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**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2010 KA 0834**

**STATE OF LOUISIANA**

**VERSUS**

**CLARENCE ROGERS**

**Judgment rendered: OCT 29 2010**

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**On Appeal from the 18<sup>th</sup> Judicial District Court  
Parish of Iberville, State of Louisiana  
Suit Numbers: 599-07 & 600-07; Division D  
The Honorable William C. Dupont, Judge Presiding**

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**Counsel for Appellant  
State of Louisiana**

**Michael Parks  
Plaquemine, Louisiana**

**Counsel for Appellee  
Clarence Rogers**

*KUHN, J CONCURS*

**BEFORE: KUHN, PETTIGREW AND KLINE, JJ.<sup>1</sup>**

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<sup>1</sup> Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

**KLINE, J.**

On June 1, 2007, the defendant, Clarence Rogers, was charged by two Iberville Parish grand jury indictments with malfeasance in office, a violation of La. R.S. 14:134, and unauthorized use of an access card, a violation of La. R.S. 14:67.3(B). He pled not guilty to all charges. On July 7, 2009, prior to trial, the defendant filed a motion to quash the indictments for failure to commence trial within two years as required by La. Code Crim. P. art. 578(A)(2). On October 21, 2009, over the state's objection, the trial court granted the defendant's motion to quash. The state now seeks review of the trial court's ruling. We reverse the granting of the motion to quash and remand the matter to the district court for further proceedings.

**ASSIGNMENT OF ERROR  
GRANTING OF DEFENSE MOTION TO QUASH**

In a single assignment of error, the state argues the trial court erred in granting the motion to quash because the time limitation for commencement of trial was suspended on two separate occasions (January 31, 2008, and November 5, 2008) when the defendant requested, and was granted, a continuance of the trial. The state further asserts the time limitation was interrupted by the defendant's failure to appear at a court proceeding on December 15, 2008 after receiving actual notice on December 9, 2008.

Louisiana Code of Criminal Procedure article 578(A)(2) provides that trial of non-capital felonies must be held within two years from the date of the institution of the prosecution. "Institution of prosecution" includes the finding of an indictment, as in this case, or the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. Code Crim. P. art. 934(7); **State v. Wilson**, 95-0613, p. 4 (La. App. 1st. Cir. 4/4/96), 672 So.2d 716, 718-19. Upon expiration of this time limitation, the court shall, on motion of the defendant,

dismiss the indictment and there shall be no further prosecution against the defendant for that criminal conduct. La. Code Crim. P. art. 581.

In the instant case, the defendant is charged with two non-capital felonies, thus requiring commencement of trial within two years from the date the prosecution was instituted. The prosecution of this matter was instituted by grand jury indictments on June 1, 2007. Therefore, under the statute, the state had until June 1, 2009, to commence the defendant's trial. As of July 7, 2009, the date the defendant moved to quash the indictments, the case had not been tried. Clearly, the two-year period for commencement of trial was exceeded in this case; thus, the defendant's motion to quash is facially meritorious.

Once a defendant shows that the state has failed to bring him to trial within the time periods specified by La. Code Crim. P. art. 578, the state bears a heavy burden of showing that an interruption or suspension of the time limit tolled the running of the two-year period. **State v. Morris**, 99-3235, p. 1 (La. 2/18/00), 755 So.2d 205 (per curiam). Interruption of the time limit is provided for in La. Code Crim. P. art. 579, which provides:

A. The period of limitation established by Article 578 shall be interrupted if:

(1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or

(2) The defendant cannot be tried because of insanity or because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state; or

(3) The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record.

B. The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.

In addition, La. Code Crim. P. art. 580 allows for the suspension of the time limitations. It provides:

When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial.

Under the facts and circumstances of this case, for the state to successfully meet its burden of justifying the delay, it must show that the period of approximately twenty-five months between the institution of the prosecution against the defendant and the filing of the motion to quash includes one or more periods of suspension totaling at least one month and six days, or an interruption that may have caused the period of limitation to begin anew.

