STATE OF LOUISIANA	*	**NO. 2003-KA-0986**
VERSUS	*	**COURT OF APPEAL**
GEORGE KELLER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 435-086, SECTION "I"
HONORABLE RAYMOND C. BIGELOW, JUDGE
* * * * * *
Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Max N. Tobias Jr., and Judge Leon A. Cannizzaro Jr)

CANNIZZARO, J., CONCURS WITH REASONS

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REVERSED AND REMANDED

The State brings this appeal, arguing that the district court erred in granting the defendant's motion to quash. Because we find that under the facts and circumstances of this case the defendant's right to a speedy trial was not violated, we reverse the trial court's decision.

On June 25, 2002, the State filed a bill of information in case number 431-208 charging George Keller with possession of marijuana, second offense, in violation of La. R.S. 40:966(D)(2). The defendant pleaded not guilty on July 8th. On July 31st all parties appeared for a hearing on the motions, but the court reset the hearing for August 9th. On that date the defendant did not appear, and the matter was reset for August 16th. The State requested and was granted a continuance on that date. The matter was reset for August 28th, and reset for September 13th by the court. At the hearing held on that day, the court found probable cause and denied the motion to suppress the evidence. Trial was set for November 6th, but the State was granted a continuance on that date, and trial was reset for November 25th. When the State asked for a continuance that day and the court denied it, the State entered a *nolle prosequi*.

Two days later, on November 27th, the case was reinstituted as case number 435-086. On December 11th at his arraignment, Mr. Keller announced that he would file a motion to quash the bill of information, and

the defense attorney filed the motion on December 17th. After a hearing on January 10, 2003, the trial court granted the motion to quash.

At the hearing, defense counsel argued that when the State's request for a continuance was denied, the State's remedy was to take a writ to this Court. The judge then asked if the reason for the continuance was the fact that a police officer witness was missing, and the State affirmed that it was. The judge established that the officer had testified at the motion hearing, and that the State had not offered a stipulation as to what the officer's testimony would be at trial, even though the defense had agreed to stipulate to the officer's testimony. The State also acknowledged that it had not filed a written motion for a continuance. The judge then declared that the issue in this case was fairness and, after finding that the State had taken advantage of its position, granted the motion to quash the bill of information.

The facts of this case are unknown and irrelevant.

In its brief the State argues that the district court erred in granting the motion to quash because neither the defendant's right to a speedy trial nor any of the time limitations in the Code of Criminal Procedure were violated. La. C.Cr.P. art. 61 provides that:

> 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.

Additionally, under La. C.Cr.P. art. 691, the State has the right to dismiss an indictment without the consent of the court, and under La. C.Cr.P. art. 576, the State may reinstitute the charges within six months of dismissal. In this case, the State reinstituted the case two days after the dismissal. Furthermore, under La. C.Cr.P. art. 578 the State has two years after instigation of charges to bring a defendant to trial in a non-capital felony case. In this case the original bill of information was filed on June 25, 2002, and the motion to quash was granted on January 10, 2003, only six and one-half months later.

Recently, this Court considered the same issue in *State v. Santiago*, 2003-0693 (La. App. 4 Cir. 7/23/03), ___So. 2d ___, 2003 WL 21763528, and stated:

> In addition to the statutory right to a speedy trial recognized by La. C.Cr.P. art. 701(A), a defendant also has a fundamental, constitutional right to a speedy trial. In analyzing such a constitutional speedy trial violation claim, it is well-settled that the standard to be applied is the four factor test set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); to wit: (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. The initial factor, the length of the delay, is often referred to as the "triggering mechanism" because absent a "presumptively prejudicial" delay, further inquiry into the *Barker* factors is unnecessary. *See*

> *State v. DeRouen*, 96-0725, p. 3 (La. App. 4 Cir. 6/26/96), 678 So. 2d 39, 40.
> As the State points out, it is well-settled that a defendant challenging the State's dismissal and reinstitution of charges has the burden of showing a violation of his constitutional right to a speedy trial. *State v. Henderson*, 2000-511, p. 7 (La.App. 4 Cir. 12/13/00), 775 So.2d 1138, 1142.

Id., p. 3.

Considering Mr. Keller's right to a speedy trial under the first *Barker* factor, we note that the length of the delay was about six and one-half months from the time of the filing of the first case on June 25, 2002, to the granting of the motion to quash on January 10, 2003. In *State v. Brady*, 524 So.2d 1356 (La.App. 1 Cir. 1988), the First Circuit considered a case in which a defendant convicted of armed robbery argued that his right to a speedy trial had been violated by a delay of five months and three weeks. The court found that that length of time was not only not unreasonable but actually a minimal delay. Similarly, we find that in this case no "presumptively prejudicial" delay exists, and therefore further inquiry into the *Barker* factors is unnecessary. The defendant's right to a speedy trial was not violated under a *Barker v. Wingo* analysis nor under the statutory time limitations imposed by the Louisiana Code of Criminal Procedure. La.C.Cr.P. art. 576 & 578.

