

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2006-KA-1201**

VERSUS * **COURT OF APPEAL**

VANESSA CHISOLM * **FOURTH CIRCUIT**

* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 459-425, SECTION "K"
Honorable Arthur Hunter, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris, Sr., and Judge Roland L. Belsome)
BELSOME, J., CONCURS IN THE RESULT.

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REVERSED AND REMANDED

On February 1, 2005, in case number 455-908 "K", the State filed a bill of information charging defendant, Vanessa Chisolm, with solicitation of crime against nature, in violation of La. R.S. 14:89(2). Defendant pleaded not guilty at her arraignment on February 4, 2005. Trial and a hearing on motions were set for February 22, 2005; pursuant to a defense motion, trial was continued to March 2, 2005. On that date the State entered an oral motion for a continuance which was denied by the district court. The State entered a nolle prosequi, and defendant was released.

The case was reinstated approximately two and one-half months later on May 13, 2005 as case number 459-425 which was allotted to Section "K" to follow the previous case, 455-908 "K". On June 23, 2005, defendant failed to appear for arraignment. An alias capias was issued for her arrest; bond was set at \$10,000.00. Subsequently, on June 28, 2005, defendant was arrested. An arrest on capias notification hearing was set for July 25, 2005; defendant entered a plea of not guilty on that date. Relator was released on her own recognizance. A hearing on motions was set for July 29, 2005. On that date, defense counsel filed a motion to quash the bill of information, which was granted. The State now appeals.

FACTS AND PROCEDURAL HISTORY:

On January 4, 2005, defendant willfully and unlawfully violated La R.S. 14:89, relative to crime against nature, in that defendant solicited one Officer Darren Brazley with the intent to engage in unnatural carnal copulation, to wit: oral copulation for compensation in the amount of twenty dollars.

On July 29, 2005, defendant filed a two paragraph motion to quash arguing that her constitutional right to a speedy trial was violated because the State nolle prosequed the charges and subsequently reinstated them after the State was denied a continuance on the date of trial.

DISCUSSION:

In a single assignment of error, the State argues on appeal that the trial court improperly granted defense counsel's motion to quash the bill of information reinstituting prosecution because defendant failed to carry her burden of proving that the delay between the filing of the original bill of information and the filing and granting of the motion to quash was presumptively prejudicial and triggered a violation of defendant's constitutional right to a speedy trial. Defendant argues that the district court stated that there was no speedy trial violation but granted the motion because the State used its authority to dismiss and reinstate the charges as a mere

contrivance to take control of the court's docket and avoid the denial of the oral motion for a continuance which was in the district court's authority to deny. Defendant's argument is without merit.

A defendant has the right under the Sixth Amendment and Article 1, Section 16 of the Louisiana Constitution to a speedy trial. This constitutional right attaches when an individual becomes an accused either by formal indictment or by arrest and actual restraint. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971); State v. Sweeney, 443 So. 2d 522 (La. 1983). In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972), the Supreme Court set out the following four factors to determine whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant as a result of the delay. The court stated that the length of the delay was the **triggering mechanism**; and, until the delay was **presumptively prejudicial**, there was no need to inquire into the other factors. (emphasis added). The court further stated that the length of the delay, which would provoke such an inquiry, was dependent upon the peculiar circumstances of the case. The court noted that the reason for the delay was closely related to the length of the delay and that different weights would be given to different

reasons. As to the defendant's assertion of his right to a speedy trial, the court stated that the assertion of the right was entitled to strong evidentiary weight in determining whether the defendant was deprived of his right. Regarding the final factor, the court stated that prejudice was to be assessed in light of the interests of the defendant which the speedy trial right was designed to protect. The court identified those interests as preventing oppressive pretrial incarceration, minimizing the anxiety and concern of the defendant, and limiting the possibility that the defense would be impaired.

In State v. Reaves, 376 So. 2d 136 (La. 1979), the defendant was charged with possession of one marijuana cigarette, a misdemeanor, and trial was set and continued four times in the **three and one-half months** since charges had been brought. On the fourth trial date, the State moved for a continuance because its principal witness was absent. The trial court denied the continuance, and the State nolle prosequed the bill of information. The State then filed a new bill of information which the defendant moved to quash on the basis that he had been denied his right to a speedy trial. The trial court granted the motion, and the Supreme Court affirmed. The court stated that, although the defendant had not been subjected to an extremely long delay, he was denied his right to a speedy trial. The continuances had been caused by the failure of the arresting officer to appear at trial to testify

for the State, and the court stated that the responsibility for these repeated absences had to rest with the State. The defendant had not moved for a speedy trial before filing his motion to quash. The court stated that because the defendant was charged with a misdemeanor, the prejudice requirement was not as stringent.

