NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0480**
VERSUS	*	**COURT OF APPEAL**
TAMMY A. HEMARD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 395-939, SECTION "K"
HORABLE ARTHUR HUNTER, JUDGE

* * * * * *

Chief Judge William H. Byrnes, III

* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, and Judge Patricia Rivet Murray)

HARRY F. CONNICK
DISTRICT ATTORNEY
JULIE C. TIZZARD
ASSISTANT DISTRICT ATTORNEY
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLANT

JOHN WILSON REED
GLASS & REED

530 Natchez Street
Suite 350
New Orleans, LA 70130
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

The state appeals the trial court's ruling that granted the defendant Tammy A. Hemard's motion to quash the bill of information. We affirm.

On February 26, 1998, Tammy A. Hemard was charged by bill of information with theft of more than $500 in violation of La. R.S. 14:67(B)(1). The matter was set for arraignment on March 13, 1998, and the defendant filed a recognizance bond in the amount of $20,000. When she did not appear on March 13, 1998 for arraignment, a *capias* for her arrest was issued. The clerk's office filed an affidavit of bond forfeiture notification and certified receipt on April 2, 1998. On October 18, 2001, the defendant, through counsel, requested that the matter be placed on the docket. The next day, after the trial court recalled the *capias*, the defendant appeared before the court, was arraigned, and pleaded not guilty. On November 2, 2001, the defendant filed a motion to quash, and on December 14, 2001, the trial court granted the defendant's motion. The state objected and the state's appeal followed.

At the hearing on the motion to quash, the defense successfully argued that the state failed to bring the case to trial within two years from the date of institution of prosecution as required by La. C.Cr.P. art. 578(2). The bill of information in this case was filed on February 26, 1998, and, according to the defense, the case prescribed on February 26, 2000.

The state countered that under La. C.Cr.P. art. 579(3), prescription was interrupted because after receiving actual notice the defendant failed to appear for arraignment. La. C.Cr.P. art. 579 provides in part that the period of limitation set forth in La. C.Cr.P. art. 578 shall be interrupted if: "(3) The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record."

As the Supreme Court noted in *State v. Rome,* 93-1221 p. 4 (La. 1/14/94), 630 So.2d 1284, 1287: "An interruption of prescription occurs when the state is unable, through no fault of its own, to try a defendant within the period specified by statute. . . ." When a defendant seeks to quash the charges against him due to a violation of the time limits of art. 578, the State bears the burden of showing that an interruption under art. 579 occurred. The State is held to a "heavy burden" of showing just and legal cause for the interruption. See *State v. Mattox*, 96-1406 and 96-2370 (La. App. 4 Cir. 12/10/97), 704 So.2d 380, *writ denied,* 98-1701 (La. 8/28/98),

723 So.2d 419 *and writ denied* 98-2395 (La. 9/25/98), 725 So.2d 493.

On its face, the two-year period for trial has expired in this case. Therefore, the state must prove that the time limitation was interrupted by actual notice to the defendant. The only evidence in the record of the state's effort to locate the defendant is a copy of the receipt for certified mail with the defendant's name and address on it; the receipt is postmarked March 26, 1998. There is no signed receipt indicating that the mail was received. The state offered no additional evidence of any efforts made to locate the defendant. Its position is that a subpoena was mailed to her address notifying her of the date of her arraignment, and when she did not appear in court, the trial court forfeited the bond. In its brief, the state maintains that proof of actual notice is part of the record.

The defendant argues that *State v. Foster*, 96-0670 (La. 6/28/96), 675 So.2d 1101, controls this case. In *Foster*, 675 So.2d at 1102, where the defendant failed to appear for arraignment after a single attempt at domiciliary service at the address he had given, the Supreme Court stated:

> The single attempt at domiciliary service upon relator by leaving the subpoena with an unidentified Ms. Lewis, who indicated that she did not see relator often at that address and refused to sign the return, did not establish that relator had actual notice of the proceedings and did not discharge the state's heavy burden "to exercise due diligence in discovering the whereabouts of the defendant as well as in taking appropriate steps to

> secure his presence for trial once it has found him."

The defendant in the present case contends that less effort was made to find her than the attempt at domiciliary serve which the Supreme Court found inadequate in *Foster*.

At the hearing on the motion to quash, the defense noted that under La. C.Cr.P. art. 735, types of service, subpoenas are to be served by "domiciliary service, personal service, or United States mail as provided in Paragraph B." Domiciliary and personal service require delivery by the sheriff to the addressee or to someone of appropriate age and discretion residing at the addressee's dwelling. Under Paragraph B, subpoenas may be sent by certified mail with return receipt requested or by first class mail. Section three of Paragraph B sets out the requirements; it states:

> Service by mail shall be considered personal service if the certified return receipt or the return form is signed by the addressee. Service by mail shall be considered domiciliary service if the certified return receipt or the return form is signed by anyone other than the addressee.

In this case a signed receipt is not in the record. Under La. C.Cr.P. art. 735 (B)(2), "[i]f a signed return is not received by the sheriff, the subpoena shall be served by domiciliary or personal service as provided in Paragraph A." There is no evidence in the record that the sheriff attempted domiciliary or

personal service on the defendant.

Accordingly, because the state failed to carry its burden to prove that actual notice was given to the defendant, we find that the time limitation for commencing trial was not interrupted, and we affirm the trial court's granting of the motion to quash the bill of information.

AFFIRMED