No. 04-92191-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLANT,

v.

DALTON J. UPTON, DEFENDANT-APPELLEE

BRIEF OF APPELLEE DALTON J. UPTON

APPEAL FROM THE DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE WARREN M. WILBERT, JUDGE
DISTRICT COURT CASE NO. 00-CR-2986

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STATEMENT OF THE CASE

The State of Kansas appeals to the Kansas Court of Appeals from the trial court's denial of its motion to reconsider.

STATEMENT OF ISSUES

Whether the State of Kansas can use the appeal of a ruling denying its untimely motion for reconsideration to "back-door" an out-of-time appeal on issues it failed to raise below.

STATEMENT OF FACTS

On January 25, 2001, the District Court of Sedgwick County, Kansas, sentenced Defendant, as a criminal history "G", to sixty (60) months in prison on the primary offense of Unlawfully Manufacturing a Controlled Substance (methamphetamine), contrary to K.S.A. 65-4159, a severity-level 1 drug-grid felony, a crime committed in November 2000. (R. I, 11, 20.) The court also imposed concurrent sentences on additional offenses committed at the same time: sixty (60) months in prison for Illegal Possession of Ephedrine/Pseudo-ephedrine, contrary to K.S.A. 65-7006(a), a severity-level 1 drug-grid felony; eleven (11) months in prison for Possession of Methamphetamine, contrary to K.S.A. 65-4160(a), a severity-level 4 drug-grid felony; and six (6) months in jail for Criminal Possession of a Firearm, contrary to K.S.A. 21-4204(a)(1), a class B non-person misdemeanor. (R. I, 10-11, 21-22.)

At a hearing on March 12, 2004, a Friday, the State of Kansas was represented by James E. Puntch, Jr., an Assistant District Attorney with considerable prosecutorial trial and appellate experience:[1]

THE COURT: State have any position on the motion?

MR. PUNTCH: No, Your Honor.

(R. II, 1-2.) Accordingly, the district court corrected the crime severity levels of the sentences, imposing a severity-level 3 drug-grid felony sentence of twenty-three (23) months in prison on the crime of Unlawfully Manufacturing a Controlled Substance and a concurrent a severity-level 4 drug-grid felony sentence of sixteen (16) months in prison on the crime of Illegal Possession of Ephedrine/Pseudoephedrine. (R. I, 27, 43-44; R. II, 1-7.)

On March 30, 2004, a Tuesday, the State filed a Motion for Reconsideration of the March 12th ruling arguing that the district court "has not considered the merits of the State's argument" that "*State v. McAdams*" [*sic*] is not to be applied retroactively, citing *State v. McCoin*, 32 Kan.App.2d 638, 87 P.3d 325 (March 26, 2004).[2] (R. I, 28-29.) The district court overruled the motion on April 13, 2004, because the State had not filed the motion within ten (10) days of March 12th and because *McCoin* was not yet binding precedent. (R. I, 42.) The State filed its Notice of Appeal on April 23, 2004, alleging that the district court had erred in denying its Motion for Reconsideration. (R. I, 45-46.)

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[1]Mr. Puntch's practice with the Sedgwick County District Attorney dates back to at least 1977. See *State v. Glymph*, 222 Kan. 73, 563 P.2d 422 (1977).

[2]This Judgment of the Court of Appeals since has been vacated and the opinion withdrawn from publication. *State v. McCoin*, ___ Kan. ___, __ P.3d ___ (No. 91,039, December 3, 2004).

ARGUMENT

1. The district court did not abuse its discretion in denying the State's untimely Motion for Reconsideration.

An appellate court reviews the denial of a motion to alter or amend judgment for abuse of discretion. *Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 441, 970 P.2d 526, 532 (1998).

A motion for reconsideration is considered a motion to alter or amend a judgment. *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128, 1135 (1992). A motion to alter or amend a judgment must be filed not later than ten (10) days after entry of the judgment complained of. K.S.A. 60-259(f). K.S.A. 60-206(a) applies to the computation of time for the filing of the motion under K.S.A. 60-259(f). *In re Marriage of Willenberg*, 271 Kan. 906, 909, 26 P.3d 684, 688 (2001). Thus, the State had ten (10) *business* days from Friday, March 12th, or until Friday, March 26th, to file a motion pursuant to K.S.A. 60-259(f). It failed to take any action until Tuesday, March 30th, and even then neither requested nor filed a motion to permit filing out of time. Under such circumstances, the district court did not abuse its discretion in denying the State's motion.

