

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA10-739

D.B.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 23, 2011

APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[NO. JV-2010-06]

HONORABLE TERRY SULLIVAN,
JUDGE

AFFIRMED

CLIFF HOOFFMAN, Judge

Appellant D.B. appeals from a Scott County Circuit Court Juvenile Division order granting the State's request for an extended juvenile jurisdiction (EJJ) designation.

On February 17, 2009, the State filed a petition in the juvenile division of circuit court in the case numbered JV 2009-07 alleging that D.B. should be declared delinquent on the offense of rape. The petition included a request for an EJJ designation. At a pre-adjudication hearing on November 24, 2009, D.B. raised the issue that no EJJ designation hearing had been held. The matter was reset for a pre-adjudication hearing on December 8, 2009, and at this hearing the State moved to nolle pros the petition with the anticipation of refileing the charges. D.B. objected to the charges being nolle prossed, but the court granted the motion.

On February 16, 2010, the State filed a petition for delinquency in the case numbered

JV 2010-06, which made the same allegations complained of in JV 2009-07 and also requested an EJJ designation. D.B. filed a motion to quash an EJJ designation. At a hearing on May 25, 2010, the court granted the State's request for EJJ designation,¹ and D.B. now appeals. For purposes of appeal, a designation order is a final, appealable order and shall be subject to an interlocutory appeal. Ark. Code Ann. § 9-27-503(f) (Repl. 2009).

D.B.'s first argument is that the trial court lost subject-matter jurisdiction of JV 2010-06 as an EJJ case by failing to hold an EJJ designation hearing in JV 2009-07 before the expiration of the ninety-day period set out in Arkansas Code Annotated section 9-27-503 (Repl. 2009). Arkansas Code Annotated section 9-27-503(a) provides that "[w]hen a party requests an extended juvenile jurisdiction designation, the court shall hold a designation hearing . . . no longer than ninety (90) days following the petition or motion requesting such designation." The petition requesting the designation in JV 2009-07 was filed on February 17, 2009, and served upon D.B. on February 22, 2009; thus, the ninety-day period expired well before the issue was brought up at the pre-adjudication hearing on November 24, 2009.

D.B. claims that allowing the State to voluntarily dismiss the case to refile violates the plain language of section 9-27-503(a) because the word "shall" in the statute makes a timely designation hearing mandatory. D.B. also argues that the title of section 9-27-503 is indicative of the legislature's intent to make the statute jurisdictional and that extended juvenile jurisdiction is a form of subject-matter jurisdiction. D.B. contends that jurisdiction

¹D.B. agreed to toll the time from May 11, 2010 to May 25, 2010, after requesting a continuance at the May 11, 2010 designation hearing; thus, the hearing was held within ninety days from the petition requesting an EJJ designation.

over the delinquency action was retained but that extended juvenile jurisdiction was lost due to failure to hold a timely designation hearing.

In *Cobbins v. State*, the defendant argued that the circuit court lost jurisdiction because it failed to hold a transfer hearing within ninety days after charges were filed. 306 Ark. 447, 816 S.W.2d 161 (1991). Arkansas Code Annotated section 9-27-318(b)(2) (Repl. 1991) stated that “the circuit court shall hold a hearing within ninety days of the filing of charges to determine whether to retain jurisdiction of the juvenile in circuit court.” A hearing on transferring the case from circuit court to juvenile court was demanded well beyond the ninety-day period and was not held until almost fourteen months after the charges were filed. The supreme court held that although the language of the statute was mandatory, it was silent on the effect of noncompliance and there was nothing to indicate it was jurisdictional.

The *Cobbins* court also held that it was appropriate to analogize to a statute requiring a parole revocation hearing within a reasonable time not to exceed sixty days after the defendant’s arrest, Arkansas Code Annotated section 5-4-310(b)(2) (1987). The *Cobbins* court noted that in *Haskins v. State*, 264 Ark. 454, 572 S.W.2d 411 (1978), it held that this sixty-day requirement was not jurisdictional but instead represented the period beyond which the hearing could not be delayed if the defendant objected. The *Haskins* court also held that failure to demand a hearing within the sixty-day period waived the right to insist on a timely hearing. *Cobbins* was represented by counsel who filed motions during the ninety-day period but made no motion to transfer during that period. The *Cobbins* court held that counsel’s failure to demand a transfer hearing until well beyond the ninety-day period waived

the right to insist on a timely hearing. *Cobbins*, 306 Ark. at 451–52, 816 S.W.2d at 164.

Here, D.B.’s objection to the failure to have the hearing within ninety days was untimely because it was not raised until after the ninety days had already passed. We hold that D.B. waived his right to insist on a timely hearing.

D.B. argues that this case should be governed by the holdings in cases involving the Arkansas speedy-trial rule where our supreme court has said that “the primary burden is on the court and the prosecutor to assure that a case is brought to trial in a timely fashion” and that “a defendant has no duty to bring himself to trial.” *Glover v. State*, 307 Ark. 1, 817 S.W.2d 409 (1991). However, the effect of noncompliance with the speedy-trial rule is written within the rule. Ark. R. Crim. P. 28.1. Arkansas Code Annotated section 9-27-503(a) contains no penalty for noncompliance.

D.B. also argues that his case should be treated like *Webb v. State*, 318 Ark. 581, 886 S.W.2d 624 (1994). In *Webb*, the defendant successfully motioned the circuit court to transfer his case to juvenile court. The juvenile court then granted the State’s motion to nolle prosequi the charges, and the State charged Webb again in circuit court. Our supreme court held that the circuit court had deliberately relinquished or lost jurisdiction of Webb by virtue of the waiver element of the transfer order. The court’s jurisdiction of Webb was surrendered pursuant to a valid hearing on the motion to transfer and could not be reconferred by the State’s action of refileing the charges. *Webb* is clearly distinguishable from the case at bar because here the juvenile court did not deliberately relinquish jurisdiction by transferring the case or by any other means.

For his second point on appeal, D.B. argues that he was denied due process of law when the trial court designated this matter as an EJJ case. D.B. claims that he had a fundamental right to see that section 9-27-503(a) was strictly construed with all doubts resolved in favor of the defendant. He also claims that a fundamental right to liberty is implicated because if he is sentenced under the EJJ statute, he may receive an adult suspended sentence that would not be in play if the statute is strictly construed and he is tried as an alleged delinquent. Even if there is no fundamental right or liberty interest, D.B. claims that the trial court's application of the law is fundamentally unfair because giving the State a "do over" does not comport with due process.

The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Hunt v. State*, 354 Ark. 682, 686, 128 S.W.3d 820, 823 (2003). Although penal statutes are to be strictly construed, nothing is taken as intended which is not clearly expressed. *Id.* There is nothing expressed in Arkansas Code Annotated section 9-27-503(a) about the effect of noncompliance and nothing that indicates the time limit is jurisdictional. As for his argument that the application of the law is fundamentally unfair, D.B. cites no authority as to what principle of fundamental fairness has been violated. This court has repeatedly held that it will not consider an argument, even a constitutional one, if the appellant makes no convincing argument or cites no authority to support it. *Talbert v. State*, 367 Ark. 262, 272, 239 S.W.3d 504, 513 (2006).

We affirm the order granting the State's request for an EJJ designation.

GLOVER and ABRAMSON, JJ., agree.