Certification of Word Count: 3,667

COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
El Paso District Court Honorable Kirk S. Samelson Case Number 08CR272	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellant v. M.T. Defendant-Appellee	☐ COURT USE ONLY ☐
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ANSWER BRIEF OF DEFENDANT-APPELLEE

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INTRODUCTION

M.T., Defendant-Appellee, was the defendant in the trial court and will be referred to as Defendant. Plaintiff-Appellant, the State of Colorado, will be referred to as the prosecution. Citations to the electronic record include the name of the PDF file and page number on which the information appears.

STATEMENT OF THE ISSUES PRESENTED

I. Does this Court lack jurisdiction to consider this untimely appeal?

II. Assuming arguendo that the prosecution's appeal is timely, which it is not, did the trial court abuse its discretion by dismissing charges against Defendant when the evidence presented at the preliminary hearing failed to establish probable cause?

STATEMENT OF THE CASE

The prosecution charged Defendant with two counts of aggravated robbery,[1] two counts of crime of violence (used a weapon),[2] three counts of felony menacing,[3] and one count of theft ($500-$1,000).[4] (court file p6-9) The date of the alleged offense was December 1, 2007. (*Id.*) A preliminary hearing was held on June 2, 2008. (transcript) After the prosecution presented its evidence and after hearing argument from counsel, the trial court ruled, "I'm going to find that the People have not shown

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[1] § 18-4-302(1)(b), C.R.S. 2007 (a class three felony)
[2] § 18-1.3-406(2)(a)(I)(A), C.R.S. 2007 (sentence enhancer)
[3] § 18-3-206(1)(a), (b), C.R.S. 2007 (a class five felony)
[4] § 18-4-401(1), (2)(b.5), C.R.S. 2007 (a class one misdemeanor)

probable cause, and I'm going to order [the defendant] to be released on these charges. I'm going to dismiss these charges without prejudice." (transcript p38)

The prosecution filed a notice of appeal on July 16, 2008. (court file p18)

STATEMENT OF THE FACTS

The prosecution alleged that Defendant robbed a Burger King at approximately 4:30 a.m. on December 1, 2007. (transcript p5,36-37) The investigating police officer, Detective Gina Seago, and the restaurant manager, Kari Seefeld, testified at the preliminary hearing. (transcript)

A. Detective Seago's Testimony

Detective Seago testified regarding several interviews with Seefeld. On the morning of the robbery, police interviewed Seefeld and the other witnesses. (transcript p9,13) They told police that, during the robbery, the robber wore a bandana across his face and on his head. (transcript p9) Only the robber's eyes were visible. (transcript p16) Seefeld stated that she did not know who the robber was. (transcript p13) After another employee told police that, during the robbery, Seefeld called the robber Mike several times, Seefeld explained to police that she initially thought the robber was someone named Mike but that she later realized it was not him. (transcript p6, 14)

Detective Seago testified that she conducted two interviews with Seefeld in January 2008. (transcript p13) On January 8, Seefeld described the robbery. She claimed that she was counting her drawer at 4:40 a.m., as she did daily, when she heard a knock at the back door. (transcript p5) There were three other employees present. (transcript p6) One of the employees opened the door, and the robber pushed his way in. (transcript p5) Armed with a gun, he ordered the employee to the floor and demanded money from Seefeld. (*Id.*) He then left the restaurant. (*Id.*)

Seefeld stated that the robber's eyes were brown. (transcript p17) Seefeld told Detective Seago that she initially thought the robber was Mike but that, when he turned around, she realized it was not Mike. (transcript p6,28) Seefeld stated that she assumed the robber was Mike because Mike often wore bandanas. (transcript p18) During this interview, Detective Seago informed Seefeld that she was a suspect. (transcript p15)

Detective Seago interviewed Seefeld again on January 10. (transcript p13) After viewing a photo array, Seefeld indentified defendant as the robber. (transcript p8-9,15) Seefeld claimed that she was previously too scared to identify Defendant as the robber because he lived across the street from her. (transcript p20) She claimed that she recognized him as the robber because she recognized his eyes. (transcript p16) And she stated that the robber's eyes were blue or hazel. (transcript p17) At

the hearing, after looking at Defendant's eyes, Detective Seago confirmed that his eyes were brown. (transcript p18)

