

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA1479
El Paso County District Court No. 08CR272
Honorable J. Patrick Kelly, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

MFT,

Defendant-Appellee.

ORDER VACATED AND CASE
REMANDED WITH DIRECTIONS

Division V

Opinion by: JUDGE BOORAS
Graham and Bernard, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: April 2, 2009

John R. Newsome, District Attorney, Eugene V. Tiell, Deputy District Attorney,
Doyle J. Baker, Deputy District Attorney, Colorado Springs, Colorado, for
Plaintiff-Appellant

Douglas K. Wilson, Colorado State Public Defender, Ryann S. Hardman,
Deputy State Public Defender, Denver, Colorado, for Defendant-Appellee

The People appeal the trial court's order dismissing the aggravated robbery, felony menacing, and theft charges against defendant, MFT, based on its finding that probable cause as to the offender's identity was not established at the preliminary hearing. We vacate the order and remand the case for reinstatement of the charges.

On December 1, 2007, a man wearing bandanas on his head, above and below his eyes, entered a fast food restaurant with a gun. The manager of the store seemed to recognize him as defendant because he was an ex-employee of the store who lived near her. She called him by name several times. The robber put the gun to the manager's head and demanded that she open the store safe. He took the money from the safe and left.

Defendant was charged with two counts of aggravated robbery, two counts of crime of violence, three counts of felony menacing, and one count of misdemeanor theft.

At the preliminary hearing, the trial court dismissed all the charges, finding that the only evidence it had heard from the manager was that she was able to identify the robber based on his eyes, that the robber wore a bandana, and that defendant often

wore a bandana, and that the manager had indicated that the robber had blue eyes but defendant had brown eyes.

I. Jurisdiction

Defendant argues that the appeal must be dismissed because the People's notice of appeal was untimely under C.A.R. 4(b)(3) and therefore, we lack jurisdiction to consider it. He argues that, because a defendant is entitled to a preliminary hearing only on felony charges, the court's dismissal of the charges against him at the end of the preliminary hearing left an outstanding charge of misdemeanor theft and therefore, the People were required to file their notice of appeal within ten days of the court's dismissal order. We disagree.

A trial court's dismissal of one or more counts of a charging document prior to trial is a final order subject to appeal. § 16-12-102(1), C.R.S. 2008 (any order that dismisses one or more counts of a charging document prior to trial "shall constitute a final order that shall be immediately appealable").

If the trial court enters an order dismissing the case in its entirety, then the notice of appeal from that order must be filed

within forty-five days after the entry of the order. C.A.R. 4(b)(2); *People v. Collins*, 32 P.3d 636, 638 (Colo. App. 2001).

However, if the court's order dismisses one or more, but not all, of the charges prior to trial, a notice of appeal must be filed within ten days of the date of the court's order. Failure to timely file this notice of appeal deprives this court of jurisdiction to consider it. See C.A.R. 4(b)(3); *People v. Severin*, 122 P.3d 1073, 1074-75 (Colo. App. 2005).

Here, at the preliminary hearing, the prosecutor argued that probable cause had been established for all the charges, including the misdemeanor theft charge. Defendant asked the court to dismiss the charges or lower his bond. The trial court dismissed the charges against defendant, including the theft charge, and no further actions have been taken in this case. See *People v. Linares-Guzman*, 195 P.3d 1130, 1136 (Colo. App. 2008) (court may take judicial notice of information on state court system computerized database). Therefore, because the case was dismissed in its entirety, the People had forty-five days under C.A.R. 4(b)(2) in which to file a notice of appeal. The court's order dismissing the case was entered on June 2, 2008. The notice of appeal was filed on July 16,

2008, forty-four days later. Thus, the notice of appeal was timely filed and we have jurisdiction to consider the merits.

II. Probable Cause

The People contend that the evidence presented at the preliminary hearing was sufficient to establish probable cause that defendant committed aggravated robbery, felony menacing, and theft. They argue that the court abused its discretion and applied the wrong standard of law because it did not view the evidence presented in favor of the prosecution. We agree.

The prosecution may appeal “any dismissal of a charge prior to trial, even though such appeal is not based on a question of law.”

Collins, 32 P.3d at 639.

A preliminary hearing serves the limited purpose of determining whether there is probable cause to believe that an offense has been committed and that the person charged committed the offense. The prosecution is not required to produce evidence sufficient to support a conviction; rather, it need only present evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime.

Id.

“The court must view all evidence and draw all inferences in favor of the prosecution” *People v. Hall*, 999 P.2d 207, 221 (Colo. 2000). If testimony is conflicting, the trial court must draw the inference favorable to the prosecution. *Collins*, 32 P.3d at 640.

The trial court’s decision that probable cause has not been established will be upheld absent an abuse of the court’s discretion. *Id.*

Here, the prosecution presented the testimony of the store’s manager and the investigating officer. The officer testified that he interviewed the store manager who told him that she recognized the robber as defendant when he first came in the door and that she called him by name several times. He further testified that other employees said they heard her call him by name and that she picked defendant out of a photo lineup as the person she knew as defendant and the person who robbed the store. He acknowledged that the manager also told officers that, although she thought at first the robber was defendant, she could then tell that it was not him, but explained that the manager did not identify defendant as the robber at first because she lived across the street from him and

feared for her safety. The manager gave contradicting statements as to defendant's eye color to the officer.

The manager testified that she did not initially identify defendant because she was scared to name him. She also testified that she recognized him from his general appearance when he entered the store. She stated that she knew defendant because she worked with him, they were neighbors, and he had been to parties at her house. She testified in court that his eyes were blue, but acknowledged that they were brown when the court ordered her to look at him.

Although the trial court noted the correct legal standard for determining probable cause, we agree with the People that the court erroneously ignored the officer's testimony and resolved the conflicts in the manager's testimony in defendant's favor. The evidence at the preliminary hearing, viewed in the light most favorable to the prosecution, shows that the manager positively identified defendant as the person who robbed the restaurant based on his eyes, the bandanas, her familiarity with him from work and as neighbors, and his general appearance. She not only identified defendant as the robber in a police interview, but also picked him

out of a photo lineup. This evidence is “sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime.” *Hall*, 999 P.2d at 221 (quoting *People v. Dist. Court*, 926 P.2d 567, 570 (Colo. 1996)); see *People v. Walker*, 675 P.2d 304, 307 (Colo. 1984). Thus, we conclude that the trial court, as a matter of law, erred in dismissing the charges.

Accordingly, the trial court’s order dismissing the charges is vacated and the case is remanded for reinstatement of the charges.

JUDGE GRAHAM and JUDGE BERNARD concur.