

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR10-414

KIARA SMITH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 20, 2010

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CR-2008-323-1CM-2]

HONORABLE ROBERT H. WYATT,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Kiara Smith was found guilty of two counts of indecent exposure in Jefferson County Circuit Court after appealing his district-court conviction. On appeal, Smith contends that the circuit court violated his right to a speedy trial. Because Smith failed to preserve the issue for our review, we affirm.

On May 1, 2008, Smith appealed to the Jefferson County Circuit Court his conviction in Jefferson County District Court. The matter was set for trial on April 27, 2009. However, on April 24, 2009, Smith requested, and was granted by the circuit court, a mental evaluation. The trial was reset for June 17, 2009. On June 10, 2009, the Arkansas Department of Human Services, Division of Behavioral Health Services, requested an extension of time to complete Smith's evaluation. An order was entered on August 4, 2009, resetting the June 17, 2009 jury

trial to December 7, 2009. The order contained a provision that the delay occasioned by the continuance would be excludable under Arkansas Rules of Criminal Procedure, Rule 28.3(a) (2009).

At the pretrial proceeding on December 7, 2009, defense counsel moved for dismissal of the trial based on the expiration of the speedy-trial time period. Counsel argued that there were only four days of speedy-trial time left when Smith moved for the mental examination. He claimed that the mental examination was completed and a report filed with the circuit court on August 26, 2009, and that once the mental examination was received, the speedy-trial time should have run anew. Smith argued that the time from August 26, 2009, to the time of the speedy-trial motion on December 7, 2009, should not have been excludable time from speedy-trial computation, and the case should have been dismissed. The trial court denied Smith's motion. He was tried and found guilty on both counts of indecent exposure and was sentenced to concurrent sentences of six months each. This appeal timely followed.

Arkansas Rule of Criminal Procedure 28 governs speedy trial. Any defendant charged in circuit court shall have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months of the date of arrest. *See* Ark. R. Crim. P. 28.1(c) and 28.2(a) (2010). Certain periods of time are excluded in computing the time for trial. *See* Ark. R. Crim. P. 28.3. The appellate court reviews the excludability of time for speedy-trial calculation de novo. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). Once a defendant demonstrates a prima facie case of a speedy-trial violation, specifically, that the trial will be

held beyond the twelve-month speedy-trial period, the burden is on the State to show that the delay was the result of the defendant's conduct or was otherwise justified. *Id.*

The defendant must lodge a timely objection to an order excluding time under Rule 28.3, however, or else the issue is not preserved for appellate review. *Mack v. State*, 321 Ark. 547, 905 SW.2d 842 (1995).

The parties agree that the time period between the date of Smith's motion, April 24, 2009, and the date that the mental-health evaluation became available, August 26, 2009, is attributable to Smith, and therefore not included for purposes of speedy trial. However, the period between after August 26, 2009, and the date of the jury trial on December 7, 2009, is at issue. Smith claims that the time period should be included in the speedy-trial calculation, and the State disagrees.

We agree with the State that Smith's point on appeal is not preserved for appellate review because Smith did not object in a timely fashion to the circuit court's order. The State contends that the order was filed on June 17, 2009, and excluded the time period at issue here.¹ Smith never objected to that order, nor did he object to the continued tolling of the speedy-trial clock after his mental-health examination was filed. Instead, he waited, and moved to dismiss on the morning of trial—six months from the date of the June 17, 2009 trial

¹The order at issue reflects a file-mark date of August 4, 2009. Because the jury trial was set for June 17, 2009, and the mental-health evaluation was not available until August 26, 2009, the jury trial was reset for December 7, 2009. The State's argument that the jury trial was reset by order filed June 17, 2009, misstates the actual date that the circuit court's order resetting the jury trial was filed.

Cite as 2010 Ark. App. 684

date and four months after the filing of the report. Such a delay cannot be considered timely. Because Smith was bound to timely object to the circuit court's order, the point is not preserved. *See Mack, supra*. Accordingly, we affirm Smith's conviction.

Affirmed.

PITTMAN and KINARD, JJ., agree.