

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2006-KA-1197**

VERSUS * **COURT OF APPEAL**

ZACHARIAH LEWIS * **FOURTH CIRCUIT**

* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 458-054, SECTION "K"
Honorable Arthur Hunter, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III,
Judge David S. Gorbaty)

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REVERSED AND REMANDED

The defendant was charged by a bill of information with possession of crack cocaine on August 17, 2004 in case number 451-138 in the Criminal District Court for the Parish of Orleans. Shortly thereafter, he pled not guilty at arraignment. For unexplained reasons, a series of status hearings followed until November 10, 2004 when the case was transferred to Section "K" to follow case number 452-699, a higher class case, in which the defendant was charged with attempted distribution of cocaine.

Motions were scheduled for December 3, 2004; however, because the State was unprepared, the district court found no probable cause on the charge. Both of defendant's cases were set for trial on December 8, 2004. The state elected to proceed in the attempted distribution case, and this case was reset for January 14, 2005. On the date, the state requested and was granted a continuance. At the following setting on February 28, the case was continued on the defense's motion.

On March 21, 2005, the case was again set for trial, and the State requested a continuance, which was denied, and the state entered a *nolle prosequi* dismissing the case. The case was reinstated on April 6, 2005, and the defendant was arraigned on the reinstated charge on April 11, 2005. On April 18, 2005, the defendant filed a motion to quash, which the trial court granted.

The transcript from the hearing on the motion to quash reflects that the district court granted the motion on the basis that the state utilized the *nolle prosequi* to grant itself a continuance after the court had denied its motion. Subsequently, the district court entered a *per curiam* opinion regarding this case and a number of similar cases wherein the court stated that it granted the motion to quash because the State had failed to conform its motion for a continuance to the requirements of La. C.Cr.P. art. 707 *et seq.* Article 707 provides that a motion for a continuance must be in writing, must specifically allege the grounds upon which it is based, and must be filed at least seven days prior to the commencement of trial. The court reiterated its previous statement that the state had utilized the *nolle prosequi* to grant itself the continuance it sought but had been denied. Additionally, the *per curiam* specified that in as much as the motions to quash were based on a violation of the right to a speedy trial they were denied on that basis.

FACTS

There are no facts in the record concerning the offense.

DISCUSSION

The State contends that the trial court erred in granting defendant's motion to quash. Recently, in *State v. Batiste*, 2005-1571 (La. 10/17/06), 939 So.2d 1245, the Louisiana Supreme Court granted *certiori* with the

intention of addressing "the court's inherent power to manage its docket, *see* La.C.Cr.P. art. 17, along with the district attorney's right to control the criminal prosecutions instituted in his district, *see* La.C.Cr.P. art. 61." 2005-1571, pp. 4-5, 939 So.2d at 1249. Although the court determined that it was unnecessary to reach the issue, it nevertheless addressed the codal and jurisprudential foundations relative to such cases as follows:

Article 691 of the Louisiana Code of Criminal Procedure confers on the district attorney the power to dismiss a formal charge, in whole or in part, and provides that leave of court is not needed. La.C.Cr.P. art. 693 expressly provides, subject to narrowly delineated exceptions, that dismissal of a prosecution "is not a bar to a subsequent prosecution...." The general limit imposed by the legislature on the discretion of the State under La. C.Cr. P. art. 691 to dismiss a prosecution without the consent of the court is that the dismissal of the original charge is "not for the purpose of avoiding the time limitation for commencement of trial established by Article 578." La.C.Cr.P. art. 576. La. C.Cr.P. art. 578(2) requires that trial of a non-capital felony be commenced within two years from the date of institution of the prosecution.

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.

2005-1571, p. 5, 939 So.2d at 1249.

Recently, in *State v. Anderson*, 2005-1116, (La. App. 4 Cir. 8/23/06), 940 So.2d 682, which concerned one of the cases addressed by the trial court in its per curiam, this court considered the issue of whether the trial

court properly granted the defendant's motion to quash after the state reinstated the charges. After reviewing the grounds enumerated in La.C.Cr.P. arts. 532 and 534 for quashing a bill of information this court concluded that the granting of a motion to quash was not a permissible response to the State's failure to comply with La. C.Cr.P. art. 707. Furthermore, this court noted that the State has plenary authority pursuant to La.C.Cr.P. art. 576 to dismiss a charge and then reinstitute prosecution where doing so will not circumvent the statutory time limits for commencing trial under La.C.Cr.P. art. 578. In reversing, this court remarked: "Although the district court judge may have been frustrated by the State's failure to be prepared for trial, we find no valid basis upon which he could quash the bill of information in this case." 2005-1116, p. 6, 940 So.2d at 685.

Additionally, this court declined to address whether the defendant's speedy trial rights had been violated because the district judge had specified "that the denial of the right to a speedy trial was *not* the basis upon which the defendants' motion to quash was granted." 2005-1116, p. 7, 940 So.2d at 686.

In any event, in Mr. Lewis' circumstance there is no basis to consider that his constitutional right to a speedy trial was violated under the four part *Barker v. Wingo* analysis. The length of the delay, approximately eight

months, was quite short. Additionally, one of the reasons for the delay was the fact that defendant's other case was tried first. Furthermore, for unknown reasons, approximately two months elapsed after the case was allotted, and the case was continued once on defense motion. Finally, there is no indication in the record that Mr. Lewis lost any witnesses or that the State gained a tactical advantage by dismissing the charge and reinstating it later aside from obtaining a continuance that the district court felt it was otherwise not entitled. Considering the circumstances, the district court judge abused its discretion in quashing the bill of information.

CONCLUSION

Accordingly, for the foregoing reasons, we reverse the judgment granting the defendant's motion to quash the bill of information and remand this matter for further proceedings in accordance with this opinion.

REVERSED AND REMANDED