any display any conduct rising to the severe level of conduct in *Davis* or *Clovis*. Dismissal with prejudice was not appropriate in this case as it is in no way similar to the circumstances in the above cases. See also *State v. Bolen*, 270 Kan. 337, 13 P.3d 1270 (2000). The district court's unreasonable dismissal was an abuse of discretion. Therefore, even if dismissal was appropriate, the district court should not have dismissed the case with prejudice.

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals reverse the district court's judgment, remand the case with directions to reinstate the complaint, and set the matter for trial.

Respectfully submitted,

DEREK SCHMIDT
Memorial Hall, 2nd Floor
120 SW 10th Street
Topeka, KS 66612
(785) 296-2215



CHADWICK TAYLOR, #19591
District Attorney
Third Judicial District
Shawnee County Courthouse
200 SE 7th Street, Suite 214
Topeka, Kansas 66603
(785) 251-4330



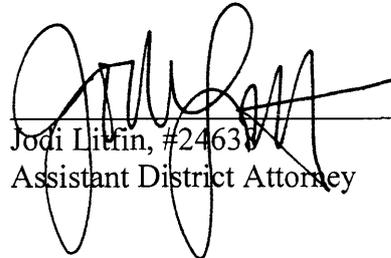
JOE LITFIN, #24638
Assistant District Attorney
Shawnee County Courthouse
200 SE 7th Street, Suite 214
Topeka, Kansas 66603
(785) 251-4227
Attorneys for Plaintiff-Appellee

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 4th day of October, 2015, to:

Debra Wilson
Capital and Conflicts Appellate Defender
Capital and Conflicts Office
701 SW Jackson, Third Floor
Topeka, Kansas 66603-3729

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



Jodi Litfin, #24638
Assistant District Attorney