2. The State of Kansas failed to file a timely Notice of Appeal from the March 12th hearing; consequently, the Kansas Court of Appeals lacks jurisdiction to proceed further.

A motion to alter or amend judgment tolls the time for appeal only if it is filed timely within ten days of the entry of judgment. *Uhock v. Sleitweiler*, 13 Kan.App.2d 621, 625, 778 P.2d 359, 362 (1988).

The right to appeal in a criminal case is strictly statutory, and absent statutory authority, there is no right to appeal. *State v. Freeman*, 236 Kan. 274, 276, 689 P.2d 885, 889 (1984). Aside from K.S.A. 22-3603 regarding interlocutory appeals, an appeal by the prosecution in a criminal case is permitted only to the extent authorized by K.S.A. 22-3602(b); because it delineates no time limit for the prosecution to appeal, the thirty-day limit specified by the rules of civil procedure applies. *Freeman*, 236 Kan. at 277, 689 P.2d at 889 (citing K.S.A. 22-3606 and K.S.A. 60-2103).

Here, the State's time for appeal began to run when the district court announced its ruling on Friday, March 12, 2004. *See City of Wichita v. Brown*, 253 Kan. 626, 861 P.2d 789 (1993). An appellate court has jurisdiction to entertain a State's appeal only if it is taken within time limitations and in the manner prescribed by the applicable statutes. *State v. Snodgrass*, 267 Kan. 185, 196, 979 P.2d 664, 672 (1999); *State v. Unruh*, 263 Kan. 185, 189, 946 P.2d 1369, 1373 (1997); *State v. Kleen*, 257 Kan. 911, 913, 896 P.2d 376, 377 (1995). The State's failure to file its Notice of Appeal by Monday, April 12, 2004, bars this Court from proceeding further. The Kansas Appellate Courts have only such jurisdiction as is provided by law, and when the record discloses a lack of jurisdiction, the courts have the *duty* to dismiss the appeal. *State v. Moses*, 227 Kan. 400, 404, 607 P.2d 477, 481 (1980). No rational basis exists for holding the prosecution to a less strict time standard than that to which a defendant is held.

3. The State cannot "back-door" an appeal of the district court's ruling of March 12th by pretending to appeal from its ruling of April 13th.

In a criminal case, the prosecution cannot file an appeal merely to determine whether the trial court committed error. *State v. Stewart*, 243 Kan. 639, 644, 763 P.2d 572, 576 (1988). Instead:

> "Appeals to the court of appeals may be taken by the prosecution from cases before a district judge as a matter of right in the following cases, *and no others*:
> (1) From an order dismissing a complaint, information or indictment;
> (2) from an order arresting judgment;
> (3) upon a question reserved by the prosecution; or
> (4) upon an order granting a new trial in any case involving a class A or B felony or for crimes committed on or after July 1, 1993, in any case involving an off-grid crime."

K.S.A. 22-3602(b) (emphasis added). Quite obviously, subsections (1), (2) and (4) are not applicable here.

Appeals of questions reserved by the state are entertained only where they involve issues of statewide interest important to the correct and uniform administration of the criminal law and the interpretation of statutes. *State v. Crow*, 266 Kan. 690, 692-93, 974 P.2d 100, 103 (1999). Further, an appellate court only obtains jurisdiction over the rulings identified in the notice of appeal. *State v. Taylor*, 262 Kan. 471, 475, 939 P.2d 904, 907 (1997). Here, without reference to any statutory authority, the State's Notice of Appeal designated the denial of a motion for reconsideration as the specific ruling appealed; such an issue clearly fails to qualify as a "question reserved."

The State then attempts to enlarge its appeal by mischaracterizing the district court's April 13th ruling as leading directly to the imposition of an illegal sentence. No statutory

authority exists for the State to later expand on the question reserved for appeal. *State v. Cockerham*, 266 Kan. 981, 983, 975 P.2d 1204, 1206 (1999). Although no formal procedural steps are required by K.S.A. 22-3602(b) to appeal on a question reserved, the State must make proper objections or exceptions at the time the order complained of is made or the action objected to is taken, laying the same foundation for appeal that a defendant is required to lay. *State v. Schulze*, 267 Kan. 749, 751, 985 P.2d 1169, 1171 (1999). The State concedes it raises issues of illegal sentencing for the first time on appeal. Appellant's Brief at 6.

