STATE OF LOUISIANA	*	**NO. 2016-KA-0393**
VERSUS	*	**COURT OF APPEAL**
JOHN SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOVE, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent from the majority's decision to vacate the trial court's ruling and remand the matter for an evidentiary hearing. My review of the present set of facts and analysis of the *Barker* factors differs from the majority. First, I disagree with the majority's methodology for calculating the length of delay. Second, I find the State fails to prove it made reasonably diligent efforts to bring Mr. Smith to trial; thus, the reason for the delay weighs against the State. Third, I find Mr. Smith is not required to establish specific prejudice to his defense.[1] Explained in greater detail below, I would affirm the trial court's granting of Mr. Smith's motion to quash.

Appellate courts review a trial court's ruling on a motion to quash for an abuse of discretion. *State v. Brown*, 11-0947, p. 4 (La. App. 4 Cir. 3/7/12), 88 So.3d 662, 664 (citing *State v. Love*, 00-3347, p. 9-10 (La. 5/23/03), 847 So.2d 1198, 1206-07). In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court reasoned that none of the four factors is considered to be a "necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial." *Id*., 407 U.S. at 533, 92 S.Ct. at 2193. Instead, the Court reasoned that they are "related factors and must be considered together with such other circumstances as may be relevant." *Id.*

[1] I agree with the majority's finding that Mr. Smith sufficiently asserted his speedy trial right.

Length of Delay

Regarding the first *Barker* factor, the State relies on *State v. Mathews*, 13-0525 (La. 11/15/13), 129 So.3d 1217, to argue that when a defendant is not incarcerated or subjected to a restraint on his or her liberty, that time should not be considered in the calculation of the length of the delay.[2] *Id.*, 13-0525, p. 3, 129 So.3d at 1219 (citing *United States v. MacDonald*, 456 U.S. 1, 2, 102 S.Ct. 1497, 1498, 71 L.Ed. 2d 696 (U.S. 1982). The State suggests *Mathews* creates a bright line rule for calculating the length of delay.

I respectfully dissent from the majority's adoption of the State's argument. Under the circumstances of this case, the time between Mr. Smith's termination from the diversion program and reinstitution of the charge should not be excluded from the calculation of the length of delay merely because he was not incarcerated during the delay. Simply because a defendant is not incarcerated during the delay between the dismissal and reinstitution of the charge does not preclude a defendant from suffering prejudice to his ability to prepare a defense or prejudice of living with the anxiety associated with the possible reinstitution of his charge.

I also find *Mathews* does not establish a bright line rule. In particular, the *Mathews* decision does not expressly overrule previous appellate court decisions which calculated the length of delay between the filing of the original bill of information and the granting of the motion to quash, regardless of whether or not the defendant was incarcerated. *See State v. Leban*, 611 So.2d 165, 169 (La. App. 4th Cir. 1993). Case law further reveals that only one case has examined the *Mathews'* paradigm as part of its review of a ruling on a motion to quash and the first *Barker* factor. *See State v. Ordonez*, 14-186 (La. App. 5 Cir. 9/24/14), 151 So.3d 94. *Ordonez* is distinguishable, however, because the delay in prosecution

[2] The State's challenge under *Mathews* is raised for the first time on appellate review as the State did not argue *Mathews* in its opposition to the motion to quash or argument at the hearing at the trial court level.

was due to the State's inability to locate the juvenile victim in its case against defendant for sexual battery; the State informed the defendant that it would reinstitute the charge when it could locate the victim and did so immediately upon her contacting the district attorney's office shortly after she turned 18; and the State had 30 years from the day the victim turned 18 to institute prosecution for the offense. *Id.*, 14-186, p. 8, 151 So.3d at 100.

Moreover, the circumstances of this case warrant our consideration of the delay in the reinstitution of the charge against Mr. Smith after his termination from diversion. Mr. Smith is charged with possession of heroin. I find the alleged offense is "more akin to an ordinary street crime" as compared to "a serious, complex conspiracy charge." *Barker*, 407 U.S. at 530-31, 92 S.Ct. at 2192. Therefore, the length of delay that is considered presumptively prejudicial in an uncomplicated drug possession charge might otherwise be acceptable for a more serious and complex felony charge.

