NOT DESIGNATED FOR PUBLICATION

No. 117,701

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRIANA MARIE BRASHIER,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES E. PHELAN, judge. Opinion filed November 30, 2018. Affirmed.

Catherine A. Zigtema, of Zigtema Law Office LC, of Shawnee, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BUSER, P.J., ATCHESON, J., and WALKER, S.J.

PER CURIAM: Defendant Briana Marie Brashier appeals her convictions for two counts of battery and one count of misdemeanor criminal damage to property following a bench trial in Johnson County District Court on the grounds her trial lawyers ineffectively represented her by failing to object to a lack of personal jurisdiction and by failing to assert a statutory speedy trial violation. She also asserts her waiver of her right to jury trial was legally insufficient. We find the contentions to be without merit and affirm Brashier's convictions and resulting sentences.

Brashier does not contest the sufficiency of the State's evidence to support the charges, and her points on appeal do not depend upon the underlying factual circumstances. So we dispense with a narrative account of them. All three charges arose from a single incident in May 2015. Brashier was promptly taken into custody, charged, and released on bond the following day. The State dismissed the initial case without prejudice on September 25, 2015, when a witness failed to appear for the scheduled trial. The State refiled the charges as a new case on September 29, 2016, just over a year later.

In late December 2016, Brashier sought to change lawyers. On January 11, 2017, the district court ended up appointing a new lawyer to represent her. The new lawyer filed a request for jury trial a week later and about two months after that waived a jury in favor of a bench trial. The district court tried the case on April 12 and after hearing the evidence convicted Brashier of all three misdemeanors. The district court sentenced Brashier to concurrent six-month jail terms on each conviction and placed her on probation for 12 months. Brashier has timely appealed.

Brashier characterizes her first point on appeal as ineffective assistance of her trial lawyers in violation of right to counsel as guaranteed in the Sixth Amendment to the United States Constitution. In turn, Brashier identifies what she says are two instances of constitutionally ineffective representation: (1) Her first lawyer failed to assert the State's lack of personal jurisdiction over her in the refiled case because she purportedly never received a summons or a copy of the complaint; and (2) her second lawyer failed to assert a violation of K.S.A. 2017 Supp. 22-3402 that affords criminal defendants a statutory right to speedy trial.

We typically do not look at ineffectiveness claims on direct appeal for the very practical reason that little in the record sheds much light on the strategic considerations, if any, a trial lawyer may have had for taking certain actions or for having not acted in other

ways. *State v. Dull*, 298 Kan. 832, 839, 317 P.3d 104 (2014). That sort of evidence can be developed in a habeas corpus proceeding where the defendant's trial lawyer often will testify about why he or she handled the criminal case in a particular manner. In exceedingly rare instances, we might consider a constitutional ineffectiveness claim if the relevant facts were undisputed and the purported grounds could not possibly be explained as the product of a reasoned defense strategy. See *Wimbley v. State*, 292 Kan. 796, 807, 275 P.3d 35 (2011). That rare case is not this case.

Although we decline to consider Brashier's constitutional claim for ineffective representation in the district court, we can and will review as free-standing assertions of error the constituent issues she has identified as composing that claim.

After the State refiled the charges, Brashier apparently wasn't served with a summons or a copy of the complaint in the new case. She seems to have raised the lack of service more than once. The record is unclear whether the State initially corrected the oversight. The error would affect the district court's personal jurisdiction over Brashier rather than its subject matter jurisdiction over the criminal case.

In any event, the record shows that during a hearing on November 30, 2016, Brashier asserted that she had never received the complaint from the refiled case. The State suggested that was incorrect. The district court, however, printed out a copy of the complaint and gave it to Brashier and her lawyer. So Brashier indisputably received the complaint and notice of the charges as of that date.

Brashier may not have gotten a summons—the record isn't excruciatingly clear and at least suggests she might not have been served. But the purpose of a summons is to notify a defendant that a complaint has been filed, to describe the charges, and to require the defendant to appear before the district court at a specified time and place to respond. See K.S.A. 2017 Supp. 22-2304(b). Here, by the time Brashier formally received the

complaint on the record, she already had a lawyer and had made several court appearances in the refiled case. To the extent there might have been a technical slipup in the paperwork, the error was harmless. Brashier obviously had notice of the charges long before she elected to go to trial, and she claims no actual prejudice. Any problem affected neither the district court's subject matter jurisdiction over the case nor its personal jurisdiction over Brashier.

