

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 1246

STATE OF LOUISIANA

VERSUS

STEVEN SMITH

Judgment Rendered: MAR 11 2014

On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Docket Number 01-CR8-83148, Division G

Honorable Hillary Crain, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Jan
RHP by GMB
Quilley

GUIDRY, J.

The defendant, Steven M. Smith, was charged by bill of information with driving while intoxicated (DWI), fourth offense, in violation of La. R.S. 14:98. The defendant pled not guilty. The trial court granted the defendant's motion to quash one of the predicate offenses, but denied his motion to quash the bill of information based on untimely prosecution. The defendant withdrew his previous not guilty plea and pled guilty to DWI, third offense, reserving the right to appeal the trial court's ruling on the motion to quash the bill of information, pursuant to State v. Crosby, 338 So. 2d 584 (La. 1976). The trial court sentenced the defendant to five years of imprisonment at hard labor and ordered that thirty days of the sentence be served without the benefit of probation, parole, or suspension of sentence. The trial court suspended the remainder of the sentence and imposed five years of supervised probation under general and special conditions, including imposition of a \$2000 fine, 240 hours of community service, substance abuse evaluation and recommended treatment, \$200 to the indigent defender board, and \$100 to the judicial expense fund. The defendant's appeal challenges the trial court's ruling on the motion to quash the bill of information, based on untimely prosecution. For the following reasons, we vacate the trial court's ruling on the motion to quash the bill of information and remand for a reopened hearing on the motion to quash.

STATEMENT OF FACTS

Because the defendant pled guilty to the instant offense and stipulated to the existence of a factual basis, the facts of the offense were not developed. In accordance with the bill of information, the instant offense occurred October 13, 2001.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the trial court erred in denying his motion to quash, based on untimely prosecution. The defendant contends that over two years passed since the institution of prosecution in 2001 and the date of his guilty plea in 2013. The defendant acknowledges that the time limitation was interrupted in 2004 when he failed to appear, and the State was unable to serve him. The defendant contends that when he was arrested and incarcerated in the Washington Parish jail in 2006 and 2008, the State had the opportunity to serve him at that point, and the cause of interruption no longer existed.¹ Thus, the defendant argues that, prior to his guilty plea, over two years elapsed from the point that the cause of interruption no longer existed.

When a trial court denies a motion to quash, its determination should not be reversed in the absence of a clear abuse of the trial court's discretion. See State v. Odom, 02-2698, p. 6 (La. App. 1st Cir. 6/27/03), 861 So. 2d 187, 191, writ denied, 03-2142 (La. 10/17/03), 855 So. 2d 765. However, a trial court's legal findings are subject to a de novo standard of review. See State v. Smith, 99-0606, p. 3 (La. 7/6/00), 766 So. 2d 501, 504.

Louisiana Code of Criminal Procedure article 578(2) provides that trial of noncapital felonies must be held within two years from the date of the institution of the prosecution. "Institution of prosecution" includes the filing of an indictment, or, as in this case, the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. C. Cr. P. art. 934(7); State v. Cotton, 01-1781, p. 4 (La. App. 1st Cir. 5/10/02), 818 So. 2d 968, 971, writ denied, 02-1476 (La. 12/13/02), 831 So. 2d 982. A motion to quash is the proper vehicle to assert that the time limitation for the commencement of trial has expired. La. C. Cr. P. art.

¹ After the ruling at issue denying the motion to quash, the defendant stated in open court that he was in jail in 2006 and 2008 for child support and asked why he was not attached during those periods of incarceration.

532(7). 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. C. Cr. P. art. 581. When a defendant has brought an apparently meritorious motion to quash based on prescription, the State bears a heavy burden to demonstrate either an interruption or a suspension of time, such that prescription will not have tolled. State v. Rome, 93-1221 (La. 1/14/94), 630 So. 2d 1284, 1286; State v. Haney, 442 So. 2d 696, 697-98 (La. App. 1st Cir. 1983).

Louisiana Code of Criminal Procedure article 579 states:

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.

Louisiana Code of Criminal Procedure article 580, concerning the suspension of the time limitation, states that 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. The prescriptive period is merely suspended until the trial court rules on the filing of preliminary pleas. The relevant period is not counted, and the running of the time limit resumes when the court rules on the motions. State v. Lathers, 05-0786, p. 8 (La. App. 1st Cir. 2/10/06), 924 So. 2d 1038, 1043, writ denied, 06-1036 (La.

