NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1636**
VERSUS	*	**COURT OF APPEAL**
RUSSELL A. BRILEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-830, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Max N. Tobias, Jr.)

HONORABLE HARRY F. CONNICK
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REVERSED AND REMANDED

This matter is before the court on the appeal of the State of Louisiana from the criminal district court's order granting the motion of Defendant-Appellee, Russell A. Briley ("Mr. Briley"), to quash the bill of information filed against him by the State. Mr. Briley moved to quash the bill of information on the grounds that the numerous delays in the case abridged his right to a speedy trial. The State maintains that Mr. Briley was himself the cause of the overwhelming majority of the delays of which he now complains. This presents a procedural issue only peripherally influenced by the underlying charges.

On 24 March 1997, in case # 388-599, Mr. Briley was charged by bill of information with attempted second degree murder, in violation of La. R.S. 14:27(30.1). Mr. Briley was also charged with being a convicted felon in possession of a firearm, in violation of La. R.S. 14:95.1. He was arraigned and entered a plea of "not guilty" on 9 April 1997. On 23 April 1997, following a hearing on Mr. Briley's motion to suppress his confession, the court issued its order granting in part and denying in part the motion. Both Mr. Briley and the State objected to the ruling. Writs were taken to this court which reversed the trial court's granting of the defendant's motion to suppress the statement.

On 30 January 1998, Mr. Briley requested a re-hearing on his earlier

motion to suppress his confession. The trial court granted the re-hearing. Following that re-hearing, the court issued its order denying the motion to suppress. Mr. Briley objected and announced his intent to seek supervisory writs. However, no evidence in the record establishes that the proposed action occurred. On 3 April 1998, a status hearing was held. Trial was set for 26 May 1998. On 26 May 1998, Mr. Briley failed to timely appear, arriving after court was recessed. Trial was re-set for 1 June 1998. On that date, all parties appeared but the State was unable to produce its witnesses. The State entered a *nolle prosequi* in the matter.

On 19 June 1998, the State's case against Mr. Briley was reinstated as criminal action #398-525. Mr. Briley was arraigned on 14 July 1998 at which time the court set 31 July 1998 for hearing any relevant motions in the matter. The matter was repeatedly continued at Mr. Briley's request to 14 August, 28 August, and 10 September 1998. The trial court finally conducted hearings on 10 September 1998, and 22 January 1999. Trial was set for 15 March 1999. On that date, Mr. Briley's defense attorney failed to appear at the appointed time and the trial was re-set for 25 May 1999. On 25 May 1999, Mr. Briley and the State jointly moved for a continuance of the trial date. The matter was re-set for trial on 13 July 1999, at which time Mr. Briley moved for another continuance. The matter was reset for trial on 23

July 1999. The parties entered a joint motion for continuance and trial was re-scheduled for 1 September 1999. On that date, Mr. Briley requested and was granted yet another continuance and a trial date of 4 November 1999 was set. The State moved for a continuance which was granted over Mr. Briley's objections. On 12 November 1999 Mr. Briley again joined the State in requesting and securing a continuance of his trial.

On 15 November 1999, the court granted the State's motion to recuse Mr. Briley's counsel and Mr. Briley was advised to obtain new counsel. On 29 November 1999, the court reversed its prior ruling and denied the State's motion to recuse. Accordingly, defense counsel was allowed to remain counsel of record. The matter proceeded to the new trial date of 5 December 1999, at which time the State moved for a continuance. The defense objected to the proposed continuance and the court denied the State's motion. The State again entered a *nolle prosequi*.

The State filed a third bill of information on 6 January 2000, as case # 411-830. Arraignment of Mr. Briley was held on 7 April 2000. Mr. Briley moved for continuance which motion was granted at the hearing on 28 April 2000. On 5 May 2000, the defense filed a motion to quash the bill of information on grounds that his right to a speedy trial had been violated. On 8 June 2000, after a hearing on the matter, Mr. Briley's motion to quash was

granted. The State maintains on appeal that, since the issue was never previously raised by him, Mr. Briley waived his statutory right to a speedy trial and may only proceed on his constitutional right to a speedy trial.

In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court of the United States established four factors to be considered in determining whether a defendant's constitutional right to a speedy trial was violated:

> (1) length of the delay;
> (2) reason for the delay;
> (3) whether defendant asserted the right; and,
> (4) prejudicial effect to the defendant.

407 U.S. at 530. Under the *Barker* test, no one factor is controlling. *Barker* mandates a balancing of these factors in light of the totality of the circumstances.

In *Barker*, the Court addressed a defendant's complaint that his Sixth Amendment right to a speedy trial was being violated where more than five years elapsed between his arrest and ultimate trial. More than four years of that delay period was attributable to the prosecution's failure or inability to try a co-defendant in order to have the co-defendant's testimony at the defendant's trial. The defendant failed to object to the numerous continuances requested by the State during the pendency of the co-defendant's trial. It was only after the co-defendant was convicted that the

defendant began to assert his right to a speedy trial. The Supreme Court found that the defendant's constitutional right to a speedy trial was not violated and that the defendant was not seriously prejudiced by the delay between his arrest and trial. The Court concluded that prejudice does not exist where the defendant does not genuinely desire a speedy trial.

In the case at bar, the delay is approximately 39 months. It is a delay presumed by our jurisprudence to be prejudicial. *State v. Esteen*, 95-1079 (La. App. 4 Cir. 4/03/96), 672 So.2d 1098, *writ denied*, 96-0979 (La. 9/27/96), 679 So.2d 1359; *State v. Leban,* 611 So.2d 165 (La. App. 4 Cir. 1992), *writ denied*, 619 So.2d 533 (La. 1993). In *Esteen*, *supra*, this court found that the defendant's constitutional right to a speedy trial was violated where the defendant had been incarcerated for 11 months awaiting his trial on a marijuana-related charge and was not significantly responsible for the delay. In *Leban, supra,* this court found that a 16 month delay was presumed prejudicial and rendered its decision on a balancing of all of the *Barker* factors. One must balance the prejudice of the delay against the equities of the remaining three factors as set forth in *Barker*, *supra.*

Our review of the record indicates that approximately one year of the delay was attributable to Mr. Briley's pre-trial motions. Further and of at least equal importance, the record establishes that of the 14 continuances

granted in this matter, Mr. Briley initiated 8 of them (more than 50% of the total). He acquiesced in 3 more. This squarely places on Mr. Briley's shoulders responsibility for over 75% of the trial delays of which he now complains. Furthermore, the record shows that Mr. Briley has been out on bond since his arraignment thereby mitigating the prejudicial impact of the delays. Thus, Mr. Briley has actively pursued the delay of his trial and has not been denied his constitutional right to a speedy trial.

For the foregoing reasons, we reverse the criminal district court's order granting the defendant's motion to quash. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED