

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2002-KA-2444**  
**VERSUS** \* **COURT OF APPEAL**  
**ERIC BROWN** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\*  
\*  
\*  
\* \* \* \* \*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 426-177, SECTION "K"  
Honorable Arthur Hunter, Judge  
\* \* \* \* \*  
**Judge Terri F. Love**  
\* \* \* \* \*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Terri F. Love, Judge David S. Gorbaty)

**Eddie J. Jordan, Jr., District Attorney**  
**Leslie Parker Tullier, Assistant District Attorney**  
**David M. Abdullah, Assistant District Attorney**  
619 South White Street  
New Orleans, LA 70119

**COUNSEL FOR PLAINTIFF/APPELLANT**

**Shannon Michaels**  
**Collin Williams**  
**Warren J. Yemm**  
**Rule XX Student Attorneys**  
**Pamela Metzger**  
**Associate Professor of Law**  
**Director of Tulane Criminal Law Clinic**

6329 Freret Street  
New Orleans, LA 70118

**COUNSEL FOR DEFENDANT/APPELLEE**

**REVERSED AND REMANDED**

On April 27, 2001, the defendant was charged by bill of information with forcible rape in violation of La. R.S. 14:42.1. The case was allotted to section “K” and given case number 421-271. At his arraignment on May 2, 2001, the defendant entered a plea of not guilty.

On November 15, 2001, the underlying facts of this case went before the grand jury who returned an indictment for aggravated rape of a child under 12 years old in violation of La. R.S. 14:42, and was allotted to section “L”. The defendant’s previous charge for forcible rape in case number 421-271 “K” was dismissed on November 20, 2001, when the State entered a nolle prosequi.

On February 21, 2002, the defense filed a motion to quash, arguing that under La. C.Cr.P. art. 576, the State could not dismiss charges then reinstitute the case as a higher class charge. On May 6, 2002, the State informed the trial court it would prosecute the case as a non-capital case, thereby only exposing the defendant to a mandatory life sentence.

Thereafter, section “L” and section “K” transferred the case back and forth multiple times. On October 9, 2002, the trial court (section “K”) granted the

defense motion to quash. It is from this ruling that the State takes the instant appeal.

## **DISCUSSION**

The State argues the trial court erred in finding La. C.Cr.P. art. 576 prevents the State from filing a new indictment charging the defendant with a greater charge than the existing charge, where there have been no changes in the circumstances of the case.

La. C.Cr.P. art. 576 provides:

When a criminal prosecution is timely instituted in a court of proper jurisdiction and the prosecution is dismissed by the district attorney with the defendant's consent, **or before the first witness is sworn at the trial on the merits, or the indictment is dismissed by a court for any error, defect, irregularity, or deficiency, 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.

La. C.Cr.P. art. 61 provides:

Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal

prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.

The criminal code is silent on the district attorney's authority under the instant circumstances. However, the State argues that La. C.Cr.P. art. 61 gives the district attorney the authority to control the prosecution of defendants. Prior to trial, a prosecutor should remain free to exercise broad discretion to determine the extent of society's interest in a prosecution, and an initial charging decision should not freeze future conduct. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1977). In Bordenkircher, the issue before the U.S. Supreme Court was whether the due process clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to re-indict the accused on more serious charges if he did not plead guilty to the offense with which he was originally charged. The Court found due process was not violated when the state prosecutor carried out the threat charging the defendant with a higher charge.

As the State notes, in the instant offense, new prosecutors assigned to the case determined that forcible rape was an inappropriate charge where the victim was seven days shy of her 12<sup>th</sup> birthday. Hence, the matter was re-submitted to the grand jury, which returned an indictment for aggravated

rape. After this new indictment was returned, the charge of forcible rape was dismissed. Given these facts, it is clear La. C.Cr.P. art. 576 is inapplicable in the instant case.

Based on the broad discretion afforded district attorneys under La. C.Cr.P. art. 61, and the U.S. Supreme Court's findings in Bordenkircher, the trial court erred in granting the defendant's motion to quash the indictment.

The defendant argues the State's lengthy delay in ensuring its appeal record was lodged in this Court and in filing its appeal brief deprived him of his constitutional right to a speedy trial. He contends that even if this court grants the State relief, the State should nonetheless be estopped from prosecuting him because of the delay in perfecting its appeal.