B. Kari Seefeld's Testimony

Seefeld testified regarding the details of the robbery. (transcript p21-25) She claimed that, during the robbery, she was looking down at her legs but that she also stared into the robber's eyes. (transcript p23,30,31) The robber wore bandanas "across his nose and down, then on his head and up." (transcript p26) She claimed to be ninety-five percent sure that Defendant was the robber. (transcript p31) She stated, "I can't tell you how I recognized him. There is no actual thing to tell you that, I just did." (*Id.*) She stated that the robber's eyes were blue. (transcript p31) However, after looking at Defendant's eyes in court, Seefeld confirmed that Defendant's eyes were brown. (transcript p34)

Defense counsel asked Seefeld, "Ma'am the truth is that [Defendant] is not the person who robbed the Burger King, correct?" (transcript p34) Seefeld responded, "Correct, I cannot tell you, it's for everybody else to decide. I, personally, that's who I thought it was." (*Id.*) On redirect examination, Seefeld stated, "There is nothing that I could say that would properly I.D. him for you guys." (transcript p35) The prosecution asked, "At this point, are you certain of who the robber was?" (*Id.*) Seefeld replied, "I was." (*Id.*)

C. Argument and Court's Ruling

After presentation of evidence, the prosecution argued, "obviously there has been cross-examination, and the Court has heard as far as questionable questions concerning the identity, I think for Ms. Seefeld – at this point, she is relatively certain for probable cause purposes." (transcript p36) Defense counsel responded, "Judge, her last answer was that she was – meaning, in the past tense – previously certain. How she finished her testimony is that she's not good on the details. The robber's eyes were blue, [Defendant's] eyes are brown. We have the wrong man in custody." (transcript p37) The court ruled that the prosecution did not establish probable cause to believe that Defendant committed the charged offenses:

> Well, looking at the evidence in the light most favorable to the People, the only testimony I've heard from Ms. Seefeld is that she was able to identify the robber based on his eyes, and the fact that he wore a bandanna – [Defendant] oftentimes wore a bandanna. Ms. Seefeld indicated that the robber had blue eyes; Defendant has brown eyes. I'm going to find that the People have not shown probable cause, and I'm going to order Defendant to be released on these charges. And I'm going to dismiss these charges without prejudice.

(transcript p37-38)

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to consider this appeal. Because the prosecution appeals the dismissal of some but not all charges against Defendant, and because the prosecution filed the appeal outside the ten-day time limit, this appeal is untimely. *See* C.A.R. 4(b)(3), 4.1(b), C.R.S. 2008; *People v. Severin*, 122 P.3d 1073 (Colo. App. 2005).

Assuming arguendo that the prosecution's appeal is timely, which it is not, the trial court did not abuse its discretion by dismissing charges against Defendant because the evidence that the prosecution presented at the preliminary hearing was not sufficient to cause a person of ordinary prudence and caution to entertain a reasonable belief that Defendant committed the crimes charged. *See People v. Collins*, 32 P.3d 636, 639-40 (Colo. App. 2001).

ARGUMENT

I. This Court Lacks Jurisdiction to Consider This Appeal.

A. Standard of Review

Subject matter jurisdiction cannot be waived and may be asserted at any time. *E.g.*, *People ex rel. Garner v. Garner*, 33 P.3d 1239, 1241 (Colo. App. 2001); *see Severin*, 122 P.3d at 1074 ("[T]he jurisdiction of this court is a matter that we may raise and resolve sua sponte."). This court reviews the issue of jurisdiction de novo. *E.g.*, *In re Estate of Murphy* (Colo. App. 2008).

B. Law and Analysis

A person accused of certain felonies is guaranteed the right to a preliminary hearing.

> In cases in which a direct information was filed pursuant to Rule 7 (c), either the defendant, or the prosecutor, if accused of a class 1, 2, or 3 felony or a class 4, 5, or 6 felony if such felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S. may request a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony who may not request a preliminary hearing shall participate in a dispositional hearing unless otherwise waived for the purposes of case evaluation and potential resolution.