The underlying issue in this case is the State's right to *nolle prosequi*

a case and reinstitute it. The district court granted the motion to quash because of the unfairness to the defendant after the State gave itself a continuance.

Recently, in *State v. Love*, 2000-3347 (La. 5/23/03), 847 So. 2d 1198, the Louisiana Supreme Court considered whether a defendant's right to a speedy trial had been violated, and the court emphasized that the facts and circumstances of each individual case determine the propriety of the motion to quash where the district attorney enters a *nolle prosequi* and then reinstitutes the charges. In *Love*, when the State's request for a continuance was denied, the State immediately entered a *nolle prosequi* in open court, stating on the record the intention to recharge the defendant, which the State did some four months later. When the State reinstated charges, the defendant filed a motion to quash asserting his right to a speedy trial which was denied. This Court reversed, finding that the defendant's right to a speedy trial had been violated. The Supreme Court granted writs and reversed this Court and reinstated the conviction and sentence of the trial court, finding that the defendant's right to a speedy trial had not been violated. The court cautioned that:

> When, as in this case, a trial judge denies a motion to quash, that decision should not be reversed in the absence of a clear abuse of the trial court's discretion. Moreover, nothing in the record of this case indicates that the trial court's actions can be

attributed to his belief that he was constrained by this court's . . . decision [in *State v. Alfred*, 337 So.2d 1049 (La.1976)] to deny the motion to quash. In fact, Orleans Parish Criminal Court judges have often in the past decade granted motions to quash in cases like the present one, where the district attorney had *nolle prossed*, then reinstituted charges. See *State v. Carter*, 2002-1279 (La.App. 4 Cir. 1/29/03), 839 So.2d 390; *State v. Larce*, 2001-1992 (La.App. 4 Cir. 1/23/02), 807 So.2d 1080; *State v. Henderson*, 2000-0511 (La.App. 4 Cir. 12/13/00), 775 So.2d 1138; *State v. Gray*, 98-0347 (La.App. 4 Cir. 10/21/98), 766 So.2d 550; *State v. Pham*, 97-K-0459 (La.App. 4 Cir. 3/26/97), 692 So.2d 11; *State v. DeRouen*, 96-0725 (La.App. 4 Cir. 6/26/96), 678 So.2d 39; *State v. Esteen*, 95-1079 (La.App. 4 Cir. 4/3/96), 672 So.2d 1098, *writ denied*, 96-0979 (La.9/27/96), 679 So.2d 1359; *State v. Firshing*, 624 So.2d 921 (La.App. 4 Cir.1993), *writ denied*, 93-2621 (La.2/25/94), 632 So.2d 760; *State v. Leban*, 611 So.2d 165 (La.App. 4 Cir.1993). These cases indicate that the judges of the Criminal District Court understand that a trial judge has the authority to grant a motion to quash when the circumstances of the individual case warrant such an action.

Moreover, close review of the above cases indicates that the judges of the Fourth Circuit Court of Appeal do not feel constrained by *Alfred*, as none of the above cases cite to *Alfred*. In fact, in the two most recent cases from that appellate court – *Carter* and *Larce*, the court has reversed trial court judgments granting motions to quash, purely on the basis of the plenary authority to *nolle pros* and reinstitute charges, given to the district attorney by La.Code of Crim. Proc. arts. 576 and 578. Prior to those two cases, the appellate court sometimes reversed trial court rulings granting motions to quash in cases involving a *nolle pros*

and reinstitution, finding that the trial court abused its discretion in finding that the defendant's right to speedy trial had been violated. See *Gray*, *Pham*, and *DeRouen*. At other times, the court of appeal has affirmed trial court rulings granting motions to quash in similar circumstances, as in *Henderson*, *Firshing* [], *Esteen* [], and *Leban* []. This court has been asked to review only two of the above cases – *Firshing* and *Esteen*. In both cases, this court denied applications to review appellate court judgment affirming trial court judgments granting motions to quash. *Id*. The upshot of all of these cases is that Louisiana courts understand that determination of motions to quash in which the district attorney entered a nolle pros and later reinstituted charges should be decided on the basis of the facts and circumstances of the individual case.

