

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2006-KA-1092**  
**VERSUS** \* **COURT OF APPEAL**  
**KIM M. PETERS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 459-901, SECTION "K"**  
**Honorable Arthur Hunter, Judge**

\* \* \* \* \*

**Judge Dennis R. Bagneris Sr.**

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(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.,  
and Judge Terri F. Love)

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**REVERSED**

On August 5, 2004, the state filed a bill of information in case number 450-851 charging Kim Peters with distribution of heroin. The defendant entered a not guilty plea on August 18<sup>th</sup>. A hearing on motions was scheduled for August 26<sup>th</sup>. On that day, the defense requested a continuance, and the hearing on motions was rescheduled for September 15<sup>th</sup>. Because the court was closed that day, the hearing was continued to the date on which it was held, October 15<sup>th</sup>; the district court found probable cause and denied the motion to suppress the evidence. The defendant's trial dates of November 15<sup>th</sup> and December 6<sup>th</sup> were continued on defense motions. A separate trial was in progress on December 13<sup>th</sup>. On January 6, 2005 and February 3<sup>rd</sup>, the defendant's trial was continued on joint motions, and a hearing to determine counsel was scheduled for March 3<sup>rd</sup>. On that day, new counsel was appointed, and the defendant's trial was scheduled for March 24<sup>th</sup>, when the state entered its nolle prosequi.

On June 1, 2005, the case was reinstated as case number 459-901. The case was originally allotted to Section D. On June 17<sup>th</sup>, the case was transferred to Section K to follow case number 450-851. The defendant did not appear for arraignment on June 29<sup>th</sup>, and her arraignment was continued until July 8<sup>th</sup>. On

that day, the defendant entered a not guilty plea, and a hearing on motions and trial were scheduled for July 25<sup>th</sup>. The defense filed a motion to quash on the 25<sup>th</sup>, and the motion was granted by the district court.

## **DISCUSSION**

In its brief, the state argues that the district court erred in granting the motion to quash because the defendant's right to a speedy trial was not violated.<sup>1</sup>

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

[s]ubject 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 reinstated the case less than three months after the dismissal. Furthermore, under La. C.Cr.P. art. 578 the state has two years after institution of prosecution to bring a defendant to trial in a non-capital felony case. In this case, the original bill of information was filed on August 5, 2004, and the motion to quash was granted on July 25, 2005, less than twelve months later.

This Court considered the same issue as raised here in *State v. Santiago*, 2003-0693 (La. App. 4 Cir. 7/23/03), 853 So. 2d 671, 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.

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<sup>1</sup> The state indicates that the district court did not give reasons for granting the motion to quash; however, the only ground raised in the motion was the denial of the defendant's right to a speedy trial.

514, 530 (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 reinstatement 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.

Applying the first *Barker* factor to this case, this court has found more lengthy delays than the less than twelve-month delay here non-violative of the right to a speedy trial. See *State v. DeRouen*, 96-0725 (La. App. 4 Cir. 6/26/96), 678 So. 2d 39 (fifteen months elapsed between institution of prosecution and motion to quash two counts of possession with intent to distribute cocaine and one count of possession of 28 to 200 grams of cocaine not violative). Hence, the delay in this case may be deemed presumptively un-prejudicial and no further inquiry into the remaining *Barker* factors is necessary. However, for the sake of argument, the other factors are discussed.

The second *Barker* factor questions the reasons for the delay. Here, the defense either requested or acquiesced in nearly all of the continuances granted. The court was closed one day and was conducting the trial in a separate case on another. New defense counsel had to be appointed later in the proceedings, and the defendant failed to appear on one occasion. Hence, the state was not responsible for the nearly twelve-month delay.

The third factor is the defendant's assertion of her right to a speedy trial. No motions for speedy trial were urged. However, the constitutional right to a speedy trial is not dependent on filing a motion. Rather, the right attaches when an individual becomes an accused, either by formal indictment or bill of information, or arrest and actual restraint. *State v. Dewey*, 408 So. 2d 1255 (La. 1982). Moreover, the defendant asserted a violation via her motion to quash.

Finally, the defendant has not alleged, nor does the record support, a finding of prejudice caused by the delay. The defendant has been released on bond throughout the proceedings, and there is no indication that she has lost any witnesses or evidence.

In sum, the record does not support the district court's judgment granting the motion to quash. Therefore, we hereby reverse the district court's judgment and remand the matter for further proceedings.

**REVERSED**