STATE OF LOUISIANA

VERSUS

DALE JOSEPH ARCENEAUX

NO. 13-KA-953

FIFTH CIRCUIT

COURT OF APPEAL

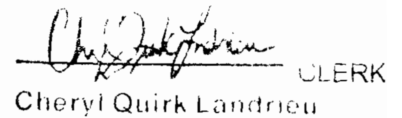
STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 12-3287, DIVISION "E"
HONORABLE JOHN J. MOLAISON, JR., JUDGE PRESIDING

April 23, 2014

COURT OF APPEAL
FIFTH CIRCUIT

FILED APR 2 3 2014



CLERK
Cheryl Quirk Landrieu

MARC E. JOHNSON
JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Marc E. Johnson

PAUL D. CONNICK, JR.
DISTRICT ATTORNEY
Twenty-Fourth Judicial District
Parish of Jefferson
TERRY M. BOUDREAUX
MYLES RANIER
ASSISTANT DISTRICT ATTORNEYS
200 Derbigny Street
Gretna, Louisiana 70053
COUNSEL FOR PLAINTIFF/APPELLANT

GWENDOLYN K. BROWN
ATTORNEY AT LAW
Louisiana Appellate Project
P. O. Box 64962
Baton Rouge, Louisiana 70896
COUNSEL FOR DEFENDANT/APPELLEE

APPEAL CONVERTED TO WRIT APPLICATION; RELIEF DENIED

The State appeals the granting of a motion to quash two predicate offenses listed in the bill of information that charged Defendant, Dale Arceneaux, with driving while intoxicated ("DWI"), fifth offense. For the reasons that follow, we convert the appeal to a writ application and deny relief.

On June 20, 2012, Defendant was charged in a bill of information with driving while intoxicated ("DWI"), fifth offense, in violation of La. R.S. 14:98(A)(E). The bill of information alleged Defendant had been previously convicted four times of DWI on (1) July 1, 1999, under docket number 98-4821 in the 24th Judicial District Court (JDC); (2) July 1, 1999, under docket number 99-3479 in the 24th JDC; (3) December 8, 2011, under docket number 623363 in the 29th JDC. (4) January 3, 2012, under docket number S1197974 in Second Parish Court; and

Defendant pled not guilty and filed a motion to quash the bill of information, claiming the first two predicate offenses could not be used to increase the grade of his current DWI charge because they fell outside the 10-year cleansing period set forth in La. R.S. 14:98(F)(2). The State filed an opposition to the motion to quash, arguing that the time Defendant was incarcerated from 2006 to 2011 for a burglary conviction should be excluded in computing the 10-year period. After a hearing, the trial court granted Defendant's motion and quashed the first two predicate offenses relating to his 1999 DWI convictions. The State orally noticed its intent to appeal, to which the trial court responded that it believed the proper procedure was a writ. Nonetheless, the State subsequently filed a motion for appeal, which the trial court granted.

Under La. C.Cr.P. art. 912(A), "[o]nly a final judgment or ruling is appealable." A final judgment is one which puts an end to the proceedings. *State v. Quinones*, 94-436 (La. App. 5 Cir. 11/29/94); 646 So.2d 1216, 1217. Article 912(B)(1) further provides that the State may appeal "[a] motion to quash an indictment or any count thereof." However, when read and interpreted in reference to subsection A, a ruling on a motion to quash must be a final judgment that puts an end to the proceedings in order to be appealable.

In this case, we find that the trial court's quashing of two of the four predicates does not put an end to the proceedings and, thus, is not a final appealable judgment. Rather, the trial court's ruling simply reduces the grade of the offense from a fifth offense DWI to a third offense DWI.[1] Additionally, we do not find the quashing of a predicate offense is equivalent to quashing a "count" of the indictment. Thus, we find the State improperly filed an appeal.

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[1] We note that this case does not involve the quashing of predicate DWI convictions that results in the reduction of the charged offense from a felony to a misdemeanor.

Although this Court generally avoids converting matters that are improperly filed as appeals to writ applications, we will make an exception in this case upon finding that the interests of justice and judicial economy would best be served by converting the matter to a writ application. *See State v. Lyons*, 13-180 (La. App. 5 Cir. 10/9/13); 128 So.3d 407, 412.

The sole issue the State raises for review is whether the trial court erred in granting Defendant's motion to quash two of the four predicate DWI convictions because they fell outside the 10-year cleansing period set forth in La. R.S. 14:98(F)(2). While the State concedes that Defendant's two 1999 convictions fall outside the 10-year cleansing period, it maintains that between the last day of Defendant's sentence for his 1999 convictions (July 1, 2000) and his third DWI conviction in 2011, Defendant was convicted of simple burglary and placed in the custody of the Department of Corrections from July 6, 2006 through May 11, 2011. The State contends that under La. R.S. 14:98(F)(2), any time a defendant spends in a penal institution for ***any*** offense, not just for DWI related offenses, is excluded when calculating the 10-year cleansing period.[2] Thus, the issue presented is whether La. R.S. 14:98(F)(2) excludes time a defendant spends incarcerated in a penal institution for a non-DWI related offense from the calculation of the 10-year cleansing period.