A chronology of the proceedings in this case, as documented in the record, is as follows:

- On July 30, 2007, following the defendant's arraignment, the court set the matter for motions on October 31, 2007.
- Thereafter, on August 6, 2007, counsel for the defendant filed, among other things, motions for a preliminary examination, for discovery, and to suppress the evidence and/or statements.
- On October 31, 2007, when the matter was called before the court, counsel for the defendant "waived" all motions and the state moved to have the matter set for trial on February 6, 2008.
- On November 29, 2007, the matter came before the court and the February 6, 2008 trial date was maintained with a pretrial conference scheduled for January 31, 2008.
- On January 31, 2008, when the matter came before the court for pretrial, on motion of the defense, the trial of the matter was continued to March 4, 2008, with pretrial on February 27, 2008.

- On March 3, 2008, on motion of the state, the trial was continued to June 3, 2008, with pretrial rescheduled to May 29, 2008.
- On May 29, 2008, on motion of the state, the trial was again continued until August 5, 2008. The pretrial was set for July 31, 2008.
- On July 31, 2008, the state moved to have the trial continued until September 2, 2008. Pretrial was scheduled for August 28, 2008.
- Thereafter, on August 28, 2008, again on the motion of the state, the matter was continued until November 4, 2008, with a pretrial conference scheduled for October 30, 2008.
- At the October 30, 2008, pretrial conference, the state offered the defendant a plea deal, which he rejected. Trial of the matter was set to commence on November 5, 2008.
- On November 5, 2008, the trial was not commenced. Following a brief exchange regarding the matter (which will be discussed in detail below), the district court instructed the defendant to return to court on November 24, 2008, to receive a new trial date.
- The matter came up for trial again on January 15, 2009. On this date, the state moved for a continuance. Trial was reset to March 31, 2009.
- On March 30, 2009, the state sought, and was granted, another continuance of the trial date. The trial was rescheduled to July 7, 2009.<sup>2</sup>
- When the matter came for trial on July 7, 2009, counsel for the defense filed the motion to quash, based on untimely prosecution, in open court. The trial court took the matter under advisement and later granted the motion.

On appeal, the state argues that the motion to quash should not have been granted because the period of limitation for commencement of trial was both

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<sup>2</sup> Neither the defendant nor his counsel was present in court when this trial date was selected. The court noted that defense counsel had previously indicated that the defendant would not oppose the granting of a continuance if requested by the state.

suspended and interrupted in this case. First, the state claims the defendant made motions to continue the trial on both January 31, 2008, and November 5, 2008. As the state correctly asserts, a motion to continue filed by the defendant is a preliminary plea, which suspends the running of the period of limitation until the court rules on the motion, "but in no case shall the state have less than one year after the ruling to commence the trial." La. Code Crim. P. art. 580.

The record before us reflects that the defendant requested a continuance of the trial on January 31, 2008. The motion was granted the same day. The trial of the matter was continued until March 4, 2008. Under the language of Article 580, once the court rules on a preliminary plea, the period of limitation is no longer suspended. Therefore, contrary to the state's assertions, the suspensive effect of this preliminary plea by the defense lasted, at best, one day. As previously noted, the delay between the grand jury indictments and the filing of the motion to quash was approximately two years, one month, and six days. Thus, the record must establish an additional period of suspension in order for the state to meet its burden.

Next, the state argues that the defendant also moved for a continuance on November 5, 2008. We have reviewed the minute entry and transcript for the November 5, 2008 proceedings, neither of which reflect that the defendant moved for a continuance. The minute entry simply provides that "Defense Counsel will file Motion for Trial Date. Defendant is to report back on November 24, 2008 at 9:00 A.M. to receive notice of trial date." The transcript provides:

THE COURT:

Clarence Rogers is here and I thought I heard Mr. Parks say last court date, correct me if I'm wrong, that he had rejected the plea offer but was waiving a jury, did I hear that correctly?

[PUBLIC DEFENDER'S OFFICE]:

Right.

THE COURT:

Okay. I didn't know if Mr. Marrioneaux [Assistant District Attorney] had heard that.

MR. MARRIONEAUX:

That's what I had heard.

