SUMMARY
April 25, 2024

2024COA43

No. 23CA1011, *People v. Allen* — Criminal Law — Preliminary Hearing or Waiver — Defendant in Custody

A division of the court of appeals holds that a defendant who has an active warrant for his arrest on a particular offense, but who has not yet been arrested on that warrant, is not "in custody" for that offense for the purposes of determining entitlement to a preliminary hearing under section 16-5-301(1)(b)(II), C.R.S. 2023, even though he is incarcerated in another state for an unrelated crime.

COLORADO COURT OF APPEALS **2024COA43**

Court of Appeals No. 23CA1011
El Paso County District Court No. 21CR2580
Honorable William H. Moller, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Robert Charles Allen III,

Defendant-Appellee.

ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LUM
Welling and Yun, JJ., concur

Announced April 25, 2024

Michael J. Allen, District Attorney, Dole Baker, Senior Deputy District Attorney, David Illingworth, Deputy District Attorney, Colorado Springs, Colorado, for Plaintiff-Appellant

Megan A. Ring, Colorado State Public Defender, William J. Patrick, Deputy State Public Defender, Colorado Springs, Colorado, for Defendant-Appellee

¶ 1 The prosecution appeals the district court's order dismissing the charge of menacing against defendant, Robert Charles Allen III, after the prosecution failed to present evidence at a preliminary hearing. Applying *People v. Subjack*, 2021 CO 10, and distinguishing that case from the one at hand, we conclude that Allen wasn't in custody for the menacing charge although he was incarcerated in another state for a separate crime and had an active warrant for his arrest in Colorado on the menacing charge; therefore, he wasn't entitled to a preliminary hearing. We reverse the court's order and remand for reinstatement of the menacing charge.

I. Background

¶ 2 Allen's charge of menacing, a class 5 felony, arose out of an incident in which he allegedly drove up next to the victim's car, pointed a handgun at her, and threatened to kill her. Allen, who was serving a sentence in a Louisiana Department of Corrections facility for an unrelated conviction when he received notice of the menacing count, sent a letter to the district court requesting to proceed with his "arrest, booking, and or seizure" so that he "may proceed to resolve any and all criminal allegations brought against

[him] in a timely fashion." In response to the letter, the court entered a written order for the prosecution to prepare a video writ so that Allen could appear in court virtually. The court also appointed the office of the public defender to represent him.

¶ 3 The prosecution filed the writ, and Allen appeared in court by video from the Louisiana Department of Corrections on January 12, 2023. At the hearing, the parties confirmed that there was an active warrant for the menacing charge. Defense counsel requested a preliminary hearing, and Allen agreed to appear at the preliminary hearing by video. The prosecutor objected to setting the matter for a preliminary hearing because, although Allen was serving a sentence in Louisiana, he was "not in custody on this case." Defense counsel responded that Allen was entitled to a preliminary hearing because "he is currently in custody [in Louisiana]," "there is a warrant out," and he had not yet posted bond. Applying *Subjack*, the district court initially concluded that, because Allen was "not technically in custody" on the menacing case, he was "not entitled to a prelim[inary hearing]." The court agreed to reset the matter for "another first appearance" and ordered the prosecution to file an "in-person writ."

¶ 4 At the next hearing, Allen again appeared by video and again requested a preliminary hearing.[1] The prosecutor again objected because Allen was not yet in custody on this case. The district court said it was "going to go ahead and set the matter," but the parties could file an objection and a response, and it would "make a ruling based on that." The court also reaffirmed with Allen that he was willing to appear by video for the preliminary hearing.

¶ 5 The prosecution filed a motion requesting that the court vacate the preliminary hearing because Allen was "not in custody for the offenses charged," and therefore, under *Subjack* and section 16-5-301(1)(b)(II), C.R.S. 2023, he was not entitled to a preliminary hearing. Defense counsel did not file a response.

¶ 6 At the next hearing, when Allen did not appear virtually or otherwise, defense counsel asked to continue the matter with a new writ. The district court was made aware of the prosecution's

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[1] The prosecution was unable to secure Allen's appearance because Louisiana is not a party to the Interstate Agreement on Detainers Act. *See* § 24-60-501, C.R.S. 2023. Therefore, the only way to secure his presence in Colorado would have been by an executive agreement between the Governor of Colorado and the Governor of Louisiana. *See* §§ 16-19-101 to -132, C.R.S. 2023. The record does not reflect that the prosecution ever requested or received any executive agreement.

motion, and the preliminary hearing was reset without further objection. The court then issued a written order noting that the matter had been addressed and requested that the prosecution issue a new video writ. The prosecution sought C.A.R. 21 relief, which our supreme court denied.

¶ 7 When the parties appeared for the scheduled preliminary hearing, Allen appeared by video and defense counsel requested to proceed. The prosecution objected and argued again that, under *Subjack* and "the plain language of [section] 16-5-301," Allen was not in custody for the offense charged, and he was, therefore, not entitled to a preliminary hearing. The district court disagreed, noting that, because Allen was serving a prison sentence in Louisiana, he was "unable to make bond" and it was "impossible" for him to "bring himself to Colorado."

¶ 8 The district court then asked the prosecutor if he was ready to proceed with the preliminary hearing. The prosecutor responded, "[I]f the court finds that the defendant is in fact entitled to the preliminary hearing, the People will not be calling any witnesses." In response, defense counsel asked the court to dismiss the menacing charge. The court noted that the prosecution was

"repeatedly placed on notice that today would be a preliminary hearing" and it was "under obligation to have witnesses ready to go." Having failed to do so, the court found "there's no probable cause to move this case forward" and dismissed the menacing charge.