However, we do not reach the issue presented because we find the State failed to carry its burden of proof at the hearing on the motion to quash. A motion to quash is a mechanism by which to raise pre-trial pleas or defenses, or those

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[2] La. R.S. 14:98(F)(2) provides:

For purposes of this Section, a prior conviction shall not include a conviction for an offense under this Section, under R.S. 14:32.1, R.S. 14:39.1, or R.S. 14:39.2, or under a comparable statute or ordinance of another jurisdiction, as described in Paragraph (1) of this Subsection, if committed more than ten years prior to the commission of the crime for which the defendant is being tried and such conviction shall not be considered in the assessment of penalties hereunder. However, periods of time during which the offender was awaiting trial, on probation or parole for an offense described in Paragraph (1) of this Subsection, under an order of attachment for failure to appear, or incarcerated in a penal institution in this or any other state shall be excluded in computing the ten-year period.

matters which do not go to the merits of the charge. *State v. Boudreaux*, 99-1017 (La. App. 5 Cir. 2/16/00); 756 So.2d 505, 507. In considering a motion to quash, a court must accept as true the facts contained in the bill of information and determine, as a matter of law and from the face of the pleadings, whether a crime has been charged. *State v. Byrd*, 96-2302 (La. 3/13/98); 708 So.2d 401, 411, *cert. denied sub nom. Peltier v. Louisiana*, 525 U.S. 876, 119 S.Ct. 179, 142 L.Ed.2d 146 (1998). At a hearing on a motion to quash, evidence is limited to procedural matters and the question of factual guilt or innocence is not before the court. *Boudreaux*, *supra*. When the issue presented in a motion to quash is exclusively a question of law, appellate courts review the ruling *de novo*. *See State v. Hamdan*, 12-1986 (La. 3/19/13); 112 So.3d 812, 816.

A motion to quash has been found to be the proper procedural vehicle by which to challenge the constitutional validity of a defendant's predicate DWI convictions. *State v. Pertuit*, 98-1264 (La. App. 5 Cir. 4/27/99); 734 So.2d 144, 147. The rationale is that a motion to quash a predicate DWI conviction does not go to the merits of the case, i.e., the guilt or innocence of the defendant, but rather only focuses on the validity of the predicate conviction. Likewise, challenging a predicate DWI conviction on the basis it falls outside the cleansing period does not go the guilt or innocence of the defendant, but rather focuses on whether said predicate can be used to enhance the grade of the charged DWI offense. Thus, we find that a motion to quash is the proper vehicle to attack a predicate DWI conviction on the basis it falls outside the cleansing period.

The Louisiana Supreme Court has held that the State has the burden of negating the cleansing period. *State v. Mobley*, 592 So.2d 1282 (La. 1992). The bill of information charged Defendant with DWI, fifth offense, committed on January 31, 2012. The bill of information listed four predicate DWI convictions:

two on July 1, 1999, one on December 8, 2011, and one on January 3, 2012. Clearly, more than 10 years had passed between Defendant's 1999 convictions and his third DWI offense in 2012. Defendant filed a motion to quash challenging the use of the 1999 predicate convictions, which were clearly outside the 10-year cleansing period, to enhance his current DWI charge. Thus, it was incumbent upon the State to prove the predicate convictions had not been cleansed under La. R.S. 14:98(F)(2).[3]

At the hearing on the motion to quash, no evidence was presented and scant arguments were made. The trial court granted the motion to quash, finding that the first two predicate offenses were outside the 10-year cleansing period. Although the trial court indicated the issue was whether Defendant's prison sentence for burglary should be excluded from calculating the cleansing period, there was absolutely no evidence submitted to show any of Defendant's sentences, either for DWI-related or non-DWI offenses, or his discharge dates from custody.

We find the State failed to negate the cleansing period for the two 1999 predicate DWI convictions that, on the face of the bill of information, were more than 10 years prior to his next alleged DWI conviction in 2012. The State never offered a copy of the certified conviction packets which form the basis of the predicate offenses used to charge Defendant as a fifth DWI offender. Thus, none of Defendant's sentences or discharge dates from custody is known. Additionally, we find it would be speculative for us to consider any argument that Defendant's alleged time in custody for a burglary conviction should be excluded from the cleansing period under La. R.S. 14:98(F)(2) because the State presented no evidence regarding this alleged incarceration.

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[3] *Compare State v. Delanueville*, 11-379 (La. App. 5 Cir. 2/14/12); 90 So.3d 15, 28, *writ denied*, 12-630 (La. 9/21/12); 98 So.3d 325, where this Court found the State was not required to prove the commission dates of the predicate DWI convictions where the conviction dates of the prior offenses were well within the 10-year cleansing period.

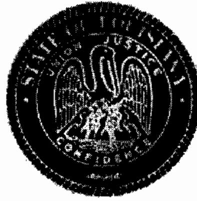
Accordingly, upon *de novo* review, we find the trial court properly quashed the two 1999 predicate DWI convictions from the bill of information on the basis they clearly fell outside the 10-year cleansing period provided in La. R.S. 14:98(F)(2), and the State failed to offer any proof negating the cleansing period. Thus, we deny relief.

APPEAL CONVERTED TO WRIT APPLICATION; RELIEF DENIED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
HANS J. LILJEBERG

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

CHERYL Q. LANDRIEU
CLERK OF COURT

MARY E. LEGNON
CHIEF DEPUTY CLERK

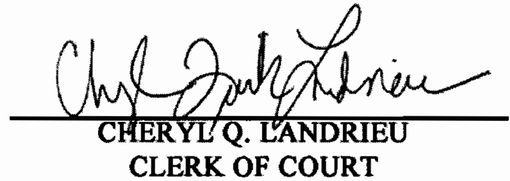
SUSAN BUCHHOLZ
FIRST DEPUTY CLERK

MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **APRIL 23, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



CHERYL Q. LANDRIEU
CLERK OF COURT

13-KA-953

E-NOTIFIED
GWENDOLYN K. BROWN
TERRY M. BOUDREAUX

MAILED
HON. PAUL D. CONNICK, JR.
DISTRICT ATTORNEY
MYLES RANIER
ASSISTANT DISTRICT ATTORNEYS
TWENTY-FOURTH JUDICIAL DISTRICT
200 DERBIGNY STREET
GRETNA, LA 70053