In State v. DeRouen, 96-0725, p. 2-3 (La. App. 4 Cir. 6/26/96), 678 So. 2d 39, **fifteen months** elapsed between institution of prosecution and the granting of the motion to quash. Two of the trial continuances were attributable to the State and the balance to weather, a crowded docket, and the actions of codefendants. Furthermore, the defendant was not incarcerated during the pendency of the proceedings. In finding that the trial court erred, this court stated that the defendant was not prejudiced to the extent found in State v. Esteen, 95-1079 (La. App. 4 Cir. 4/3/96), 672 So. 2d 1098.

In two other cases, this court has held that the right to a speedy trial was not violated by a nineteen month delay and a twenty-two month delay between the filing of the bill of information and the defendant's motion to quash. In State v. Brown, 93-0666 (La. App. 4 Cir. 7/27/94), 641 So. 2d 687, there were eight continuances during the **nineteen months** between the institution of prosecution and the granting of the motion to quash, and only

two were directly attributable to the State; furthermore, the defense did not object to the delays until the filing of his motion to quash, and no prejudice to the defendant was shown.

In State v. Johnson, 92-1458 (La. App. 4 Cir. 8/03/93), 622 So. 2d 845, the defendant argued in a pro se assignment of error on appeal that he had been denied a speedy trial. Although there was a **twenty-two month** delay between the date of arrest and the day of trial, this court found that much of the delay was due to the failure of the defendant to appear in court. Additionally, he did not argue that he was prejudiced by the delay.

In State v Love, 2000-3347 (La. 5/23/03), 847 So. 2d 1198, the Louisiana Supreme Court discussed the relationship of the appellate and trial courts and stated:

Because of the complementary role of trial courts and appellate courts demands that deference be given to a trial court's discretionary decision, an appellate court is allowed to reverse a trial court judgment on a motion to quash only if that finding represents an abuse of the trial court's discretion.

Id., at pp. 9-10, 847 So. 2d at 1206. In addition, in State v Harris, 2003-0524 (La. App. 4 Cir. 9/10/03), 857 So. 2d 16, this court stated:

Thus, . . . the proper approach to the question of whether the defendant's right to a speedy trial was violated is not merely a review of the dates and circumstances of the hearings, but an examination of the entire record in order to discern whether there was "**palpable abuse**" on the part of the trial court in granting the motion to quash. (emphasis added).

Id., at pp. 7-8, 708, 904 So. 2d at 770. Recently, in State v. Batiste, 2005-1571, p. 5 (La. 10/17/06), 939 So. 2d 1245, the 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 the instant case, slightly over two and one-half months elapsed

between the filing of the original bill of information and the filing and granting of the motion to quash. The felony charge of solicitation of crime against nature carries a fine of not more than \$2000.00 and not more than five years in prison with or without hard labor, or both. Thus, a two and one-half month delay is not presumptively prejudicial. Furthermore, the other Barker factors do not support defendant's claim. On February 22, 2005, a defense motion for a trial continuance was granted in the original case, 455-908. In the reinstated case, 459-425, defendant failed to appear for her first arraignment on June 23, 2005, which resulted in a warrant for her arrest being issued. The defense continuance and defendant's absence, which are not attributable to the state, caused an almost two week delay of the total two and one-half month delay. In addition, defendant does not allege in her motion to quash, nor does the record reflect, that she ever filed a motion for a speedy trial; nor did she object to the one continuance requested by the State. Finally, defendant has not alleged in her motion to quash any prejudice caused by the delay. She was released on her own recognition on July 25, 2005, the date of her arraignment. She has not alleged that any witness or evidence has been lost or compromised due to the delay. Therefore, taking all of the Barker factors into consideration, we find that there was "palpable abuse" on the part of the trial court in granting

defendant's motion to quash.

Accordingly, we hereby reverse the ruling of the district court granting the motion to quash and we remand the case for further proceedings.

REVERSED AND

REMANDED