

STATE OF LOUISIANA

\*

NO. 2016-KA-0393

VERSUS

\*

COURT OF APPEAL

JOHN SMITH

\*

FOURTH CIRCUIT

\*

STATE OF LOUISIANA

\* \* \* \* \*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 523-557, SECTION "D"  
Honorable Jerome M. Winsberg, Judge Pro Tempore

\* \* \* \* \*

**Judge Madeleine M. Landrieu**

\* \* \* \* \*

(Court composed of Judge Terri F. Love, Judge Max N. Tobias, Jr., Judge Madeleine M. Landrieu)

**LOVE, J., DISSENTS AND ASSIGNS REASONS**

Leon A. Cannizzaro, Jr.  
District Attorney  
Naomi Jones  
Assistant District Attorney  
Parish of Orleans  
619 South White Street  
New Orleans, LA 70119

**COUNSEL FOR APPELLANT, STATE OF LOUISIANA**

James H. Miller  
Orleans Public Defenders  
2601 Tulane Ave, Seventh Floor  
New Orleans, LA 70119

**COUNSEL FOR DEFENDANT/APPELLEE**

**VACATED AND REMANDED**

**NOVEMBER 23, 2016**

The State of Louisiana appeals the trial court judgment, which granted the defendant's motion to quash the bill of information. For reasons that follow, we find that the State was within the statutory time delay for instituting prosecution. On the issue of whether the defendant's constitutional right to a speedy trial was violated, the record shows that the defendant did not establish specific prejudice resulting from the State's reinstatement of the charge against him. However, the defendant requested an opportunity for an evidentiary hearing on this issue, and his request was denied. Because we find that the trial court should not have determined the issue of whether the defendant's constitutional right to a speedy trial was violated without allowing the defendant the opportunity to present evidence on this issue as he requested, we vacate the judgment and remand this matter to the trial court for an evidentiary hearing.

The defendant was arrested on August 17, 2009 for possession of heroin in violation of La. R.S. 40:966 C(1).<sup>1</sup> A bill of information charging the defendant with this offense was filed on August 24, 2009. The defendant pled not guilty on October 14, 2009, and had several other court appearances before entering a

---

<sup>1</sup> The underlying facts giving rise to the charge are unknown and not pertinent to this appeal.

diversion program on September 29, 2010. As a condition of enrollment in this program, the defendant waived his rights to speedy trial, and to the time limitations for institution of prosecution and trial. The defendant also acknowledged that if he was removed from the program for any reason other than the successful completion of the program, the time limitation for the institution of prosecution and for bringing his case to trial would begin to run anew.

The State entered a *nolle prosequi* as to the charges against the defendant on October 14, 2010 because of his entry into the diversion program. On April 29, 2011, the defendant was terminated from the diversion program due to his failure to comply with the program requirements.

The State reinstated the charge against the defendant by filing a bill of information on February 19, 2015, charging him again with possession of heroin. After the 2015 bill was filed, the defendant did not appear in court for several arraignment dates and a status hearing following several unsuccessful attempts to serve him with notice of court dates. As a result, the trial court issued an alias *capias* for the defendant's arrest on June 15, 2015. After being arrested on the alias *capias* on December 29, 2015, the defendant appeared in court on January 7, 2016, and entered a plea of not guilty.

On January 8, 2016, the defendant filed a motion to quash the February 19, 2015 bill of information. The defendant's motion to quash was based on grounds that both his statutory and constitutional rights to speedy trial were violated. The defendant requested an evidentiary hearing to call as a witness one of the arresting officers for the purpose of determining his independent recollection of this matter outside of the police report. The trial court denied the defendant's request for an evidentiary hearing. Following argument of counsel for the State and the

defendant, the trial court granted the motion to quash on March 4, 2016, and the State filed this timely appeal.

In its sole assignment of error, the State argues that the trial court abused its discretion in granting the defendant's motion to quash the bill of information. "In reviewing trial court rulings on motions to quash that involve factual determinations, such as speedy trial violations and *nolle prosequi* dismissal/reinstitution cases, appellate courts apply an abuse of discretion standard." *State v. Cureaux*, 2014-0503, p. 3 (La.App. 4 Cir. 4/1/15), 165 So.3d 228, 230, citing *State v. Simmons*, 2013-0312, p. 4 (La.App. 4 Cir. 10/16/13), 126 So.3d 692, 695.