Crim. P. 7(h)(1), C.R.S. 2008; *see also* Crim. P. 5(a)(4), C.R.S. 2008; § 16-5-301, C.R.S. 2008; § 18-1-404, C.R.S. 2008.

At a preliminary hearing, the trial court must determine whether the prosecution has established probable cause regarding felony charges. *Id.* Probable cause regarding misdemeanor charges is beyond the scope of the preliminary hearing.

14 Robert J. Dieter, Colorado Practice Series, Colorado Criminal Practice and Procedure, "Purpose and Scope of Preliminary Hearing" § 7.2, at 482 (2nd ed. 2004); *see* Crim. P. 5(a)(4); Crim. P. 7(h)(1); § 16-5-301; § 18-1-404.

If the prosecution does not establish probable cause to believe that the accused committed the charged offenses, the trial court must dismiss those offenses. Crim. P. 7(h)(4), C.R.S. 2008. If the court does not dismiss all charges, the court shall set the case for arraignment or trial on the remaining charges. *Id.*

> If, from the evidence, it appears to the district court that no probable cause exists to believe that any or all of the offenses charged were committed by the defendant, the court shall dismiss those counts from the information and, if the court dismisses all counts, discharge the defendant; otherwise, or subsequent to a dispositional hearing, it shall set the case for arraignment or trial.

Id.

The Colorado Appellate Rules set forth different appellate procedures for cases in which a trial court dismisses all charges against an accused and cases in which the court dismisses some, but not all, charges against an accused. C.A.R. 4(b)(3) states:

> Appeals of orders dismissing one or more but less than all counts of a charging document shall otherwise be conducted pursuant to the procedures set forth in Rule 4.1 . . . .

C.A.R. 4(b)(3), C.R.S. 2008; *Severin*, 122 P.3d at 1074. And C.A.R. 4.1(b) states: "No interlocutory appeal shall be filed after ten days from the entry of the order complained of." C.A.R. 4.1(b), C.R.S. 2008; *Severin*, 122 P.3d at 1074.

Here, the prosecution charged Defendant with two class three felonies, three class five felonies, and one class one misdemeanor. (court file p6-7) Defendant, who was in custody at the time, received a preliminary hearing, as guaranteed by rule and statute, on the felony charges. (transcript p3) The misdemeanor charge was not before the court at the hearing. *See* 14 Dieter, Colorado Practice Series, Colorado Criminal Practice and Procedure, "Purpose and Scope of Preliminary Hearing" § 7.2, at 482; Crim. P. 7(h)(1).

At the conclusion of the hearing, the court determined that the prosecution did not establish probable cause to believe that Defendant committed the charged offenses and, thus, dismissed the felony charges. (transcript p37-38) Referring to the charges properly before him at the hearing, the court stated: "I'm going to find that the People have not shown probable cause, and I'm going to order [Defendant] to be released on these charges. I'm going to dismiss these charges without prejudice." (*see* transcript p38) After dismissal of the felony charges, the misdemeanor charge remained against Defendant.

Because the court dismissed "one or more but less than all counts of a charging document," the prosecution had ten days within which to appeal the court's order. *See* C.A.R. 4(b)(3); C.A.R. 4.1(b); *Severin*, 122 P.3d at 1074. The court dismissed charges against Defendant on June 2, 2008. The prosecution should have filed a notice of appeal in this case on or before June 12. However, the prosecution filed a notice of appeal on July 16. Thus, the prosecution's appeal is untimely, and this court lacks jurisdiction to consider it. *See Severin*, 122 P.3d at 1074. Accordingly, the prosecution's appeal should be dismissed.

II. Assuming Arguendo That the Prosecution's Appeal Is Timely, Which It Is Not, the Trial Court Did Not Abuse Its Discretion by Dismissing Charges Against Defendant Because the Evidence Presented at the Preliminary Hearing Failed to Establish Probable Cause.

A. Standard of Review

An appellate court will uphold a trial court's determination that the prosecution did not establish probable cause unless the trial court abused its discretion. *Collins*, 32 P.3d at 640. The appellate court reviews a trial court's conclusions of law de novo. *People v. Hall*, 999 P.2d 207, 221 (Colo. 2000).

