

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION FOURTEEN**

STATE OF KANSAS,)
 Plaintiff,)
)
vs.)
)
JASON M. JUDD,)
 Defendant.)
_____)

Case No. 08CR 1035

MEMORANDUM DECISION
State’s Motion to Dismiss

The State of Kansas filed a Motion to Dismiss in the above referenced case on March 24, 2009. The associate counsel, representing the victims, Daniel and Devin Llamas, filed an objection to the motion on March 26, 2009, pursuant to K.S.A. 19-717. Associate counsel at a hearing on the Motion to Dismiss requested additional time (until April 24, 2009) to file a brief. This court granted the request of the associate counsel and allowed the defendant and the State additional time to file briefs as well. The final brief was filed on May 11, 2009, and subsequently on May 14, 2009, all counsel notified the court that they were not requesting oral argument.

Conclusions of Law

The defendant and the State argue in their briefs that a prosecuting attorney controls criminal prosecutions, including the discretion to dismiss a criminal case. *State v.*

Williamson, 253 Kan. 163, 853 P.2d 56 (1993); *State v. Kilpatrick*, 201 Kan. 6, 439 P.2d 1999 (1968); *State of Kansas ex rel. v. Court of Coffeyville*, 123 Kan. 66, 169 P. 183 (1917); *State v. Wilson*, 24 Kan. 189 (1880).

In addition, defendant and the State contend that there are limitations on the trial court's power to interfere with prosecutorial functions. In *Williamson*, the Court contrasted the roles of the prosecuting attorney and the judge.

“[t]he executive power is the power to enforce laws, and judicial power is the power to interpret and apply laws in actual controversies. [Citation omitted.] The prosecuting attorney is a member of the executive, not judicial, branch of government. . . . Allowing judicial oversight of what is essentially a function of the prosecutor's office would erode that power. [Citation omitted.]”

253 Kan. at 166.

In *State v. Pruett*, the Court held that in a situation where the prosecutor exercised his discretion to reduce charges to lesser offenses, the trial judge had no right to substitute his judgment for that of the prosecutor absent some compelling reason to protect the rights of the defendant. 213 Kan. 41, 515 P.2d 1051 (1973). In *Williamson*, the Court stated that “[t]he prosecuting attorney has discretion to dismiss charges, and the court cannot refuse to allow a dismissal. [Citation omitted.]” 253 Kan. at 165-66.

However, K.S.A. 19-717 specifically provides a limitation on the discretion of a prosecuting attorney to dismiss a case. K.S.A. 19-717 provides as follows:

That the prosecuting witness in any criminal action or proceeding may, at his own expense, employ an attorney or attorneys to assist the county attorney to perform his duties in any criminal action or proceeding under any of the laws of the state of Kansas, and such attorney or attorneys shall be recognized by the county attorney and court as associate counsel in such action or proceeding, and no prosecution shall be dismissed over the objection of such

associate counsel until the reason of the county attorney for such dismissal, together with the objections thereto of such associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.

In the present case, the State filed a Motion to Dismiss contending that probable cause does not exist to believe that a crime has been committed. The associate counsel then filed an objection to the dismissal of the charges against Judd. Pursuant to the statute, the court is required to *fully consider* both the reason for the proposed dismissal and the objections to that dismissal. In a recent Kansas Supreme Court case, the Court stated that “the victim’s employment of an associate counsel places some restrictions on the county attorney’s discretion to dismiss the case, which is ordinarily unrestrained.” *State v. Pabst*, 285 Kan. 1, 7, 192 P.3d 630 (2008). Under K.S.A. 19-717, the prosecutor’s discretion to dismiss a case is restricted by the requirement that the court fully consider the reason for the proposed dismissal and the objections by the associate counsel to that dismissal.

Pursuant to K.S.A. 22-3208, a motion to dismiss is to be filed prior to arraignment or within 20 days after the plea is entered. Motions to dismiss are filed for a number of reasons. Typically they are filed after preliminary hearing to challenge the sufficiency of the evidence. In this case, the State filed a motion to dismiss because the charges were “not supported by probable cause.” Because the Motion to Dismiss was filed prior to preliminary hearing, the court has heard minimal evidence in this case. When the case was first filed, Judge Conklin reviewed the affidavit prepared by Detective James Mummey and found probable cause to issue an arrest warrant. This court also has reviewed that affidavit. On October 10, 2008, Detective Mummey presented some limited testimony related to a motion to determine the

sufficiency of the affidavit supporting probable cause, which this court denied at the close of the hearing. The court has heard no evidence whatsoever from any of the witnesses who were present at the scene on March 18, 2007. There is not sufficient evidence before the court upon which to fully evaluate the State's contention that the charges are not supported by probable cause. In the briefs presented by the State, associate counsel, and defendant there were a number of material, conflicting facts. The defendant acknowledges in his brief that "the trial court has not heard all of the evidence in the case at this stage of the proceeding." (p. 4, Defendant's brief in support of the State's Motion to Dismiss). The issue of whether there is probable cause is a factual issue which can only be determined by hearing the evidence in this case. While K.S.A. 19-717 does not specifically provide for an evidentiary hearing, this court finds that the reason for the dismissal, *ie.* lack of probable cause, cannot be *fully considered* by the court based solely on arguments of counsel as set out in the briefs. This is particularly true when the alleged facts as stated in the brief of the associate counsel for the victims conflict with the alleged facts submitted by the defendant and the State in their briefs.

Therefore, this court has determined that it is necessary to hold an evidentiary hearing on the Motion to Dismiss. The court has set a conference call on **June 9, 2009 @ 2:00 p.m.** to schedule the evidentiary hearing.

Dated this **5th** day of June, 2009.

Nancy Parrish
District Judge, Third Judicial District

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION** was mailed, hand delivered, or placed in pick-up bin this 5th day of June, **2009**, to the following:

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