Additionally, jurisprudence demonstrates that courts are cautious of delays caused by the State's dismissal and reinstitution of a charge against a defendant. The Louisiana Supreme Court has continuously stated:

> In those cases where it is evident that the district attorney is flaunting his authority for reasons that show he wants to favor the State at the expense of the defendant, such as putting the defendant at risk of losing witnesses, the trial court should grant a motion to quash and an appellate court can appropriately reverse a ruling denying a motion to quash in such a situation.

Batiste, 05-1571, p. 5, 939 So.2d at 1249 (quoting *Love*, 00-3347, p. 14, 847 So.2d at 1209).

Here, Mr. Smith argues that the length of delay to consider is between the date of his arrest and the filing of the second bill of information, almost five and a half years. Alternatively, he contends that even considering his removal from diversion, the State did not reinstitute the charge for 46 months, or almost four

years. Likewise, the post-accusation delay is three times as great as the period considered in *Mathews* and is four times the period other courts have deemed presumptively prejudicial. *State v. Ervin*, 08-1078, p. 4 (La. App. 4 Cir. 4/1/09), 9 So.3d 303, 307; *also State v. Quinn*, 13-0726, p. 3-4, 136 So.3d at 269. In that courts are cautious of delays caused by the State's dismissal and reinstitution of a charge against a defendant and the 46-month delay accounts for over half of the six-year delay in Mr. Smith's prosecution, I find the nearly four-year delay relevant to this Court's review. Further, where the State dismisses a case and later reinstitutes charges, the resolution of a motion to quash is on a case-by-case basis. *State v. Lee*, 11-0892, p. 2 (La. App. 4 Cir. 1/18/12), 80 So.3d 1292, 1293 (citing *State v. Batiste*, 05-1571, p. 5 (La. 10/17/06), 939 So.2d 1245, 1249).

Given the underlying circumstances detailed above, I disagree with the majority's application of *Mathews* and the exclusion of the 46-month delay following Mr. Smith's termination from diversion. In that I find the 46-month delay is relevant, I also find it is presumptively prejudicial. I offer below my analysis concerning the reason for delay and the prejudice to Mr. Smith's defense.

Reason for Delay

The State bears the burden of rebutting the merits of the motion to quash. The State claims that it reinstituted the charge when Mr. Smith failed to complete diversion. Yet, the State waited almost four years before filing the second bill of information. At the motion hearing, the State was afforded every opportunity to justify the delay in the reinstitution of the charge after Mr. Smith's termination from diversion. When the trial court questioned the State about the delay the State claimed "[it] had to find [Mr. Smith], first off…he had six addresses."

Nevertheless, there is no evidence in the record that the State made any efforts to serve Mr. Smith in the time immediately after his termination from the diversion program. Such evidence would support the State's contention that it was

looking for Mr. Smith in order to reinstitute the charge, but the State offers none. Not until the State filed the second bill of information—almost four years after Mr. Smith's termination from diversion—did it begin efforts to locate Mr. Smith and attempt service. Although the State argued at the hearing that it had six addresses for Mr. Smith, the State attempted service at only one.[3] Service of the second bill of information and arraignment was attempted four times prior to the issuance of an alias capias in June 2015. Even still, the State made no efforts during the 46 months after Mr. Smith's termination from diversion to move forward with the proceedings. As the trial court noted, the State was not obligated to wait until Mr. Smith was located in order to reinstitute proceedings against him. In fact, the State filed the second bill of information approximately 12 months before learning of Mr. Smith's actual location. Thus, I find the record does not support the State's reason for the delay.

The State also argues that the 46-month delay weighs against Mr. Smith because he failed to provide his change of address. Without it, the State could not serve the new bill of information. The Diversion Program Agreement and Conditions for Participation form Mr. Smith signed notified him that the State has the authority to reinstitute the charge against him for failing to successfully complete the program. Part of his participation required him to notify and seek his diversion counselor's permission prior to making any changes to his address. However, Mr. Smith contends that his address changed after he was already terminated from diversion; thus, the requirement to notify his counselor of a change in address did not apply to him because he was no longer a part of the program. A review of the waiver also demonstrates there is no similar requirement on the part of participants who are terminated from the program.

[3] Although the State learned in May 2015 that Mr. Smith no longer lived at the address to which it sent notice, it did not attempt service at the other five addresses the State alleges it had on file.

