IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2016-169
	)	
PATRICK LEE WALKER,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, JUDGE:

Appellee Patrick Lee Walker was charged in Kay County District Court, Case No. CF-2015-45, with Distributing Controlled Dangerous Substance (Methamphetamine) Within 2,000 Feet of Park/School, After Former Conviction of Two or More Felonies, in violation of 63 O.S.2011, § 2-401 (F). Preliminary Hearing was held on August 31, 2015, and Walker was bound over for trial. On February 19, 2016, Walker filed a Motion to Quash, Dismiss and Otherwise Set Aside the Information. A hearing was held on the motion to quash and dismiss on February 24, 2016. At the conclusion of this hearing the Honorable David A. Bandy sustained the motion to quash and dismissed the case. The State appeals from this decision.

Appellant raises the following propositions of error:

1. Whether the district court erred when it ruled that the State failed to prove venue at the preliminary hearing; and

2. Whether the district court erred in denying the State's request to amend the Information.

BACKGROUND

At preliminary hearing Kay County Sheriff's Deputy Sean Grigsba testified that on March 25, 2014, he worked with a confidential informant to make a controlled purchase of methamphetamine from Patrick Walker. Before the informant met with Walker, Deputy Grigsba searched the informant and her car to make sure she was not in possession of any drugs or contraband. After she had been cleared, Grigsba provided the informant with money to make the controlled purchase. The informant drove to a location in Kay County which was within 2,000 feet of Ponca City Head Start and Tammy's Playskool. At this location, Walker got into the car with the informant and they drove to a location in Osage County where Walker exited the vehicle. When Walker was gone, Deputy Grigsba searched the informant and her car and retrieved the drugs she had purchased from Walker and the left over money. At the close of Deputy Grigsba's testimony Walker's attorney entered a demurrer to the evidence. Walker was bound over on the crime charged.

At the hearing on the motion to quash and dismiss the defense argued that there was insufficient evidence presented at preliminary hearing to prove that the crime occurred either in Kay County or within 2,000 feet of a school. The district court found that while the crime of distribution started in Kay County when Walker got into the car with the confidential informant, there was no evidence where they were when the drugs were actually handed to the confidential informant. Based upon this, the district court granted Walker's motion.

DISCUSSION

In appeals prosecuted pursuant to 22 O.S.2011, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

At preliminary hearing, the State has the burden to show probable cause that an offense has been committed and probable cause to show that the defendant committed the offense. *Heath v. State*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. In order to challenge the sufficiency of the evidence presented at preliminary hearing in a motion to quash, "the defendant must establish beyond the face of the indictment or information that there is insufficient evidence to prove any one of the necessary elements of the offense for which the defendant is charged." *State v. Delso*, 2013 OK CR 5,¶ 5, 298 P.3d 1192.

The Oklahoma Constitution grants an accused the right to be tried in the county in which the crime charged was committed.

> In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed.

Okla. Const. Article II, Section 20. Additionally, the State need not prove venue beyond a reasonable doubt, but rather, must prove it by a preponderance of the evidence. *See Omalza v. State*, 1995 OK CR 80, ¶ 7, 911 P.2d 286, 294.

Again, the State charged Walker with distributing a controlled dangerous substance within 2,000 feet of a school in Kay County. The State proved at preliminary hearing that Walker got into a vehicle with the confidential informant at a location in Kay County that was within 2,000 feet of a school. The two drove to a location in Osage County where Walker exited the car. Sometime between when he got into the car and when he exited the car Walker distributed controlled dangerous substance to the confidential informant. While this evidence established by a preponderance of the evidence that the crime of distribution of a controlled dangerous substance occurred in either Kay or Osage County, this crime was not the crime with which Walker was charged or upon which he was bound over.