4. The sentence imposed by the district court on March 12th is not an illegal sentence.

Defendant's controlling sentence was imposed on a violation of K.S.A. 65-4159 making it unlawful for any person to manufacture any controlled substance, such as methamphetamine; statutorily, it has been classified as a drug severity-level 1 felony. K.S.A. 65-4161(a), however, makes it unlawful for any person to compound any designated stimulant, such as methamphetamine, and is classified as a drug severity-level 3 felony. Because compounding is statutorily defined to be synonymous with manufacturing (K.S.A. 65-4101(n)), these offenses are identical, and a defendant can be sentenced only under the lesser-penalty provisions of K.S.A. 65-4161(a). *State v. McAdam*, 277 Kan. 136, 142-47, 83 P.3d 161, ___ (2004); *see also State v. Barnes*, 278 Kan. 121, ___, 92 P.3d 578 (2004), (politely declining invitation to declare *McAdam* wrongly decided). Similarly, possession of ephedrine with intent to use it to manufacture a controlled substance in violation of K.S.A.

65-7006(a), statutorily classified as a drug severity-level 1 felony, and possession of drug paraphernalia with intent to use it to manufacture a controlled substance in violation of K.S.A. 65-4152(a)(3), a drug severity-level 4, are identical offenses and a defendant can receive only the lesser penalty. *State v. Frazier*, 30 Kan.App.2d 398, 42 P.3d 188, *rev. denied* 274 Kan. 1115 (2002); *see also State v. Campbell*, ___ Kan. ___, __ P.3d ___ (Nos. 88,654, 88,656, January 31, 2005) (curtly rejecting suggestion of another Court of Appeals panel that *Frazier* wrongly decided). These statutes remain unchanged in all material respects for the offense dates covered by *McAdam*, *Frazier* and this appeal.

Continually, the Kansas Supreme Court has noted – at various times calling the rule "axiomatic," "controlling" and "fundamental" – that the penalty or sentence imposed ***must*** be under the law as it stood when the offense was committed. *State v. Sanders*, 272 Kan. 445, 463, 33 P.3d 596, 609 (2001); *City of Dodge City v. Wetzel*, 267 Kan. 402, 409, 986 P.2d 353, 357 (1999); *State v. Whitaker*, 260 Kan. 85, 92, 917 P.2d 859, 865 (1996); *State v. Woodbury*, 132 Kan. 22, 294 P. 928, 935 (1931) (even then calling rule "long-settled"). Conversely, a sentence in conflict with the sentencing statute in effect when the crime was committed may violate constitutional prohibitions against cruel and unusual punishment. *Mueller v. State*, 28 Kan.App.2d 760, 767, 24 P.3d 149, *rev. denied* 271 Kan. 1037 (2001); U.S. CONST. amend. VIII; K.S.A. CONST. B. OF R. § 9. Under the Kansas Sentencing Guidelines Act ("KSGA"), which governs sentencing in this case, the only sentence presumed to be lawful and valid is one falling within the statutorily prescribed range for the two controlling factors: crime severity and the defendant's criminal history.

A sentence within the presumptive sentence for the crime is not appealable. K.S.A. 21-4721(c)(1). The sentence imposed by the district court on March 12th falls within the statutorily prescribed range under the law as it stood when the offense was committed for the two controlling factors: crime severity, consistent with *McAdam* and *Frazier*, and Defendant's criminal history of "G." Thus, it is not an illegal sentence.

The district court judge, defense counsel *and the prosecutor* applied the law as they in good faith understood it to be as of March 12, 2004. Unlike in *State v. Vanwey*, 262 Kan. 524, 941 P.2d 365 (1997), cited in the State's Notice of Appeal, but not in its Brief, there was no attempt to mislead the prosecutor or the judge. *See In re Senecal*, 266 Kan. 669, 974 P.2d 517 (1999). The State of Kansas has been vigorous in advocating against retroactive application of *Frazier* and *McAdam*, particularly when a defendant failed to timely appeal. Similarly, the State of Kansas should not be permitted to benefit from its failure to raise certain issues in the district court and its failure to timely appeal to gain retroactive application of certain subsequent decisions it might consider favorable. *See Barnes, supra*; *State v. McCoin*, ___ Kan. ___, __ P.3d ___ (No. 91,039, December 3, 2004). This appeal must be dismissed.

CONCLUSION

The State of Kansas filed an untimely Motion for Reconsideration that did not toll the time for appeal from the ruling it now seeks to reverse; thus, its Notice of Appeal from the ruling denying its untimely motion for reconsideration cannot be used to "back-door" an

out-of-time appeal on issues it failed to raise below, and the instant appeal must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this ____ day of February, 2005, five (5) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to:

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