This Court has not addressed this issue directly. In State v. Johnson, 622 So.2d 845, 848 (La. App. 4 Cir. 1993), this court described a defendant's constitutional right to a speedy trial:

The Sixth Amendment of the U.S. Constitution also provides a right to a speedy trial. This is a fundamental right which has been imposed on the states by the due process clause of the Fourteenth Amendment. Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972). Whether this right has been violated is determined by a four-part test: the length of the delay, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant. Barker, 407 U.S. at 530, 92 S.Ct. at 2192; State v. James, 394 So.2d 1197, 1200 (La. 1981).

In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 218 (1972), the Court noted that the length of delay is a triggering mechanism, and the other three factors need not be addressed unless the court finds the length of delay to be presumptively oppressive given the circumstances of the case. The weight to be ascribed to the length of the delay and the reasons for the delay is determined by the peculiar circumstances of the particular case, i.e. the delay tolerable for a simple street crime is considerably less than that for a serious, complex, conspiracy charge. State v. Reaves, 376 So.2d 136, 138 (La. 1979).

Louisiana courts have addressed speedy trial claims based upon the delay between the filing of the bill of information/indictment and the quashing of the bill. In Reaves, the court found a three and a half month delay in simple possession of marijuana case was prejudicial, because of the economic and psychological burden placed on defendant by repeated absences of police witnesses and futile court appearances might ultimately force defendant to plead guilty to a misdemeanor to maintain his job. In State v. Brown, 93-0666 (La. App. 4 Cir. 7/27/94), 641 So.2d 687, the court found defendant's right to a speedy trial was not violated by a nineteen month delay where the State was not responsible for the continuances and the defendant did not object to the delay until he filed a motion to quash. In

State v. Firshing, 624 So.2d 921 (La. App. 4 Cir. 1993), the court found a seventeen month delay was presumptively prejudicial because the state was responsible for two of three continuances and the defendant was prejudiced by having to appear in court repeatedly for protracted litigation. In State v. Johnson, 622 So.2d 845 (La. App. 4 Cir. 1993), the court found the defendant was not denied his constitutional right to a speedy trial by a delay of twenty-two months caused by defendant's continual failure to appear in court. Further, the defendant made no showing of prejudice. In State v. Leban, 611 So.2d 165 (La. App. 4 Cir. 1992), the court found that the defendant's right to a speedy trial was violated by the sixteen month delay in filing the bill of information, where four of seven continuances were requested by the State, and defendant missed sixteen days of work because of court appearances.

The defendant's claim in this appeal is based on the state's failure to prosecute its appeal timely. Thus, the relevant time period for assessing this claim is the delay between the granting of the state's motion for appeal and the filing of its brief in this appeal.

On October 9, 2002, the defendant filed a motion to quash the indictment, which the trial court granted. On that same date, the State filed for an appeal, which the court granted. The record was lodged in this court

on December 9, 2002. On December 18, 2002, the State filed a motion to interrupt its briefing schedule, citing the need to supplement the record with the transcript of the November 20, 2001 hearing transcript, which this court granted. This court gave the State until January 22, 2003, to file this transcript. On January 30, 2003, this court issued another order directing the state to comply with its previous order. On February 4, 2003, the State filed another motion for extension of time to file the transcript. This court gave the State until March 5, 2003, to comply. The transcript was filed on February 24, 2003, and this court set a new briefing date of March 17, 2003. The State sought an extension of time to file a brief, and this Court gave the state until March 31, 2003, to file its brief. The State did not comply and again sought additional time to file its brief. This Court gave the State an additional seven days to file its brief. On April 3, 2003, the State filed its appellate brief in this Court.

Almost six months elapsed between the granting of the State's motion for appeal and its filing of its brief in this appeal. Analyzing the delay under the jurisprudence, we find that this delay was not prejudicial. The defendant is charge with an exceedingly serious offense. Under Reaves, we consider the serious of this offense along with the delay. In the instant case, we find that while the State was responsible for most of the delay, much of the delay



occurred so the State could supplement the record. Further, the defendant has not demonstrated why he will be prejudiced by the six-month delay.

**CONCLUSION**

For the foregoing reasons, the trial court is reversed and the case is remanded for further proceedings.

**REMANDED**

**REVERSED AND**