Although the evidence presented at preliminary hearing supported the lesser included charge of distribution of controlled dangerous substance, the State did not request that the Information be amended to charge this lesser crime. Defense counsel preemptively addressed the issue at the motion hearing arguing that the district court did not have the authority at the hearing to amend the Information to the lesser charge. The prosecutor did not refute this argument but rather, simply asked the district court to clarify that his ruling "adopted" defense counsel's argument that it could not strike from the Information that the distribution occurred within 2,000 feet of a school. The district court judge

responded that he was adopting this argument and the State argues on appeal that this ruling was in error. It is true that Oklahoma statute permits the State to amend an Information, in matter of substance or form, where it can be done without material injury to the defendant. 22 O.S.2011, § 304. Amending the Information in this case to the lesser included offense of possession with intent to distribute would not have caused material injury to Walker. While the district court abused its discretion in adopting defense counsel's position which was contrary to law, this was an error without effect as the State had not requested to amend the Information to conform to the evidence presented at preliminary hearing nor did it indicate that it would have made such a request absent the district court's ruling.

Based upon the evidence presented at the preliminary hearing, we find that the district court did not abuse its discretion in granting Walker's motion to quash and dismiss.

DECISION

The ruling of the trial court sustaining Walker's Motion to Quash, Dismiss, and Otherwise Set Aside the Information and dismissing Case No. CF-2015-45 in its entirety is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE DAVID R. BANDY, ASSOCIATE DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

BRIAN HERMANSON
DISTRICT ATTORNEY
KAY COUNTY COURTHOUSE
201 SOUTH MAIN STREET
NEWKIRK, OK 74647
ATTORNEY FOR STATE

JARROD STEVENSON
STEVENSON LAW FIRM, PLLC
903 N.W. 13TH STREET
OKLAHOMA CITY, OK 73106
ATTORNEY FOR DEFENDANT

APPEARANCES ON APPEAL

BRIAN HERMANSON
DISTRICT ATTORNEY
SIERRA G. SALTON
ASSISTANT DISTRICT ATTORNEY
KAY COUNTY COURTHOUSE
201 SOUTH MAIN STREET
NEWKIRK, OK 74647
ATTORNEYS FOR APPELLANT

JARROD STEVENSON
THOMAS A. GRIESEDIECK
STEVENSON LAW FIRM, PLLC
903 N.W. 13TH STREET
OKLAHOMA CITY, OK 73106
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Dissent
LEWIS, J.: Concur
HUDSON, J.: Dissent

LUMPKIN, JUDGE: DISSENTING

I must respectfully dissent. This case presents a jury question whether the act of distribution occurred within 2,000 feet of a school. Although the State may very well seek an instruction upon the lesser included offense of distribution of methamphetamine at trial, the evidence at preliminary hearing established both offenses. The evidence also met the constitutional muster for the proof of venue.

It is apparent from the record that the District Court failed to apply the proper deferential review to the magistrate's determination. "The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that Appellee committed the crime." *State v. Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d 1127, 1129; 22 O.S.2011, § 258(8). "[W]hile the State is not required to prove Appellee's guilt with certainty, the State must establish that it is reasonable to believe that Appellee committed the offense(s) at issue." *State v. Juarez*, 2013 OK CR 6, ¶ 11, 299 P.3d 870, 873. The State need only prove that the crime "might have been committed" in the charged county by a preponderance of the evidence. *Omalza v. State*, 1995 OK CR 80, ¶¶ 6-7, 9, 911 P.2d 286, 294-95; OKLA. CONST. ART. 2, § 20 ("[T]he accused may be tried in any county in which the evidence indicates the crime might have been committed."). The magistrate has the authority to bind Appellee over for "any public offense" which the evidence supports. 22 O.S.2011, § 264. "Absent an abuse of discretion in reaching that determination, the magistrate's ruling will

remain undisturbed." *State v. Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d 1127, 1129.

The magistrate's decision was not clearly against the logic and effect of the evidence produced at preliminary hearing. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194 ("An abuse of discretion has also been described as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented."). Deputy Grigsba testified that he used a confidential informant to set up a hand-to-hand purchase of methamphetamine from Appellee. The informant advised Grigsba of the place and time of the scheduled meeting. The following day, Grigsba searched the informant's person and vehicle and he supplied the informant with funds for the transaction. Grigsba observed the informant travel to the designated location in Kay County which was within 2,000 feet of a school. Appellee got into the informant's vehicle and the informant drove him to the Osage Casino in Osage County. After Appellee exited the vehicle, Grigsba recovered the substance and surplus funds from the informant. As it is reasonable to believe that Appellee committed the charged offense at the designated location in Kay County which was within 2,000 feet of the school, the magistrate did not abuse her discretion.