II. Discussion

¶ 9 The prosecution contends that the district court erred when it dismissed Allen's menacing charge based on the prosecution's failure to present evidence at the preliminary hearing because Allen wasn't in custody for the menacing charge and therefore wasn't entitled to the preliminary hearing that the district court held. Under the novel facts presented, we agree.

A. Standard of Review

¶ 10 Whether a defendant is entitled to a preliminary hearing is a question of law that we review de novo. *People v. Vanness*, 2020 CO 18, ¶ 16.

B. Analysis

¶ 11 In Colorado, a defendant charged with a class 4, 5, or 6 felony is entitled to a preliminary hearing only if they are "in custody for the offense for which the preliminary hearing is requested." § 16-5-

301(1)(b)(II); *see also* § 18-1-404(2)(b), C.R.S. 2023 (allowing a defendant to demand and receive a preliminary hearing "if the defendant is in custody"); Crim. P. 7(h)(1) (allowing a defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing to request one "if the defendant is in custody for the offense for which the preliminary hearing is requested").

¶ 12 In *Subjack*, our supreme court addressed whether a criminal defendant is "in custody" for purposes of entitlement to a preliminary hearing if the defendant is arrested (and unable to post bond) in connection with one offense while simultaneously in custody for a separate, unrelated offense. *Subjack*, ¶ 1. Rejecting the "primary basis" approach articulated in *People v. Taylor*, 104 P.3d 269 (Colo. App. 2004), and *People v. Pena*, 250 P.3d 592 (Colo. App. 2009), the court held that "a defendant is entitled to a preliminary hearing on an offense so long as he is 'in custody for [that] offense.'" *Subjack*, ¶¶ 3, 19.[2] The court concluded that the

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[2] The "primary basis" approach asked whether the offense for which the preliminary hearing is requested forms the primary basis of the defendant's custody. *People v. Taylor*, 104 P.3d 269, 272 (Colo. App. 2004), *overruled by People v. Subjack*, 2021 CO 10; *People v. Pena*, 250 P.3d 592, 594-96 (Colo. App. 2009), *overruled by Subjack*, 2021 CO 10.

defendants, Subjack and Lynch, who had been arrested on new charges while they were already serving prison sentences on unrelated offenses, were entitled to a preliminary hearing because if they "were not serving prison sentences — they would remain in custody . . . because they ha[d] not posted bond." *Id.* at ¶¶ 2, 27.

¶ 13 But unlike the defendants in *Subjack*, Allen was not being held in connection with the menacing charge. Though he had an active warrant for his arrest, he had not yet been arrested on it. Rather, the only thing holding him in custody was the unrelated Louisiana prison sentence he was serving. Therefore, he was not "in custody" for the menacing charge within the meaning of section 16-5-301(1)(b)(II) and Crim. P. 7(h)(1); accordingly, he was not entitled to a preliminary hearing. *See Subjack*, ¶ 19. We note, however, that Allen may become entitled to a preliminary hearing if there is a change in his custodial status on the menacing charge. *See, e.g.*, *People v. Rowell*, 2019 CO 104, ¶ 23 (holding that the defendant's request for a preliminary hearing is not successive where it is based on a new circumstance — namely, being held in custody for the first time on charges for which the defendant is entitled to a preliminary hearing under section 16-5-301(1)(b)(II)).

¶ 14 Where, as here, a class 5 felony is involved, the legislative mandate in section 16-5-301(1)(b)(II) authorizes a court to hold a preliminary hearing only when the defendant is in custody for the offense for which the preliminary hearing is requested. *See* § 16-5-301(1)(b)(II) ("Any defendant accused of a class 4, 5, or 6 felony . . . who is not otherwise entitled to a preliminary hearing . . . may demand and shall receive a preliminary hearing . . . *if the defendant is in custody for the offense for which the preliminary hearing is requested* . . . .") (emphasis added). Because Allen was not in custody on the class 5 felony menacing charge, he was not entitled to ask for a preliminary hearing; therefore, the court was without authority to conduct one. *See Taylor*, 104 P.3d at 272-73 (concluding the court "lacked the power and authority" to conduct a preliminary hearing for a defendant who was not "in custody" as determined under the now abrogated "primary basis" approach);[3] *see also* § 16-5-301(1)(b)(II) (stating that, upon either party's

[3] The analysis used in *Taylor* to determine whether a defendant is "in custody" was overruled by *Subjack*. *Subjack*, ¶¶ 23-24, 29. However, *Subjack* did not overrule the notion that a district court lacks the authority to conduct a preliminary hearing for a defendant who isn't statutorily entitled to ask for or receive one. *See id.*

motion, a court "shall vacate" any previously scheduled preliminary hearing for a defendant accused of a class 4, 5, or 6 felony if there is a "reasonable showing" that the defendant was released from custody prior to the hearing).

¶ 15 Because the district court lacked the authority to conduct a preliminary hearing, it necessarily follows that the court was without authority to dismiss the charges based on the prosecution's refusal to proceed at the scheduled, but unauthorized, preliminary hearing.

III. Disposition

¶ 16 The order is reversed, and the case is remanded to the district court with directions to reinstate the menacing charge.

JUDGE WELLING and JUDGE YUN concur.