

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2006-KA-1607**  
**VERSUS** \* **COURT OF APPEAL**  
**PATRICK BURNS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 446-541, SECTION "K"  
Honorable Arthur Hunter, Judge

\* \* \* \* \*

**Judge David S. Gorbaty**

\* \* \* \* \*

(Court composed of Judge Dennis R. Bagneris Sr., Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr.)

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**REVERSED AND REMANDED**

On December 19, 2003, in case number 444-289 “K”, the State filed a bill of information charging defendant, Patrick Burns, with unauthorized use of a motor vehicle, in violation of La. R.S. 14:68.4. Defendant pleaded not guilty at his arraignment on December 29, 2003. A preliminary hearing was conducted on January 16, 2004; the district court found probable cause to hold defendant for trial, which was set for January 28, 2004. On that date, the State entered a *nolle prosequi*, and defendant was released.

The case was reinstated approximately forty nine days later on March 18, 2004 as case number 446-541 which was allotted to Section “K” to follow case 444-289 “K”. On April 6 and 14, 2004, defendant failed to appear for arraignment. An alias capias was issued for his arrest; bond was set at \$10,000.00. Subsequently, over one year later (fourteen months), on July 13, 2005, defendant was arrested. On July 20, 2005, defendant entered a plea of not guilty; defense counsel filed a motion to quash the bill of information, and defendant was released. The motion to quash was granted on July 21, 2005. The State subsequently filed this appeal.

## **FACTS**

Because the record in case number 444-289 is unavailable, the facts surrounding defendant's arrest, which can be adduced from the instant case, are limited to what is stated in the bill of information. On December 6, 2003, defendant committed unauthorized use of a motor vehicle, to wit: a 1991 GMC Sierra truck belonging to Cedric Sartin.

## **DISCUSSION**

On July 20, 2005, defendant filed a motion to quash arguing that his constitutional right to a speedy trial<sup>1</sup> was violated because the State nolle prosecuted the charges and subsequently reinstated them after the State was denied a continuance.

In its sole assignment of error, the State argues that the trial court improperly granted defense counsel's motion to quash the bill of information reinstating prosecution because defendant failed to carry his 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.

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,

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<sup>1</sup> In his motion to quash defendant did not assert a violation of his statutory right to a speedy trial pursuant to La.C.Cr. P. art. 578 which requires that trial in a non-capital case be commenced within two years of the institution of prosecution. Pursuant to La. C.Cr.P. art. 580, the time period set forth in Article 578 is suspended until the trial court's ruling when the defendant files a motion to quash or other preliminary plea; but in no case shall the State have less than one year after the ruling to commence trial.

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. 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 prosecuted 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.<sup>2</sup>

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

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<sup>2</sup> In Esteen, this court affirmed the trial court's granting of a motion to quash. The court found that a two and one-half year delay between the filing of the charges and trial was presumptively prejudicial triggering an inquiry into the other factors. The case was continued twenty-two times, mostly due to the State and the trial court. Twice the State nolle prosecuted the charges when it was not ready to begin the trial. Although the defendant did not move for a speedy trial nor object to any of the continuances, this court concluded that these omissions were not dispositive, and found that they were only one factor to consider. This court also found that the defendant was "clearly prejudiced" by the delays since he spent eleven months incarcerated, and his defense was severely hampered by the death of a crucial witness.

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 defendant 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, 622 So. 2d 845 (La. App. 4 Cir. 1993), 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 p. 4, 857 So. 2d at 18 . Recently, in State v. Batiste, 2005-1571, (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.*

Id., at p. 5, 939 So 2d at 1248.

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, approximately nineteen 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 unauthorized use of a motor vehicle carries a fine of not more than \$5000.00 or imprisonment with or without hard labor for not more than ten years, or both. Thus, a nineteen-month delay does not appear to be presumptively prejudicial. Furthermore, the other Barker factors do not support defendant’s claim. In the reinstated case, 446-541, defendant failed to appear for his first arraignment on April 6 and April 14, 2004, which resulted in a warrant for his arrest being issued. Defendant’s absence, which is not attributable to the state, caused slightly over a one-year delay (fourteen months) of the total nineteen-month

delay. In addition, defendant does not allege in his motion to quash, nor does the record reflect, that he ever filed a motion for a speedy trial. Finally, defendant has not alleged in his motion to quash any prejudice caused by the delay. He was arrested on July 13, 2005, after being at large for over a year, and released on July 20, 2005, seven days later. He 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.

### **CONCLUSION**

Accordingly, for the foregoing reasons, the ruling of the district court granting the motion to quash is reversed, and this case is remanded for further proceedings.

**REVERSED AND REMANDED**