I agree with the majority that the State did not intentionally delay proceedings or intentionally fail to locate Mr. Smith. However, the State was not obligated to wait until Mr. Smith was located to reinstitute the charge against him. In that regard, the State offers no explanation for failing to reinstitute prosecution or locate Mr. Smith sooner. Thus, I find the principal reason for the delay is the State's negligence "as the State was neither diligent nor malicious" in reinstituting proceedings or attempting to locate Mr. Smith. *Ervin*, 08-1078, p. 7, 9 So.3d at 309.

When the principal reason for the delay is negligence, courts generally consider it to be a more neutral reason than a deliberate harm. Still, *Barker* requires its consideration because the ultimate responsibility rests with the State rather than the defendant. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192; *see also Ervin*, 08-1078, p. 7, 9 So.3d at 309 (although negligence is weighed less heavily against the State it still falls on "the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution") (internal citations omitted). In that the State fails to establish a justifiable reason for the delay, I also find it fails to demonstrate it made reasonably diligent efforts to bring Mr. Smith to trial during the 46-month delay.

Prejudice Caused to Defendant

Mr. Smith also contends the delay in reinstituting the charge against him "seriously prejudiced his ability to present an effective defense against the charge." Mr. Smith avers that due to the extensive delay the State's case in chief will be based solely on the testimony of the two police officers who arrested him. Considering the length of the delay since his arrest and any future trial date, the officers' testimony is likely to be based on their recitation of the facts contained in the police report and not their independent recollection of events. Further, since his arrest over six and a half years ago the B.W. Cooper Apartments where the

alleged offense took place have been demolished. Consequently, he contends that it would be nearly impossible to locate any witnesses or evidence that may assist him at trial.

Unlike the majority, I find remanding the case for an evidentiary hearing in order for Mr. Smith to establish specific prejudice is unnecessary. Based on the circumstances presented, Mr. Smith is not required to present evidence of specific prejudice. Mr. Smith is only required to establish "specific prejudice to his defense" ***if*** the State proves it demonstrated "reasonable diligence in its efforts to bring [Mr. Smith] to trial." *Ervin*, 08-1078, p. 9, 9 So.3d at 309 (recognizing the defendant's degree of proof in each case varies with the government's degree of culpability for the delay) (internal citations omitted). Therefore, because I find the State failed to prove it demonstrated reasonable diligence in its efforts to bring Mr. Smith to trial, I find an evidentiary hearing to present specific prejudice is not required in order for Mr. Smith to meet his burden under the fourth *Barker* factor.

The "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655, 112 S.Ct. at 2692-93 (quoting *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193). For our appellate review purposes, "[w]hen the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, [] and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, [] nor persuasively rebutted, the defendant is entitled to relief." *Id*., 505 U.S. at 658, 112 S.Ct. at 2694 (internal citations omitted).

While it is unclear if the arresting officers have an independent recollection of the incident involving Mr. Smith after years of numerous arrests and traffic stops since Mr. Smith's arrest, I find an evidentiary hearing to clarify this issue is unnecessary. As stated above, Mr. Smith is only required to prove specific

prejudice when the State has demonstrated reasonable diligence in its efforts to bring Mr. Smith to trial. Similarly, the passage of time has the effect of eroding exculpatory evidence and, specifically in this case, testimony. The erosion of which can rarely be shown. For that reason, courts have held "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Ervin*, 08-1078, p. 8, 9 So.3d at 309 (internal citations omitted). I find an evidentiary hearing to address what independent recollection the arresting officers have of Mr. Smith's case from over six years ago is a fruitless endeavor.

Further, in the time since Mr. Smith's termination from diversion, the B.W. Cooper Apartments where the incident occurred have been demolished. Because of the State's nearly four- year delay in the reinstitution of an uncomplicated drug charge, Mr. Smith was put at risk of losing witnesses and potentially exculpatory evidence. I find the passage of time, in this case, has impaired Mr. Smith's ability to prepare a defense and compromised the reliability of a future trial—neither of which was extenuated by Mr. Smith's acquiescence, nor persuasively rebutted by the State.

Therefore, I find no error in the trial court's decision to grant Mr. Smith's motion to quash. To find otherwise in this particular case, only serves to condone the prolonged and unjustified delay that would both penalize Mr. Smith for the State's fault and "simply encourage government to gamble with interests of criminal suspects assigned a low prosecutorial priority." *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693. Accordingly, I respectfully dissent as I find trial court did not abuse its discretion by granting Mr. Smith's motion to quash. I would affirm the judgment of the trial court.