Brashier also complains that she did not receive a trial within the time limits in K.S.A. 2017 Supp. 22-3402. Her second lawyer acknowledged a potential issue. The lawyer informed the district court he reviewed the lapsed time, taking account of both the original and refiled cases, and saw no speedy trial violation. On appeal, Brashier essentially says that's wrong. We have carefully examined the record and find no statutory speedy trial violation. There appear to be no disputed facts, and to the extent the record may be imprecise we give the benefit of any imprecision to Brashier. So the issue presents a question of law we can resolve. *State v. Dupree*, 304 Kan. 43, 48, 371 P.3d 862, *cert. denied* 137 S. Ct. 310 (2016).

Brashier concedes she was free on an appearance bond during the prosecution of the initial case and the refiled case. The State, therefore, had to bring her to trial within 180 days. See K.S.A. 2017 Supp. 22-3402(b). But delays attributable to Brashier, such as requested continuances of the trial, don't count against the 180-day limit. For purposes of determining the time attributable to a criminal defendant's requests, the district court measures from the date a request for continuance is granted to the next trial date. *State v. Robinson*, 306 Kan. 1012, 1019, 399 P.3d 194 (2017); *State v. Brown*, 283 Kan. 658, 666, 157 P.3d 624 (2007).

The statutory speedy trial time begins to run at arraignment or when arraignment is waived. *Robinson*, 306 Kan. at 1018; *State v. Jamison*, 248 Kan. 302, 304, 806 P.2d 972 (1991). Because the charges in the refiled case were identical to the charges in the

original case that the State dismissed, the speedy trial time should be aggregated or tacked. *State v. Parry*, 305 Kan. 1189, 1197, 390 P.3d 879 (2017) ("[T]his court has viewed the filing of the same criminal charges against the same defendant in successive cases as a single action for purposes of computing speedy trial times under K.S.A. 22-3402."); *Jamison*, 248 Kan. at 304 ("[T]he State cannot avoid the time limitations of K.S.A. 22-3402[2] by dismissing an action and then refiling the identical charges against the same defendant, absent a showing of necessity."). The State has not shown necessitous circumstances for dismissing the first case that would preclude tacking the speedy trial time for it with the speedy trial time for the refiled case, since it did not request a continuance before dismissing. See *Jamison*, 248 Kan. at 305 (citing with approval *State v. Ransom*, 234 Kan. 322, 325-27, 673 P.2d 1101 [1983], and *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 275-79, 589 P.2d 626 [1979]). So the time between Brashier's arraignment in the first case on May 22, 2015, and the dismissal of that case on September 25, 2015, has to be assessed for statutory speedy trial purposes.

One hundred twenty-six days elapsed between Brashier's arraignment and the dismissal of the first case. At the arraignment, the district court set the case for a scheduling conference on June 17, 2015. The record doesn't clearly establish who requested the scheduling conference, so we give Brashier the benefit and count the time between May 22 and June 17 for speedy trial purposes.[*] According to the register of action, at the scheduling conference, the district court set trial for July 21. The time between the scheduling conference and that trial date also counts toward the speedy trial limit. The day before trial the State requested a continuance, and the district court set a new date for August 25. That time counts against the speedy trial limit. On August 25, Brashier requested a continuance; the district court reset the trial for September 25. That delay, resulting from Brashier's request, does not reduce the 180-day period. The case was dismissed on September 25. Reviewing the record as favorably as possible for Brashier for speedy trial purposes, the State was responsible for 95 days in the first case from May 22 through August 25, 2015.

[*]The transcript of the arraignment shows that a lawyer appeared for Brashier, since he or she acknowledged receipt of the complaint and waived its reading. The individual, however, is not identified by name and is referred to only as "Voice." A prosecutor also appeared at the arraignment and presented the State's position on bond. The prosecutor is also unnamed and identified as "Voice." In between the statement obviously made by the defense lawyer Voice and the statement obviously made by the prosecutor Voice, the district court asks whether the case should be set for a scheduling conference or trial. One or the other Voice responds, "Scheduling." And the district court set the conference for June 17. We suppose that choice typically would have been extended to Brashier, as the defendant. But the record is effectively inscrutable as to who actually responded to the district court's question. We, therefore, assume the prosecutor did and attribute the time from May 22 to June 17 to the State.

