COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1517-CR **Cir. Ct. No. 2011CF123**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STEVEN J. DAVID,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Reversed and cause remanded.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from the judgment dismissing the felony bail-jumping charge against Steven J. David and from the order denying its motion for reconsideration. On our de novo review, we conclude

that sufficient plausible evidence existed to find probable cause to bind David over for trial. We therefore reverse the judgment and order.

¶2 David was released on bail after being charged with felony stalking. Conditions of his bond required that he have no contact, direct or indirect, with the victim, her children or her parents and that he remain at least two blocks from those parties and their residences. He also was ordered to appear at all court dates.

¶3 David was present at the preliminary hearing for the stalking case. The victim testified. As she left the stand and passed the table where David sat, he said "happy birthday" to her. The circuit court admonished David that the contact was inappropriate. The State charged him with one count of felony bail jumping for violating the no-contact provision of his bond in the stalking case.

¶4 The bailiff from the preliminary hearing for the stalking case testified at the preliminary hearing for the bail-jumping matter. He testified that he had been positioned about two feet away from David, that he heard David say happy birthday to the woman and that he noted no sarcasm or anything unusual in David's tone. After hearing arguments of counsel, the court stated that it "[did not] have a problem finding probable cause." The court bound him over.

¶5 David moved to dismiss the bail-jumping charge on the basis that the bond's no-contact provision was unconstitutionally vague. He argued that the conditions that he stay at least two blocks away from the victim yet keep all court dates failed to put him on notice of what was expected of him when he unavoidably came into contact with her in the courtroom. Persuaded by the rationale of two out-of-state cases, the court granted David's motion. The State moved for reconsideration. The court denied the motion, and the State appeals.

¶6 Our review of a circuit court's review of a probable cause determination at a preliminary hearing is de novo. *See* ***State v. Johnson***, 231 Wis. 2d 58, 66, 604 N.W.2d 902 (Ct. App. 1999). Probable cause exists when there is a "believable or plausible account" that a felony was committed. ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). The judge is not to choose between conflicting facts or inferences or weigh the evidence. ***State v. Koch***, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993). That is for the fact-finder at trial. ***Dunn***, 121 Wis. 2d at 398. The court's only role is to determine whether the facts and inferences drawn from them support the conclusion that the defendant probably committed a felony. ***Koch***, 175 Wis. 2d at 704.

¶7 The elements of felony bail jumping are that the defendant was charged with a felony, was released from custody on bond, and intentionally failed to comply with the conditions of his or her bond. WIS. STAT. § 946.49(1)(b) (2009-10). David was charged with stalking, a felony, and was released from custody on bond. The question was whether by speaking to the victim, David intentionally failed to comply with the bond's no-contact condition.

¶8 The court initially found that the evidence was sufficient to establish probable cause. Upon David's motion to dismiss the charge, however, the court was persuaded by ***In re Jones***, 898 A.2d 916 (D.C. 2006), and ***Commonwealth v. Haigh***, 874 A.2d 1174 (Pa. Super. Ct. 2005), that the bail-jumping charge against David should be dismissed. While on first reading the two cases appear strikingly similar to the one at bar, on closer look we are not convinced.

¶9 The key distinction between ***Jones*** and ***Haigh*** and this case are the procedural postures and the associated burdens of proof. ***Jones*** and ***Haigh*** arose postconviction. At trial, the State must prove the elements of a crime beyond a

reasonable doubt. *See* ***State v. Russo***, 101 Wis. 2d 206, 213, 303 N.W.2d 846 (Ct. App. 1981). Here, however, the issue arose in the context of a preliminary hearing, where the question simply is whether probable cause exists to allow the charge to go forward. *See* ***Dunn***, 121 Wis. 2d at 396-97. Probable cause exists when there is a "believable or plausible account" that a felony was committed. ***Id.*** at 398. If a plausible account exists, the defendant must be bound over for trial, even if a contrary plausible account also exists. ***State v. Sorenson***, 152 Wis. 2d 471, 481, 449 N.W.2d 280 (Ct. App. 1989).

¶10 The court here found that the conflicting bond conditions—that he remain at least two blocks from the victim yet appear at a hearing she would attend—resulted in a blurring of lines between acceptable conduct and a violation of his bond, that "happy birthday" was said without sarcasm, and that the conduct was de minimis. A preliminary hearing is not the forum to choose between conflicting facts or inferences, however, or to weigh the State's evidence against the defendant's. ***Dunn***, 121 Wis. 2d at 398. In view of the tension between the bond conditions here, the circuit court's decision to reverse the bindover made some practical sense. We are constrained, however, to conclude that it was error.[1]

¶11 We also conclude that the no-contact provision of David's bond was not unconstitutionally vague. Due process requires fair notice. *See* ***State v. Ehlenfeldt***, 94 Wis. 2d 347, 355, 288 N.W.2d 786 (1980). Here, the no-contact provision ordered that David have "no contact directly or indirectly" with the victim. That constitutes fair notice that he was not to speak to her.

[1] We encourage circuit courts that issue no-contact orders to clarify how parties subject to those orders should conduct themselves while in a courtroom and in the presence of those with whom they are not to have contact.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.