Thus, neither *Alfred* nor this decision should be read by Louisiana courts to constrain a trial court's discretion to grant a motion to quash in appropriate circumstances. In situations where it is evident that the district attorney is flaunting his authority for reasons that show that 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. In this case, we do no not believe any such palpable abuse is evident that would allow the court of appeal to vacate the defendant's conviction on that basis.

Sixth Amendment Right to Speedy

Trial

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Under the rules established in *Barker*, none of the four factors . . . is "either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial." *Id*. [407 U.S.] at 533, 92 S.Ct. 2182. Instead, they are "related factors and must be considered together ... in a difficult and sensitive balancing process." *Id*.

Length of the delay

* * * *

In the instant case, in the likely reality that the defendant remained subject to his bail obligation during the nearly four months that passed between the dismissal of his original bill of information and the filing of the new bill, the delay in this case was approximately 22 months. [FN3 omitted.] Following a lengthy discussion of Louisiana cases on this issue, the court of appeal found that delay was "presumptively prejudicial" for purposes of the *Barker* test. *State v. Love*, 99-1842 (La.App. 4 Cir. 11/8/00), 775 So.2d 717.

The charge in the instant case is possession of cocaine with intent to distribute, a non-capital felony, carrying a penalty of imprisonment at hard labor for not less than five years nor more than 30 years. La.Rev.Stat. 40:967(B)(1). Under the provisions of La.Code of Crim. Proc. art. 578(1), the State must bring the defendant to trial within two years from the date of the institution of the prosecution. In this case, when the State accepted the defendant's plea on October 14, 1998, the two-year statutory period for bringing the defendant to trial had not expired. Moreover, when a timely-instituted criminal procedure has been dismissed, a new prosecution for the same offense may be instituted within time limits established by the pertinent code article or within six months from the date of dismissal, whichever is longer, if the

> State can show that the dismissal of the original prosecution was not for the purpose of avoiding the time limit established by La.Code of Crim. Proc. art. 578. La.Code of Crim. Proc. art. 576. Thus, the State did not violate any statutory time limits in the instant case.
>
> Nevertheless, analysis of the length of the delay does not stop with a finding that the State did not violate the statutory provisions, because the right to a speedy trial is a fundamental right. As noted by the court of appeal, Louisiana courts have found that shorter time periods than the 22 months at issue in this case have violated a defendant's right to speedy trial. [FN4 omitted.] *State v. Leban*, 611 So.2d 165 (La.App. 4 Cir.1992), *writ denied*, 619 So.2d 533 (La.1993) (16-month delay), and *State v. Firshing*, 624 So.2d 921 (La.App. 4th Cir.1993), *writ denied*, 93-2621 (La.2/25/94), 632 So.2d 760 (17-month delay). Given the fact that the delay in this case was more lengthy than other delays found "presumptively prejudicial," as well as the fact that the right to a speedy trial is a fundamental right, we agree with the finding of the court of appeal that the delay in the instant case was "presumptively prejudicial," although such is not alone dispositive regarding whether a right to speedy trial was violated. Accordingly, we will consider the other three factors of the *Barker* test.

Id., p. 12 –18, 847 So.2d at 1208 –1211.

The *Love* court went on to find that none of other *Barker* factors supported the defendant's contention that his right to a speedy trial had been violated. The Supreme Court found that the delays had not prejudiced the defendant's case, specifically finding that the defendant failed to substantiate

his argument that the delay had resulted in the disappearance of two witnesses. Accordingly, the Supreme Court reversed the decision of this Court vacating the defendant's conviction and sentence and reinstated both.

In the instant case, the State did not file a written motion for a continuance as required by La. C.Cr.P. art. 707. However, only two days elapsed between the *nolle prosequi* on November 25th and the reinstitution of the case on November 27th, for a total of only six and one-half-months between the filing of the case and the time the State *nolle prossed* it and then reinstituted it. Furthermore, in this case there was no evidence that defense witnesses were lost or the defendant prejudiced.

As the courts have frequently stated, the right to a speedy trial is relative and involves a weighing process. In this case, there is little information about the defendant and no evidence of any prejudice he suffered as a result of the delay. He makes no allegation that his defense was impaired, and there is no sign that the delay was designed to hamper the defense. Additionally, the six and one-half months delay is neither "extraordinary nor capricious." It is certainly a reasonable amount of time between the filing of a case and its being *nolle prossed* and then reinstituted, and certainly far too short a period of time to raise any serious speedy trial issues. Under the facts and circumstances of this case, we do not find the

defendant's right to a speedy trial violated nor do we find the State's actions a misuse of its authority. Accordingly, we conclude that the trial judge abused his discretion in granting the defendant's motion to quash the bill of information.

The judgment of the trial court is reversed, and the case is remanded.

REVERSED AND REMANDED