To resolve Brashier's claim on appeal, we assume without deciding that the 180-day speedy trial time resumed when the State filed the complaint in the new case on September 29, 2016. The assumption is debatable, especially given Brashier's contention she never received a summons and wasn't served with the complaint. But Brashier could be entitled to no more favorable an assessment. The time between the dismissal of the case in September 2015 and its refiling in September 2016 does not count for speedy trial purposes. K.S.A. 2017 Supp. 22-3402(b) (180-day limit applies to period defendant "charged with a crime and held to answer on an appearance bond"); *Jamison*, 248 Kan. at 304. Brashier went to trial on April 12, 2017—195 days after the new case had been filed. But during that stretch, she prompted various delays of the trial.

Brashier sought and received a continuance to find a new lawyer. When she couldn't, the district court appointed a lawyer who then obtained additional continuances of the trial. As set out in *Brown*, the time between the date Brashier obtained a continuance and the new trial date were attributable to her for speedy trial purposes. See *Brown*, 283 Kan. at 666. By that measure, the entire period from December 20, 2016, to April 12, 2017, had to be excluded from the 180-day speedy trial time. In turn, the most that could be charged to the State in the refiled case was 82 days—from September 29 to December 20, 2016. When that time is aggregated with the chargeable speedy trial time

from the original case, the total is 177 days—just within the statutory 180-day limit. K.S.A. 2017 Supp. 22-3402(b). Brashier received a speedy trial.

With respect to Brashier's first point on appeal, we find no tangible error. The manner in which Brashier was supplied with a copy of the complaint in the refiled case neither substantively diminished any of her rights nor caused her actual prejudice. And she was not deprived of a speedy trial. So Bashier has not presented any reversible error underlying her claim for a violation of her Sixth Amendment right to counsel.

For her remaining issue on appeal, Brashier contends the waiver of her right to jury trial was inadequate and the inadequacy vitiated the bench trial along with the resulting convictions. Brashier's argument collapses because of a foundational flaw: She failed to secure her right to a jury trial on these charges. Brashier couldn't waive what she never had. The sufficiency of a waiver of a nonexistent right amounts to a legal irrelevancy.

All of the charges against Brashier carried a maximum punishment of six months in jail. See K.S.A. 2014 Supp. 21-5413(g)(1) (penalty provision for battery); K.S.A. 2014 Supp. 21-5813(b)(3) (penalty provision for criminal damage to property under $1,000); K.S.A. 2014 Supp. 21-6602(a)(2) (defining the penalty for class B misdemeanors). In the words of the law, that makes them "petty offenses." Criminal defendants have no constitutional right to jury trials for petty offenses. *Duncan v. Louisiana*, 391 U.S. 145, 159-61, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *State v. Shannon*, 258 Kan. 425, 435-36, 905 P.2d 649 (1995); *State v. Woolverton*, 52 Kan. App. 2d 700, 701-02, 371 P.3d 941 (2016), *rev. denied* 306 Kan. 1331 (2017). The constitutional right to jury trial automatically attaches to "serious crimes" (those punishable by incarceration for more than six months), and a defendant must affirmatively waive that right.

Although Brashier had no constitutional right to a jury trial, she did have a statutory right conferred in K.S.A. 22-3404. But the statutory right for petty offenses does not operate in the same way as the constitutional right. Pertinent here, a defendant must affirmatively request a jury trial for a petty offense—the right does not automatically arise. Under K.S.A. 22-3404(1), the defendant has to file a written request for a jury trial "not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel."

In the refiled case, the district court scheduled and then rescheduled the trial for October 26, November 30, and then December 20, 2016. The district court put any later trial setting on hold while Bashier unsuccessfully sought to hire a lawyer. As we mentioned, the district court appointed a new lawyer for Bashier in January 2017. The new lawyer filed a request for jury trial on January 17. The request, however, was long past the deadline fixed in K.S.A. 22-3404(1).

As provided in K.S.A. 22-3404(1), the district court may excuse a defendant's failure to timely request a jury trial if it finds the failure "would cause undue hardship or prejudice to the defendant." Brashier didn't request such a finding, and the district court never granted her relief from the deadline. As a result, Brashier's jury trial request was legally ineffective and secured nothing. The later waiver, whether or not facially sufficient in form, amounted to an empty exercise, since Brashier purported to waive a right she had never acquired. Brashier's appellate claim of error fails.

Affirmed.