Here, the prosecution's argument does not present a question of law. The trial court's probable cause determination did not hinge on an interpretation of law. *Cf. Hall*, 999 P.2d at 221 (reviewing trial court's probable cause determination de novo because trial court misinterpreted the term "recklessness"); *People v. Villapando*, 984

P.2d 51, 55 (Colo. 1999) (reviewing trial court's probable cause determination de novo because trial court misinterpreted the possession of contraband statute); *People v. Thornton*, 929 P.2d 729, 731-32 (Colo. 1996) (reviewing trial court's probable cause determination de novo because trial court misinterpreted the term "in custody or confinement" as used in the escape statute). And the trial court applied the correct legal standards. (*See* transcript p37); *cf. People v. Walker*, 675 P.2d 304, 305 (Colo. 1984) (trial court applied incorrect beyond a reasonable doubt standard).

The prosecution's argument merely presents the question whether the court abused its discretion by dismissing charges against Defendant. *See* OB p14 (arguing that "the evidence in this case was sufficient" to establish probable cause); *see also People v. Ayala*, 770 P.2d 1265, 1266 (Colo. 1989) ("It is not the function of this court to sit as a second preliminary hearing court to review the evidence of probable cause."); *People v. Waggoner*, 199 Colo. 450, 451, 610 P.2d 106 (1980) ("This appeal by the prosecution is no more than an advocate's dispute with the trial court's determination of the sufficiency of the evidence."); *Collins*, 32 P.3d at 640.

Thus, the appropriate standard of review in this case is abuse of discretion.

B. Law and Analysis

A person accused of certain felonies has a right to a preliminary hearing. Crim. P. 5(a)(4); Crim. P. 7(h)(1); § 16-5-301; § 18-1-404; *Hall*, 999 P.2d at 221; *Collins*, 32

P.3d at 639. At a preliminary hearing, the trial court must determine whether probable cause exists to believe that the defendant committed the charged offense. *Id.*

The preliminary hearing is a screening device designed to test the sufficiency of the prosecution's case before an impartial judge and to weed out groundless or unsupported charges. *Holmes v. Dist. Court*, 668 P.2d 11, 15 (Colo. 1983); *Maestas v. Dist. Court*, 189 Colo. 443, 446, 541 P.2d 889, 891 (1975). It protects the accused from the degradation and expense of a criminal trial. *Holmes*, 668 P.2d 11, 15 (Colo. 1983); *Hunter v. Dist. Court*, 190 Colo. 48, 51, 543 P.2d 1265, 1267 (1975) ("It protects the accused by avoiding an embarrassing, costly and unnecessary trial . . . ."). The preliminary hearing also promotes judicial economy and efficiency. *Hunter*, 190 Colo. at 51, 543 P.2d at 1267.

> The holding of a preliminary hearing is of value to the prosecution in that it offers a method for testing the complaints of prosecuting witnesses, and eliminating prosecutions actuated by prejudice or motives inconsistent with a fair administration of the criminal law. A preliminary hearing accords the defendant an opportunity to correct any misconceptions which may have arisen with respect to his conduct. An innocent defendant may be spared the ignominy resulting from a trial.

Maestas, 189 Colo. at 446, 541 P.2d at 891 (quoting Orfield, Criminal Procedure from Arrest to Appeal 72-73 (1947)).

"Those objectives would be undermined if appellate courts were to second-guess the discretionary first-hand assessments of trial courts and substitute their evaluations of testimony based on cold transcripts." *People ex rel. Leidner v. Dist. Court*, 198 Colo. 204, 207, 597 P.2d 1040, 1042 (Colo. 1979). For the preliminary hearing to be effective, "courts must be free to filter out cases unworthy of trial." *Id.*

To establish probable cause, the prosecution must "present evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime charged." *E.g.*, *Hall*, 999 P.2d at 221 (quoting *People v. Dist. Court*, 926 P.2d 567, 570 (Colo. 1996)); *Collins*, 32 P.3d at 639. In determining whether the prosecution has met its burden, the trial court must view the evidence in the light most favorable to the prosecution. *E.g.*, *Hall*, 999 P.2d at 221; *Collins*, 32 P.3d at 640.