Even if the District Court correctly determined that the magistrate had abused her discretion when she bound Appellee over for trial, the District Court erred when it agreed with defense counsel's argument that dismissal was

the sole remedy afforded by law. Oklahoma's statutes clearly make provision for the District Court to either direct that a new information be filed or order resubmittal of the case to the magistrate for further proceedings.

Our statutes have long authorized a criminal defendant to file a Motion to Set Aside or Demurrer to the indictment or information. *State v. Hammond*, 1989 OK CR 25, 775 P.2d 826, 827 (*Citing* Sections 493 and 504 of Title 22 O.S.1981), *overruled on other grounds by State v. Young*, 1994 OK CR 25, 874 P.2d 57. The proper procedure for the filing, determination, and result of these motions is set forth within 22 O.S.2011, §§ 493-513. This procedure also applies to the filing and determination of a motion to quash for insufficient evidence after preliminary hearing.

The Legislature placed the statute authorizing the filing of a motion to quash within the framework which governs the procedure for a demur or motion to set aside. "The enactment of 22 O.S.1991, § 504.1, statutorily created the motion to quash which previously had been a hybrid this Court held fell under Sections 493 or 504 of Title 22." *Tilley v. State ex rel. Scaggs*, 1993 OK CR 52, ¶ 5, 869 P.2d 847, 849. In enacting Section 504.1, the Legislature explicitly announced that "a motion to quash for insufficient evidence in felony cases after preliminary hearing" was "in addition to a demurrer to the indictment or information." 22 O.S.2011, § 504.1(A). Within § 501.1(D) the Legislature further provided that "[a]n order to set aside an indictment or information on judgment for the defendant on a motion to quash

for insufficient evidence, as provided in this section, shall not be a bar to a further prosecution for the same offense."

If the District Court sustains a demur, a motion to set aside, or a motion to quash, it should direct the filing of a new information or resubmittal of the case to either the magistrate or a grand jury when it appears that the basis for the motion or demurrer may be avoided. Sections 499 and 500 require the District Court to order the defendant discharged unless it directs the case resubmitted or a new indictment or information filed. Section 508 directs the District Court to enter a judgment sustaining the demurrer "unless the court, being of opinion that the objection on which the demurrer is sustained may be avoided in a new indictment or information, direct the case to be resubmitted to the same or another grand jury, or that a new information be filed."

The State's authority to amend the information is consistent with this procedure. This Court has recognized that the State is permitted to amend an information, in matter of substance or form, at any time before the defendant pleads, without leave, and may amend the information after plea on order of the court where the same can be done without material prejudice to the right of the defendant. *Sadler v. State*, 1993 OK CR 2, ¶ 41, 846 P.2d 377, 386; 22 O.S.2011, § 304. Coupled with the magistrate's express authority under 22 O.S.2011, § 264, to bind a defendant over for any public offense shown during the examination, it is clear that the Legislature has expressed a preference for

resubmittal of the case or amendment of the information as opposed to dismissal of the case.

In the present case, the District Court erroneously determined that it could not direct the State to file a new information in the case. Although the District Court recognized that an amendment to the information which removed the allegation that the act of distribution occurred with 2,000 feet of a school would cure the basis for Appellee's motion, the District Court found it was required to order dismissal of the case. Since the District Court's conclusion was a clearly erroneous conclusion and judgment as a matter of law this matter should be reversed.

HUDSON, J., DISSENTING

I would reverse the district court's order dismissing Walker's case and remand for further proceedings to allow for amendment of the information. The record shows the district court's dismissal of this case was based on an erroneous understanding of the law—i.e., that amendment of the information to conform with the evidence presented at preliminary hearing was not possible if the court granted the motion to quash. 22 O.S.2011, § 304. The prosecutor's exchange with the court adequately raised the issue of the court's authority to allow for an amendment. Moreover, the entire discussion of this issue below was skewed by defense counsel's dogged—and, again, erroneous—insistence that dismissal was the only option (M. Tr. 3-4, 15-18). Under these circumstances, the district court's misperception of the law foreclosed any amendment to the charge, thus amounting to an abuse of discretion. *See Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534-35 (an abuse of discretion is any unreasonable, unconscionable and arbitrary action taken by a trial court without proper consideration of the facts and law pertaining to the matter submitted). I therefore dissent to today's decision.