STATE OF LOUISIANA	*	**NO. 2002-KA-1742**
VERSUS	*	**COURT OF APPEAL**
REYNARD STEWART	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 429-410, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Patricia Rivet Murray, Judge James F. McKay III)

HARRY F. CONNICK
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REVERSED AND REMANDED

The State of Louisiana appeals the trial court's granting of the defendant's motion to quash.

On January 16, 2002, in case number 427-360, the defendant was charged with possession of more than twenty-eight grams and less than two hundred grams of cocaine in violation of La. R.S. 40:967(F). At a hearing on the motions on February 22nd the trial court found no probable cause to bind the defendant over for trial and granted his motion to suppress the evidence; however, his motion to suppress the identification was denied. The state announced its intention to take writs and asked for a stay; the trial court denied the stay. This court granted the state's writ and reversed the trial court's suppression of the evidence. *State v. Stewart*, 2002-0311(La. App. 2/25/02). The defendant, through counsel, took writs to the Supreme Court which also denied the writ. *State v. Stewart*, 2002-0631 (La. 3/12/02). On March 28th, the day set for trial, the state asked for a continuance because one of its police officer witnesses was unavailable. When the trial court denied the request, the state entered a *nolle prosequi*.

On April 4, 2002, the case was reinstituted as case number 429-410, and on May 24th the defendant filed a motion to quash. The motion was granted on May 31st. Although the defendant stated during the hearing that a motion to quash was filed, no such motion appears in the record on appeal.

At the May 31st hearing on the motion, the assistant district attorney and the defense attorney argued over the state's right to enter a *nolle prosequi*; the assistant district attorney pointed out that a key witness was out of town and cited *State v. Larce*, 2001-1992 (La. App. 4 Cir. 1/23/02), 807 So. 2d 1080, for the proposition that the state has authority to dismiss and reinstitute cases. The assistant district attorney also pointed out that neither the defendant's statutory or constitutional right to a speedy trial was violated by the dismissal and reinstitution of these charges. The defense attorney countered that the police officer the state wanted to have testify was not a necessary witness. The trial court determined that the state misused its authority in order to grant itself a continuance and granted the motion to quash.

The state now argues that the trial court erred in granting the motion to quash because under La. C.Cr.P. articles 61 and 62, the district attorney has entire charge and control of each criminal prosecution in his district, and he decides whom, when and how to prosecute. Furthermore,

under La. C.Cr.P. art. 691 the district attorney "has the power, in his discretion, to dismiss an indictment . . . and in order to exercise that power it is not necessary that he obtain consent of the court." The state cites *State v. Larce*, 2001-1992 (La. App. 4 Cir. 1/23/02), 807 So. 2d 1080, a case on point and in which the state, after being denied a continuance, entered a *nolle prosequi* and then reinstituted the charges. The trial court granted the defendant's motion to quash. In reversing the trial court, this court noted that the limitations the legislature placed on the state's ability to reinstitute charges are found in La. C.Cr.P. art. 576 which provides:

> When a criminal prosecution is timely instituted in a court of proper jurisdiction and the prosecution is dismissed by the district attorney ... a new prosecution for the same offense or for a lesser offense based on the same facts may be instituted within the time established by this Chapter or within six months from the date of dismissal, whichever is longer.
>
> A new prosecution shall not be instituted under this article following a dismissal of the prosecution by the district attorney unless the state shows that the dismissal was not for the purpose of avoiding the time limitation for commencement of trial established by Article 578.

In the case at bar, the state reinstituted the case for the same offense only eight days after the *nolle prosequi* and the district attorney was obviously not avoiding time limitations set out in C.Cr.P. art. 578 which allow two years from the filing of the bill of information and trial.

Thus, we find that the trial court erred in granting the motion to quash.

The district attorney controls dismissing and reinstating cases, and neither the defendant's statutory nor his constitutional right to a speedy trial was violated by the State's dismissal and reinstitution of these charges. *State v. Larce*, 2001-1992 (La. App. 4 Cir. 1/23/02), 807 So. 2d 1080, *State v. Henderson*, 2000-0511 (La. App. 4 Cir. 12/16/00), 775 So. 2d 1138; *State v. Oltmann*, 551 So. 2d 1 (La. App. 4 Cir. 1989).

Accordingly for reasons cited above, we find that the trial court erred in granting the defendant's motion to quash the bill of information. The judgment is reversed and the case remanded to the trial court.

REVERSED AND REMANDED