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NOTICE: UNPUBLISHED OPINION

Court of Appeals of Alaska.

Jay STEVENS, Appellant,
v.
STATE of Alaska, Appellee.

No. A-2970. | No. 3AN-S85-6275CR. | Dec. 27, 1989.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski and Mark C. Rowland, Judges.

Attorneys and Law Firms

Leslie A. Hiebert, Assistant Public Advocate, Office of Public Advocacy, and Brant McGee, Public Advocate, Anchorage, for Appellant.

Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: BRYNER, Chief Judge, COATS and SINGLETON, Judges.

MEMORANDUM OPINION AND JUDGMENT *

SINGLETON, Judge.

***1** Jay A. Stevens pled no contest and was convicted of one count of burglary in the second degree, a class C felony, in violation of AS 11.46.310(a), and one count of theft in the second degree, a class C felony, in violation of AS 11.46.130(a)(1). Superior Court Judge Peter A. Michalski suspended imposition of sentence for a period of two years and placed Stevens on probation. Stevens had entered a *Cooksey* plea in order to raise, in this court, the question of whether the prosecution against him should have been dismissed for violation of his right to a speedy trial under Alaska Rule of Criminal Procedure 45; and he alleges he was improperly terminated from a pretrial diversion agreement and the period for bringing him to trial permitted by Alaska Rule of Criminal Procedure 45(a) should have run from the moment of his termination rather than from the reinstitution of prosecution. *See Oveson v. Anchorage*, 574 P .2d 801, 803 n. 4 (Alaska 1978); *Cooksey v. State*, 524 P.2d 1251 (Alaska 1974) (allowing guilty and no contest pleas with reservation of right to appeal specific issues).

On September 11, 1985, Stevens was indicted on two counts, second-degree burglary and second-degree theft. He entered the Pretrial Diversion Program for a period of one year beginning December 31, 1985. The written Diversion Agreement imposes a number of requirements, among them is paragraph 15 which provides:
That the defendant also agrees to abide by the following special conditions set forth herein, or as modified or clarified in a performance agreement executed between the defendant and the pretrial diversion program staff:

A. Twice per month contact with the Pretrial Diversion Program, one of which must be in person.

B. 110 hours community work service.

C. Submit to PBT or U.A. on request.

Stevens did not perform the community service or regularly contact the diversion officer as required by the Diversion Agreement. On November 12, 1986, Stevens was notified he was unfavorably terminated from the program. Apparently, the supervisors of the program decided to give Stevens a second chance. His period of supervision in the diversion program was extended an additional six months through June 30, 1987. The contact requirement was reduced from twice a month to once a month and the remaining community work service would be waived if Stevens completed work towards his GED diploma.

Stevens apparently performed his community work service, but did not keep in contact with his counselor. He missed an appointment on February 26, 1987, and on March 5, 1987, he contacted his new counselor and was told he would be removed from the program. Approximately ninety days later, on May 28, 1987, the counselor formally notified the district attorney of Stevens' default.

On June 22, 1987, the district attorney's office reinstated the prosecution against Stevens, alleging that he had violated the Diversion Agreement by failing to maintain contact with the Pretrial Diversion Office and failing to obey the

instructions of the personnel in charge of the program. The notice mistakenly refers to violations of paragraph 12(a) of the agreement, but it appears clear that paragraph 15(a) was intended.

***2** Stevens challenged prosecution on two grounds, first he contended that he had complied with the provisions of the Diversion Agreement; and, secondly, that the 120-day time period of Criminal Rule 45 had run out. The state opposed and Superior Court Judge Mark C. Rowland denied the motion to dismiss:

> The motion to dismiss will be denied. I think that, in fact cases such as this where there is a diversion agreement can be analyzed in accordance with contract principles. But I find that in fact, a material breach took place on this occasion. And that in cases such as this, because of the notion of the separation of powers and the importance of prosecutorial discretion, it appears to me any breaches should be carefully looked at, to determine whether they are not material-whether or not they are material-and that such agreements with regard to that issue should be carefully scrutinized and probably strictly construed against the criminal defendant. I find the breach not material and the motion to dismiss is not well-taken and should be denied.

DISCUSSION

A defendant has no right to be placed in a pretrial diversion program. *See United States v. Hicks,* 693 F.2d 32, 34 (5th Cir.1982), *cert. den.,* 451 U.S. 1225 (1983). Once the prosecutor exercises his or her discretion to place a defendant in a diversion program, however, we believe that the defendant has the right to rely on the terms and conditions of the diversion agreement. Paragraph 10 of that agreement provides as follows:

> That it is agreed and understood by both the State of Alaska and the defendant that violation of the terms of this agreement, or of other agreements entered into between the defendant and the Pretrial Diversion Program, will result in the prosecution of this case being pursued by the State of Alaska. If that occurs, the defendant will be given notice of the prosecution and of any court appearance dates and will be allowed a hearing if the defendant disputes the alleged violation[.]

Under this provision, the defendant is entitled to an independent determination by the trial court that the deferred prosecution agreement was violated by a preponderance of the evidence with the burden of proof on the state. *See State v. Marino,* 674 P.2d 171, 174 (Wash.1984). In determining whether a material breach has occurred, the court should look at the totality of the circumstances including the entire history of Stevens' performance or nonperformance under the diversion program. We stress that the court is determining whether a breach has occurred and not whether it is appropriate to reinstitute prosecution. Recommencement of prosecution falls within the discretion of the prosecutor once a material breach of the terms of the Diversion Agreement is found. *See Marino,* 674 P.2d at 175. In pretrial diversion, there has been no determination of guilt, and strict compliance with pretrial diversion agreements is required in order to safeguard the public's interest in seeing criminals punished for their antisocial behavior. *Hicks,* 693 F.2d at 34-35.

***3** While the trial court properly viewed the issue in this case as a question of contract law, properly looked for a material breach and properly required strict compliance by the defendant with the agreement, it is not clear that the court applied the proper burden of proof. The state has the burden of proving, by a preponderance of the evidence, that Stevens violated or breached the conditions of the diversion agreement. It is therefore necessary for us to remand this case for a new hearing before the trial court. [1]

This case is REMANDED to the superior court for a new hearing.

Footnotes

* Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

1 The trial court did not expressly rule on Steven's Criminal Rule 45 argument. It seems to us that Rule 45 does not run while the pretrial diversion agreement is in full force and effect, and the state should have a reasonable length of time after material breach of the agreement to reinstate prosecution. *Cf. Aldridge v. State*, 602 P.2d 798, 799-801 (Alaska 1979) (where incarcerated person commits crime, Criminal Rule 45 does not commence until formal arrest); *Sundberg v. State*, 667 P.2d 1268 (Alaska App.1983) (120-day period within which defendant must be brought to trial after his arrest does not begin to run anew after remand following a petition for review until a reasonable time has passed.)