

STATE OF LOUISIANA

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NO. 2001-KA-1288

VERSUS

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COURT OF APPEAL

LADWYNE REFUGE

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-370, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE

JAMES F. MCKAY, III
JUDGE

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge David S. Gorbaty)

HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
VAL M. SOLINO
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana
Attorneys for Plaintiff/Appellant

REVERSED AND

REMANDED

STATEMENT OF THE CASE

The defendant Ladwyne Refuge was charged by bill of information on October 25, 1999, with possession of cocaine. On January 11, 2000, at his arraignment hearing the defendant plead not guilty. The trial court found probable cause and denied the defendant's motion to suppress on January 21, 2000. The defendant appeared for trial on January 31, 2000, but the defense counsel did not appear, and trial was rescheduled for later that day. Two police officers did not appear for the later scheduled trial, and trial was reset for February 11, 2000. On February 7, 2000, the defendant failed to appear for trial. The State refused to make an opening statement without the presence of the defendant. The defense counsel filed an oral motion to quash, which the court granted. The State orally noticed its intent to seek an appeal, and filed a written notice of appeal on February 8, 2000.

FACTS

On February 7, 2000, the State and the defense counsel appeared. The State announced it was ready for trial. The defense counsel stated that he waived the defendant's presence "at this time." The trial court announced that the defendant's presence was waived, and it was ready for trial. The

court called for opening statements, but immediately questioned how the defendant was going to waive his right to trial by jury if he was not present. The defense counsel said that the defendant had waived his right to trial by jury at the January 31, 2000 scheduled trial date. The trial court said it recalled that the defendant had waived his right to trial by jury, and again said it was ready to proceed. The State objected on the ground that the defendant was not present. The court stated that by not appearing for trial, the defendant had waived his presence. Several times the trial court ordered the State to proceed, and the State respectfully declined to proceed each time. The defense counsel then orally moved for a “writ,” which the trial court granted. The State noticed its intent to seek an appeal. The minute entry for February 7, 2000, states that the defense filed a motion to quash, which the court granted. The record contains a handwritten motion to quash filed by the defense counsel and granted by the trial court.

ASSIGNMENT OF ERROR

The State argues that the trial court improperly granted the defense counsel’s motion to quash. La. C.Cr.P. art. 532 sets forth the general grounds for a motion to quash as follows:

A motion to quash may be based on one or more of the following grounds:

- (1) The indictment fails to charge an offense which is punishable under a valid statute.
- (2) The indictment fails to conform to the requirements

of Chapters 1 and 2 of Title XIII. In such case the court may permit the district attorney to amend the indictment to correct the defect.

(3) The indictment is duplicitous or contains a misjoinder of defendants or offenses. In such case the court may permit the district attorney to sever the indictment into separate counts or separate indictments.

(4) The district attorney failed to furnish a sufficient bill of particulars when ordered to do so by the court. In such case the court may overrule the motion if a sufficient bill of particulars is furnished within the delay fixed by the court.

(5) A bill of particulars has shown a ground for quashing the indictment under Article 485.

(6) Trial for the offense charged would constitute double jeopardy.

(7) The time limitation for the institution of prosecution or for the commencement of trial has expired.

(8) The court has no jurisdiction of the offense charged.

(9) The general venire or the petit jury venire was improperly drawn, selected, or constituted. (footnote omitted).

In addition to the general grounds set forth in La. C.Cr.P. art. 532, a motion to quash a bill of information may also be based on the ground that the information was not signed by the district attorney or was not properly filed, or on the ground that the offense was not one for which prosecution can be instituted by an information. La. C.Cr.P. art. 535. A motion to quash shall be in writing and “shall specify distinctly the grounds on which it is based;” “[t]he court shall hear no objection based on grounds not stated in the motion.” La. C.Cr.P. art. 536.

The defense counsel’s handwritten motion to quash set forth as

a ground that the State failed to proceed in a timely manner, thus denying the defendant his “right to a timely trial.” As this is the sole ground set forth in the defense counsel’s motion to quash, the only possible statutory ground for the defendant’s motion to quash was under La. C.Cr.P. art. 532(7), that the time limitation for the commencement of trial expired. For the following reasons, the trial court erred in granting defendant’s motion to quash.

La. C.Cr.P. art. 578(2) sets forth the limitation for commencement of trial in non-capital felony cases—two years from the date of the institution of prosecution. Prosecution was instituted against the defendant on October 25, 1999, when he was charged by bill of information with the instant offense. See La. C.Cr.P. art. 382 (A) (prosecution for a felony punishable by other than death or life imprisonment shall be by indictment or information). Even assuming no interruptions or suspensions, the two-year period for commencement of trial would not have expired until October 2001. The trial court granted the motion to quash on February 7, 2000, less than four months after the institution of prosecution. The trial court erred to the extent it granted the defendant’s motion to quash based on the failure to timely commence trial.

The defense counsel's motion to quash based on the denial of the defendant's right "to a timely trial" might also be interpreted as asserting a violation of his right to speedy trial. La. C.Cr.P. art. 701 provides for a statutory right to speedy trial. La. C.Cr.P. art. 701(D) (1)(a) provides that after filing a motion for speedy trial, trial of a defendant charged with a felony shall be commenced within one hundred twenty days if he is continued in custody and within one hundred eighty days if he is not continued in custody. However, the failure to commence trial within the period provided for by La. C.Cr.P. art. 701 is not grounds for a motion to quash. State v. Guy, 99-1893, p. 10 (La. App. 4 Cir. 7/19/00), 775 So. 2d 454, 460 writ denied, 2000-3068 (La. 8/31/01), 795 So. 2d 1205; State v. Montgomery, 95-1209, pp. 3-4 (La. App. 4 Cir. 7/26/95), 659 So. 2d 534, 536. In addition, the record does not reflect that the defendant ever filed a motion for speedy trial. Moreover, as the defendant was released on bail and not continued in custody, even assuming the delay ran from the date the bill of information was filed, October 25, 1999, the State would have had until April 2000 to commence trial. The trial court granted the motion to quash on February 7, 2000. Thus, the trial court erred to the extent it granted the motion to quash

based on a violation of defendant's right to speedy trial under La. C.Cr.P. art. 701.

There is also a constitutional right to speedy trial, guaranteed by the Sixth Amendment to the U.S. Constitution and La. Const. art. I, § 16. Guy, supra; State v. Sullivan, 97-1037, p. 16 (La. App. 4 Cir. 2/24/99), 729 So. 2d 1101, 1109. That right attaches at the time the defendant becomes accused either by indictment, bill of information, or by arrest and actual restraint. State v. Brown, 93-0666, p. 2 (La. App. 4 Cir. 7/27/94), 641 So. 2d 687, 688. In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court set forth factors used to determine whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason(s) for the delay; (3) the defendant's assertion of his right to a speedy trial; and, (4) the prejudice to the defendant. However, the court held that the length of the delay was the triggering mechanism, and that until the delay was presumptively prejudicial, there was no need to inquire into the other factors. The trial court granted the motion to quash on February 7, 2000, some four months after the defendant's October 2, 1999 arrest. It cannot be said that this delay was presumptively prejudicial,

especially considering that the defendant posted bail on the day after his arrest. Thus, the trial court erred to the extent it granted the motion to quash on the ground that the defendant's constitutional right to a speedy trial was violated.

The trial court erred in granting the defendant's motion to quash.

For the foregoing reasons, the judgment of the trial court granting defendant's motion to quash is reversed, the prosecution reinstated, and the case is remanded to the trial court for further proceedings.

REVERSED AND

REMANDED