The defendant is alleged to have committed the offense of possession of heroin on August 17, 2009. Pursuant to Louisiana Code of Criminal Procedure article 572A(1), the State had six years from that date to bring charges against him.<sup>2</sup> It met that statutory deadline by filing a bill of information against the defendant on February 19, 2015. Once the bill of information was filed, the State had two years to bring the defendant to trial. La. C.Cr.P. art. 578A(2). Those two years have not yet elapsed.

On appeal, the defendant concedes that the State instituted prosecution against him within the statutory six-year time limitation. However, the defendant argues that even though the institution of prosecution does not violate Louisiana

---

<sup>2</sup> La. C.Cr.P. art. 572A(1) states, in pertinent part:

A. Except as provided in Articles 571 and 571.1, no person shall be prosecuted, tried, or punished for an offense not punishable by death or life imprisonment, unless the prosecution is instituted within the following periods of time after the offense has been committed:  
(1) Six years, for a felony necessarily punishable by imprisonment at hard labor.

statutory law, the motion to quash was properly granted because his constitutional right to a speedy trial was violated.

In assessing whether a defendant has been deprived of his constitutional right to a speedy trial, courts consider the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant resulting from the delay.

*Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). “The first *Barker* factor, the length of the delay, is a threshold requirement for invoking a speedy trial analysis; it functions as a triggering mechanism for further inquiry into the other three *Barker* factors.” *State v. Brown*, 2011-0947, p. 9 (La.App. 4 Cir. 3/7/12), 88 So.3d 662, 668, citing *State v. Love*, 2000-3347, p. 16 (La. 5/23/03), 847 So.2d 1198, 1210. “Only if there is a ‘presumptively prejudicial’ delay will courts proceed to analyze the other *Barker* factors.” *Id.*

In his motion to quash, the defendant argued that his constitutional right to a speedy trial was violated because more than six years elapsed from the time of the filing of the State's original bill of information and the filing of the defendant's motion to quash. The defendant asserted that this length of time was “presumptively prejudicial” for purposes of his constitutional right to a speedy trial, even though he admits that he was not incarcerated for the majority of the time leading up to his motion to quash.<sup>3</sup>

Our courts have held that “[a] district court's resolution of a motion to quash in cases such as this one, where the district attorney entered a *nolle prosequi* and later reinstated charges, is considered on a case-by-case basis.” *State v. Lee*,

---

<sup>3</sup> The record on appeal reflects that the defendant is currently out of jail on bond.

2011-0892, p. 2 (La. App. 4 Cir. 1/18/12), 80 So.3d 1292, 1293, citing *State v. Batiste*, 2005-1571, p. 5 (La. 10/17/06), 939 So.2d 1245, 1249. We note initially that the defendant has incorrectly included in his calculation of the delay period the time when he was enrolled in the diversion program. When the defendant entered the diversion program, he agreed to waive his rights to the time limitations for prosecution and trial.

The State argues that, in addition to not including the period of time when the defendant was enrolled in the diversion program, the entire forty-six month time period between the date the State entered a *nolle prosequi* and the date the State filed the second bill of information should not be included in the calculation of the length of delay. The State cites *State v. Mathews*, 2013-0525, p. 3 (La. 11/15/13), 129 So.3d 1217, 1219, which relied on the rule of *United States v. MacDonald*, 456 U.S. 1, 9, 102 S.Ct. 1497, 1502 (1982), that when a defendant is not incarcerated or subjected to other restraints on his liberty, that time should not be considered in calculating the time delay in a constitutional speedy trial claim. See *United States v. Loud Hawk*, 474 U.S. 302, 312, 106 S.Ct. 648 (1986). Rather, the *Mathews* Court only included in its calculation the time period between a defendant's arrest in the first case and the date of the *nolle prosequi*, and the time period between the date of the filing of the second bill of information and the date of the filing of the motion to quash. See *Mathews*, 2013-0525, p. 3, 129 So.3d at 1219.

Applying the *Mathews* method of calculation to the instant case, the first time period was approximately fourteen months (August 17, 2009 through October 14, 2010), and the second time period was approximately eleven months (February 19, 2015 through January 8, 2016). Thus, excepting the time period between the

*nolle prosequi* and the filing of the second bill of information when the defendant was not incarcerated, the total time to be considered in calculating the delay for the defendant's constitutional speedy trial claim is approximately twenty-five months.

Whether a twenty-five month delay is presumptively prejudicial is not absolute because this court has held that “[t]he specific circumstances of a case will determine the weight to be ascribed to the length of and reason for the delay.” *Batiste*, 2005-1571, p. 7, 939 So.2d at 1250. Because we find that twenty-five months arguably constitutes a presumptively prejudicial delay, we will evaluate the remaining *Barker* factors.