THE COURT:

Okay. All right. Then that being the case, I'll have to put a date, I'll have to give a special date to try that one 'cause it won't take, I don't want to waste a jury week for that. So if the Public Defender's office will put that in the form of a motion with a request for a trial date, --

[PUBLIC DEFENDER'S OFFICE]:

Okay.

THE COURT:

-- then I will then fill that in after consulting with the prosecution and the Public Defender's office and get a date that will work for it.

MR. MARRIONNEAUX:

Is Mr. Roger's [sic] huh, we're going to have to notify him.

THE COURT:

Mr. Roger's [sic], you understand? What is my next - -

MR. MARRIONNEAUX:

We have a date December 15<sup>th</sup> here.

THE COURT:

What's the next day I'm going to be here for a criminal issue?

MR. MARRIONNEAUX:

Well, we have arraignments November 24<sup>th</sup>.

THE COURT:

Okay. November 24<sup>th</sup>. Mr. Roger's [sic] come here on November 24<sup>th</sup> and I'll have made that date by then, I will have given it a date and you can get your notice then. So just come on the 24<sup>th</sup> - get your notice right now for the 24<sup>th</sup> and just come on that date but

you won't be going to trial on that date, that will be the day that I will have set the trial date.

MR. ROGERS:

Yes, sir.

THE COURT:

And I'll try not to make [it] too far off so y'all can resolve this matter. Okay.

From the foregoing, we simply cannot conclude with any degree of certainty that this delay in the case was occasioned by the defense. As such, we do not consider the delay to have had a suspensive effect on the time limitations for commencement of the trial.

Finally, the state argues that the time limitations were interrupted, and began to run anew, when the defendant failed to appear in court on December 15, 2008. We do not agree. Initially, we note that there is no indication in the record that the defendant received actual notice of the December 15, 2008 court date. Secondly, the record reflects that on December 15, 2008, the court noted that the defendant's case was back before the court "to get a trial date." Neither the defendant nor his counsel was present at this proceeding. In response to the court's inquiry regarding the defendant's presence, the Deputy Clerk of Court replied, "I think he already signed." The court agreed, "I think he already got it." There was no further action on this date. Contrary to the state's assertions, we do not find that the defendant's absence from the proceeding set solely to issue a new trial date constituted a "failure to appear" such as to interrupt the time limitations for trial when it is clear the defendant had already received the trial date. The record reflects the defendant and his counsel were present in court on all occasions before and after this date.



In resolving this issue, however, we note that La. C.Cr.P. art. 920 requires us to consider on appeal “[a]n error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” Here, a mere inspection of the record reveals that although the state failed to raise this argument in its motion to reconsider the granting of the motion to quash below or in its brief in this court, the defendant’s outstanding motions for a preliminary examination, for discovery, and to suppress the evidence served as preliminary pleas for the purpose of suspending the time limitations for commencement of the trial. A preliminary plea is any pleading or motion filed by the defense which has the effect of delaying trial, including properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and bills of particulars. **State v. Brooks**, 2002-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (per curiam). The record reflects that counsel filed the aforementioned motions on August 6, 2007, and they remained pending until October 31, 2007, when counsel for the defendant “waived all motions.” These outstanding motions suspended the running of the time limitations for trial for over two and one-half months. Because the delay between the grand jury indictments and the filing of the motion to quash was approximately two years, one month, and six days, this period of suspension is sufficient justification for the delay in the commencement of the defendant’s trial.

In so ruling, we acknowledge the Louisiana Supreme Court’s instruction that the state bears a heavy burden of showing that an interruption or suspension of the time limit tolled the running of the two-year period specified by La. Code Crim. P. art. 578 once a defendant shows that the state has failed to bring him to trial within the time allowed. **Id.** We can find no jurisprudence, however, interpreting and applying the state’s heavy burden to a situation analogous to the one here where the state’s error is discoverable by mere inspection of the record. Accordingly, we

conclude that we should base our holding here on the positive instruction of La. Code Crim. P. art. 920.

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

**DECREE**

For the foregoing reasons, we reverse the district court's ruling granting motion to quash and remand for further proceedings.

**RULING REVERSED; REMANDED FOR FURTHER PROCEEDINGS**