

Kenneth VANSANDT *v.* STATE of Arkansas

CR 81-92

621 S.W. 2d 681

Supreme Court of Arkansas
Opinion delivered October 5, 1981

1. CRIMINAL PROCEDURE — SPEEDY TRIAL — TRIAL MUST BE WITHIN THREE TERMS OF COURT. — Appellant was not accorded his right to a speedy trial under Art. 8, A.R. Crim. P., Ark. Stat. Ann. Vol. 4A (Repl. 1977), inasmuch as he was not brought to

trial within three terms of court as required by Rule 28.2, A. R. Crim. P.

2. **CRIMINAL PROCEDURE — TRIALS, NECESSARY DELAY — BURDEN ON STATE TO PROVE EXCLUDABLE PERIODS.** — Rule 28.3, A. R. Crim. P., permits exclusions for periods of necessary delay in bringing an accused person to trial; however, the burden is on the State to prove excludable periods of time under the rule. *Held:* In the instant case the State did not meet its burden and the trial court improperly excluded a 43-day period from the period in which an accused person must be brought to trial.

Appeal from Arkansas Circuit Court, Southern District,
H. A. Taylor, Judge; reversed and dismissed.

Jenkins & Berry, by: *Russell D. Berry*, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. On September 12, 1980, appellant, Kenneth Vansandt, was convicted in Arkansas County Circuit Court of possession of a firearm by a felon and sentenced to five years imprisonment. Prior to trial Vansandt filed a motion to dismiss asserting that he was not accorded a speedy trial under Art. 8, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977); he alleged that he was not brought to trial within three terms of court as required by Rule 28.1 (b). We agree.

The trial court acknowledged that appellant's trial was held 39 days after three full terms of court had passed, but it found that there was an excludable period of 43 days under Rule 28.3 which permits exclusions for periods of necessary delay. It is not clear from the record which part of this rule the trial court relied upon in finding the excludable period, but the court did specify the excludable period began on March 28, 1980, when appellant filed his motion to suppress evidence and ended on May 9, when the hearing on this motion was actually heard by the court. This hearing was originally set for April 4, but was continued due to the unavailability of a key State witness.

The question presented is whether the trial court

correctly excluded the 43-day period from the computation of defendant's right to a speedy trial under our Rules of Criminal Procedure. The burden is on the State to prove excludable periods of time under Rule 28.3. *State v. Lewis*, 268 Ark. 359, 596 S.W. 2d 697 (1980). The State clearly did not meet its burden since the record reflects the witness for the hearing was unavailable for only one day. The State's only argument to support the 43-day delay was a statement that its witness, Deputy Ellenburg, "had been admitted to the hospital [on the day of the hearing] for an emergency situation. He had to stay there for a good period of time. I don't know the exact time." When asked if it was in excess of 30 days, the prosecutor stated, "I don't know." The defense attorney agreed that the witness was hospitalized on the day of the hearing, but refused to agree that his illness continued more than a day. The defense attorney then suggested that the State subpoena Deputy Ellenburg and base its argument for a longer excludable period upon the length of his stay in the hospital; but the State did not do so.

Reversed and dismissed.