Considering the second factor, i.e., the reason for the delay, the record shows that some of the delays in the early stages of this case prior to the defendant's entry into the diversion program were due to his difficulties in securing and maintaining counsel. Also, from the time the first bill of information was filed until the date that the State entered a *nolle prosequi*, the defendant failed to appear at two court hearings and requested a continuance of another court date.

Other than the trial court's cancellation and continuance of three other court dates, the remainder and majority of the delay in the twenty-five month period calculated above appears to be attributable to the State, although the record does not show that the delay was “a deliberate attempt to delay the trial in order to hamper the defense.” See *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. The record shows that the State had difficulty locating the defendant prior to the issuance of the alias *capias* on June 15, 2015. However, as noted by the trial court, the State was not obligated to wait until the defendant was located in order to reinstitute proceedings against him, and, in fact, filed the second bill of information approximately eleven months prior to gaining knowledge of the defendant's actual

location. Nonetheless, we do not find that the State deliberately attempted to delay proceedings or to not locate the defendant.

Concerning the third *Barker* factor, i.e., the defendant's assertion of his right to a speedy trial, the defendant argued that he asserted his constitutional right to a speedy trial as soon as he learned of the reinstatement of the charge against him in January 2016. We agree.

Regarding the original prosecution instituted on August 24, 2009, the record shows that the defendant had difficulties obtaining and maintaining counsel. Once that case was dismissed and charges were no longer pending, no reason existed for the defendant to assert any violations of his constitutional or statutory rights to a speedy trial. However, once the State reinstated the charge against him in February 2015, the defendant regained the right to assert any violations of his right to a speedy trial and did so soon after he was arrested on the new bill and appeared in court. That defense counsel did not file a separate motion for speedy trial, but instead included this claim in a motion to quash is of no moment. We find the defendant sufficiently and timely asserted his constitutional right to a speedy trial.

Finally, concerning the fourth *Barker* factor, i.e., the prejudice to the defendant resulting from the delay, the defendant, quoting *Barker*, alleged in his motion to quash that he has been disadvantaged "by living under a cloud of anxiety, suspicion, and...hostility." *See Barker*, 407 U.S. at 533, 92 S.Ct. at 2193. The defendant also alleged that the delay in reinstating the charge against him had "seriously prejudiced [the defendant] and his ability to present an effective defense against this charge." In support of this allegation, the defendant stated that "commonsense indicates that many, if not all, of the possible witnesses or pieces of evidence that might be able to assist [the defendant] will be gone after this six-and-



a-half year delay since the incident in question and the present.” He also alleged that “any testimony from any law enforcement officer that would be provided against [the defendant] at a hearing or trial will likely only be a regurgitation of the police report, without any independent recollection of the incident or elaboration on it.” At the hearing on the motion to quash, defense counsel argued that the delay prejudiced the defendant because “memories fade, it is hard to know what evidence has or has not been lost, or what witnesses have or have not been lost.”

A defendant is required to raise sufficient and specific prejudice as opposed to only claims of general prejudice. See *State v. Bell*, 2013-0117 (La. 9/27/13), 122 So.3d 1007. In *State v. Brown*, 2011-0947, p.12 (La. App. 4 Cir. 3/7/12), 88 So.3d 662, 670, this Court found that the defendant’s “generalized allegation regarding losing contact with unidentified witnesses” was insufficient to establish specific prejudice.

In this case, the defendant presented only generalized allegations of prejudice in his motion to quash. However, at the hearing on the motion, he requested an evidentiary hearing to present testimony on the issue of prejudice to him as a result of the delay, and the trial court denied that request. We find that the defendant should have been afforded an opportunity to present evidence on the issue of whether his constitutional right to a speedy trial has been violated. See *State v. Brown*, 2015-1319 (La.App. 4 Cir. 4/20/16), 193 So.3d 267; *State v. Dillon*, 2011-0188 (La.App. 4 Cir. 8/24/11), 72 So.3d 473. Accordingly, we vacate the trial court judgment and remand this matter for an evidentiary hearing. Following the hearing, the trial court is to rule anew on the basis of the expanded record.

For the reasons stated above, the trial court judgment granting the defendant's motion to quash the bill of information is vacated, and this matter is remanded to the trial court for an evidentiary hearing on the issue of whether the defendant's constitutional right to a speedy trial has been violated.

**VACATED AND REMANDED**