

STATE OF LOUISIANA

*

NO. 2006-KA-0801

VERSUS

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COURT OF APPEAL

HERBERT JAMES

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 460-404, SECTION "K"
Honorable Arthur Hunter, Judge

* * * * *

Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
and Judge Edwin A. Lombard)

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**REVERSED
AND
REMANDED**

On August 20, 2004, in case number 451-299, the State filed a Bill of Information charging Herbert James with two counts of sexual battery upon “A. B.”, a minor child, in violation of La. R.S. 14:43.1. On September 8, 2004, James entered a plea of not guilty and filed various defense motions including an Application for Bill of Particulars.

On January 14, 2005, the district court found probable cause to proceed. Trial in this matter was reset four times – twice by the State’s motion and twice by joint motion. The State filed a Notice of Exculpatory Information and moved to continue the case on June 13, 2005. The district court denied the State a continuance, and the State entered a *nolle prosequi* to the charges.

The State reinstated charges on June 15, 2005, under case number 460-404, once again charging James with two counts of sexual battery upon A. B. to which James pled not guilty and filed a written Motion to Quash the reinstated charges. James argued that the State failed to answer his Motion for Bill of

Particulars, which he filed on September 8, 2004. The district court granted the Motion to Quash, without reasons.

The facts of this case are unknown and irrelevant. The sole issue in this appeal is whether the district court erred when it granted James' Motion to Quash the Bill of Information.

Although the transcript of the hearing on the Motion to Quash the Bill of Information in this case is included in the record, it does not contain any argument by the defense or the State, or the reasons for the district court's ruling. However, James' Motion to Quash the Bill of Information was based on two arguments:

1) the State failed to answer his Motion for Bill of Particulars, and 2) the case was an improper reinstatement of charges which the State had previously *nolle prosequied*.

La.C.Cr.P. art. 532 sets forth the general grounds upon which a motion to quash can be granted and includes the instance in which the district attorney fails to furnish a sufficient bill of particulars when ordered to do so by the court.

While the record herein verifies that James did file a Motion for Bill of Particulars, there is no indication the State filed a response to the motion, neither is there any indication that the district court ordered the State to

respond. See La. C.Cr.P. art. 532(4). There is no evidence that James objected to the State's failure to respond to the discovery request, nor did he seek to compel the State to respond, prior to filing the motion to quash. The record also indicates that James acquiesced in four continuances of trial – two of which were for plea bargaining purposes. Based upon the foregoing facts, James waived his right to an answer to his Motion for Bill of Particulars, thus he cannot now raise the complaint on appeal. See La. C.Cr.P. art. 841.

As to the reinstatement of charges, the state has the authority to enter a *nolle prosequi* and reinstate the charge. Both this court and the Louisiana Supreme Court have recognized this authority, but have also recognized that it may be overcome under the circumstances of any given case by the defendant's constitutional right to a speedy trial. See State v. Love, 2000-3347 (La. 5/23/03), 847 So. 2d 1198, and State v. Scott, 2004-1142 (La. App. 4 Cir. 7/27/05), 913 So. 2d 843.

Recently, in State v. Batiste, 2005-1571, p. 5 (La. 10/17/06), 939 So.2d 1245,1249, the Supreme Court stated:

A court's resolution of motions to quash in cases where the district attorney entered a nolle prosequi and later reinstated charges should be decided on a case-by-case basis. *State v. Love*, 00-3347, p. 14 (La. 5/23/03), 847 So. 2d 1198, 1209.

In those cases “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.” *Id.*

In Batiste, the Court found that the reason for the dismissal of the earlier charge was because the victim was unavailable to testify. The Court then considered the defendant’s speedy trial claim and found that although nineteen months elapsed between the filing of the original bill and the quashing of the charges in the second case, the reasons for the delay were not solely those of the state. The Court found that there was no intentional delay on the state’s part to gain a tactical advantage, that the defendant did not assert his speedy trial right prior to filing his motion to quash, and that there was no suggestion that his defense was impaired by the delay. The court then reversed the trial court’s quashing of the charge and this court’s affirmation of the trial court’s ruling.

In this case, the State filed the original bill of information on August 20, 2004. James pled not guilty on September 8, 2004. The district court reset the motions hearing twice on defense motion and twice on joint motion. Further, trial in this matter was continued twice on State’s motions and twice on joint motions, and on June 13, 2005, the State entered a *nolle*

prosequied of the case. Thus, less than ten months elapsed between the filing of the original bill of information and the State's decision to *nolle prosequi* the case.

As per La. C.Cr.P. art. 578(2), the State had two years from the institution of prosecution in which to bring the defendant to trial in this case. As such, the State did not enter a *nolle prosequi* of the original case in order to circumvent the statutory limitation on bringing the defendant to trial. Moreover, James did not object to the continuances, and his first assertion of his right to speedy trial was the motion to quash information upon refileing of charges after initial dismissal.

Further, because this case involves a felony charge, we cannot presume the delay is prejudicial. See *Pham v. Pham*, 97-0459 (La. App 3 Cir. 3/26/97), 692 So.2d 11, in which the Third Circuit Court found that a nine-month delay in a case of cheating at gambling did not warrant the quashing of charges, even though the defendant had to travel from Houston to New Orleans four times for trial.

DECREE

For the foregoing reasons, the judgment of the district court is reversed, and this matter is remanded for further proceedings.

**REVERSED
AND
REMANDED**