11/3/06), 940 So. 2d 659. A preliminary plea is any pleading or motion filed by the defense that 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, 02-0792, p. 6 (La. 2/14/03), 838 So. 2d 778, 782 (per curiam).

In the instant case, the defendant was charged with a noncapital felony. Thus, trial was required to be commenced within two years of the date of the institution of the prosecution. The bill of information was filed on November 20, 2001, and the defendant's Boykin hearing and guilty plea took place on March 20, 2013. More than eleven years elapsed from the filing date of the original charging instrument to the date of the guilty plea. Thus, the State had the burden of showing an interruption or suspension of the prescriptive period. The defendant filed a motion to quash, based on untimely prosecution, on November 18, 2010, and filed modified motions to quash on the same basis on February 3, 2011, and May 3, 2012. The hearing on the motion to quash took place on April 4, 2011, and the trial court took the matter under advisement. The trial court denied the motion to quash on April 25, 2011, and again stated that the motion was denied at the Boykin hearing on March 20, 2013.

A suspension of the time limitation began on January 24, 2002, two months and four days after the institution of prosecution, when the defendant filed motions to suppress a confession and evidence and a motion for a Prieur hearing. The defendant filed a subsequent motion to quash and to suppress evidence of a predicate offense on February 14, 2002, also causing a suspension of the time limitation.

On May 7, 2002, the trial court granted the motion to quash as to one of the defendant's predicate offenses (a June 2001 predicate). The motions to suppress and motion for a Prieur hearing were ordered dismissed on April 15, 2003. Thus,

the time limitation resumed on that date, and the State had one year and nearly ten months to commence trial. While the record does not contain proof of actual notice to appear on June 2, 2004² (one year, one month, and eighteen days after the time limit previously resumed), the defendant concedes that an interruption took place when he failed to appear on that date. Although the time period had not elapsed by the date of the defendant's failed appearance, there is nothing in the record to show that service was subsequently attempted.

In denying the motion to quash, the trial court concluded that the two-year time period was interrupted from the June 2, 2004 failed appearance to the defendant's arrest in 2010. Without specification, the trial court also noted that there were pending motions that served as suspensions of the time limitation. However, the record is devoid of any motions that were still pending at that time.³ Before ruling on the motion to quash, the trial court specifically stated that attachments were issued, showing that the defendant was personally served with notice prior to the failed appearance on June 2, 2004. The court further noted that service was attempted using the address provided by the defendant on January 15, 2004, when he posted bond, and the defendant's father refused service at that address.

However, the referenced documentation relied upon by the trial court was not made a part of the record for review nor was any testimony introduced. In short, there is no evidence for this court to review in order to determine the correctness of the trial court's ruling on the motion to quash. In such cases, the matter should be remanded to the trial court for a reopened hearing on the motion

² The record reflects that the defendant failed to appear on May 20, 2002, and the only evidence in the record that the defendant received notice of the May 20, 2002 trial date is the December 18, 2001 minute entry of the defendant's arraignment at which the date was set. For the June 2, 2004 failed appearance, the court ordered an attachment and bond forfeiture on motion of the State. The trial court noted that the defendant was arrested on that attachment in July of 2010.

³ The record reflects that no other defense motions were left pending after the trial court dismissed the defendant's motions to suppress and motion for a Prieur hearing on April 15, 2003.

to quash to allow the trial court to receive competent evidence, if possible. Cf. State v. Jackson, 424 So. 2d 997, 1000 (La. 1982); see also State v. Smith, 447 So. 2d 565, 569 (La. App. 1st Cir. 1984). Since the record probably can be made complete by another hearing on the motion to quash, we remand the matter to the trial court for a reopened hearing on the motion. See State v. Schaub, 563 So. 2d 974, 976 (La. App. 1st Cir. 1990).

Accordingly, the judgment denying the defendant's motion to quash the bill of information is vacated. We remand this case for the trial court to receive, at the reopened hearing, testimony and/or documentary evidence relevant to the defendant's argument that the time limitation for the commencement of trial has expired. If, upon remand, the trial court grants the motion to quash, the defendant must be afforded an opportunity to withdraw his Crosby guilty plea. In the event that the trial court again denies the motion, we reserve to the defendant the right to timely appeal the adverse ruling within thirty days of that ruling.

JUDGMENT VACATED;REMANDED FOR A REOPENED HEARING ON THE MOTION TO QUASH.