STATE OF LOUISIANA	*	**NO. 2006-KA-1200**
VERSUS	*	**COURT OF APPEAL**
JAMEL HENDERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 459-394, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Charles R. Jones
Judge
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Edwin A. Lombard, and Judge Leon A. Cannizzaro Jr.)

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REVERSED AND REMANDED

The State of Louisiana seeks review of the judgment of the district court which granted the defendant's Motion to Quash the Bill of Information. We Reverse.

On January 31, 2005, the State of Louisiana filed a bill of information in case number 455-879, charging Jamal Henderson with possession of cocaine. Henderson entered a not guilty plea on February 17, 2005. On March 24, 2005, a hearing on motions began but was recessed until April 18, 2005, when the State of Louisiana entered a *nolle prosqui* of the bill of information.

On May 13, 2005, prosecution was reinstituted as case number 459-394 with the filing of a new bill of information. Henderson entered a not guilty plea on June 20, 2005. On July 22, 2005, he failed to appear for the hearing on motions, and the hearing was rescheduled for July 29, 2005. On that day, the district court granted the defense motion to quash bill of information, and the State of Louisiana noted its intent to file an appeal. This timely appeal followed

The facts of this case are unknown and irrelevant.

The State of Louisiana argues that the district court erred in granting

Henderson's Motion to Quash the Bill of Information based on the denial of his right to a speedy trial. The state represents 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 Henderson's constitutional right to a speedy trial.

Conversely, Henderson argues that a speedy trial violation is nonexistent. Instead, he represents that the district court's reason for granting the motion to quash was because the state entered its *nolle proequi* after its motion to continue was denied. He bases his representation on the fact that the district court had issued an earlier per curiam in which it gave this reason for granting the motion to quash in over twenty-five cases. Notably, the per curiam is not part of the current record, and this case is not among those listed in the per curiam.

The state is correct in its argument that it has the authority to enter a *nolle prosequi* and reinstitute the charge. Both this court and the Louisiana Supreme Court have recognized this authority, but have also recognized that it may be overborne under the circumstances of any given case by the defendant's constitutional right to a speedy trial.

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 reinstituted 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.

The first question is whether the delay was sufficient to act as a triggering mechanism. In this case, it appears that it was not. Only seven months elapsed from the filing of the original bill of information to the

granting of the motion to quash. While the Louisiana Supreme Court held in State v. Reaves, 376 So. 2d 136 (La. 1979), that a delay of three and one-half months was sufficient to violate the defendant's rights, that case involved misdemeanor possession of marijuana, not a felony as in the instant case, and the defendant in Reaves repeatedly made fruitless court appearances until he was forced to enter a guilty plea. In this case, Henderson made four court appearances prior to the filing of the motion to quash; two were arraignments and two were motion hearings. He failed to appear for a subsequent motion hearing. On the day of the scheduled continuance, the district court granted the motion to quash.

Unlike in Batiste, the state's reasons for filing its motion to continue on April 18, 2005 is unknown. Nonetheless, considering the short amount of time between the filing of the original bill of information and the granting of the motion to quash, the trial's court's ruling is difficult for this court to uphold. No intentional delay on the state's part to gain a tactical advantage has been shown. Further, Henderson was not in custody during any of the proceedings, he did not assert his speedy trial right prior to filing his motion to quash, and he has not argued that his defense was impaired by the delay. Thus, viewing the record as a whole, the district court's decision to quash the prosecution was an abuse of discretion.

DECREE

For the reasons above indicated, the district court's judgment granting the Motion to Quash the Bill of Information is reversed. The matter is remanded to the district court.

REVERSED AND REMANDED