Here, the court did not abuse its discretion in concluding that the prosecution presented insufficient evidence to induce a person of ordinary prudence and caution to entertain a reasonable belief that Defendant committed the charged offenses. At the preliminary hearing, Seefeld expressed doubt that Defendant was the robber. Although she claimed to be "ninety-five percent sure" that Defendant was the robber (transcript p31), she then stated, "Correct [Defendant is not the person who robbed the Burger King], I cannot tell you, it's for everybody else to decide" (transcript p34).

She stated, "There is nothing that I could say that would properly I.D. him for you guys." (transcript p 35) And, after being asked whether she was certain of the robber's identity, she responded, "I was," implying that she was no longer certain. (*Id.*)

Seefeld testified without hesitation that the robber's eyes were blue (transcript p31), but she confirmed that Defendant's eyes were brown (transcript p34). And Seefeld identified Defendant as the robber only after Detective Seago told Seefeld that she was also a suspect. (transcript p15) This evidence and Seefeld's doubtful testimony do not constitute sufficient evidence to induce a person of ordinary prudence and caution to entertain a reasonable belief that Defendant committed the charged offenses.

The prosecution contends that the court erroneously applied the law governing preliminary hearings. OB p10. However, the court began its ruling by noting the correct standard. The court stated that it viewed the evidence in the light most favorable to the people. (transcript p37) *Cf. Walker*, 675 P.2d at 305 (trial court applied incorrect beyond a reasonable doubt standard).

The prosecution also asserts that the court weighed conflicting evidence in reaching its conclusion. OB p11. However, the court's ruling evidences no weighing of evidence. (*See* transcript p37-38) Rather, the prosecution's argument focused

solely on Seefeld's identification of Defendant, and the court's ruling responded to that argument. (*See* transcript p36-38)

Finally, the prosecution argues that the court overlooked circumstantial evidence that Defendant was the robber. OB p11-12. The prosecution did not argue to the trial court that circumstantial evidence established Defendant's identity. Even if it had, such evidence does not establish that element. Thus, the court could not have ignored such evidence. Seefeld testified that she worked with Defendant for about a month on five occasions. (transcript p27) She did not testify regarding what hours Defendant worked or his familiarity with restaurant procedures. Also, the prosecution claims that, because the robber came over to Seefeld when she said "Mike," the robber must have been Defendant. OB p12. However, that conclusion does not necessarily follow from that evidence. The robber could have come over to Seefeld for any number of reasons, including the realization that Seefeld was counting money. (*See* transcript p21-22)

The prosecution's reliance on *Walker*, 675 P.2d 304, is misplaced. The trial court dismissed charges against the defendant after it used an incorrect standard for determining probable cause. The trial court stated, "a trial of this case would not result in any finding beyond a reasonable doubt as to the identity of the defendant," and, "I don't think the Court should waste its time in going through the exercise of

having the jury come back and say we can't determine beyond a reasonable doubt that this is the party." *Id.* at 305, 306.

The evidence at the preliminary hearing in *Walker* established more than a tentative identification. Police observed the suspect running from the credit union, trying to remove a red velour shirt, and entering a home. *Id.* at 305. Police then found the defendant sweating profusely in the home with the red velour shirt and with traveler's checks whose serial numbers matched those alleged to have been stolen. *Id.* at 305, 307. Thus, the supreme court determined that there was probable cause to believe the defendant committed the charged offenses. *Id.* at 307.

Accordingly, the trial court did not abuse its discretion by determining that the prosecution did not establish probable cause to believe that Defendant committed the charged offenses.

CONCLUSION

For the reasons and authorities presented in part I, this Court should dismiss the appeal and remand the case to the trial court for further proceedings on the remaining misdemeanor charge.

Alternatively, for the reasons and authorities presented in part II, this Court should affirm the trial court's order dismissing felony charges against Defendant and

remand the case to the trial court for further proceedings on the remaining misdemeanor charge.

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CERTIFICATE OF SERVICE

I certify that, on February 4, 2009, a copy of this Answer Brief Of Defendant-Appellee was placed in the U.S. Mail, postage prepaid, addressed as follows:

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