

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2006-KA-1609**
VERSUS * **COURT OF APPEAL**
LIONELL BAILEY * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 461-421, SECTION "C"
Honorable Benedict J. Willard, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., and Judge Edwin A. Lombard)

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MAY 2, 2007

REVERSED AND REMANDED

On January 7, 2005, the State filed a bill of information in case number 455-109 charging Lionell Bailey with possession of cocaine. Bailey entered a not guilty plea on January 12, 2005. On February 15, 2005, the district court found probable cause, denied the Motion to Suppress the Evidence and granted the Motion to Suppress the Statement. Trial was scheduled for March 29, 2005. On that day, the State entered a nolle prosequi.

On July 21, 2005, the case was reinstated as case number 461-421. Bailey's arraignment was scheduled for August 1, 2005, when the district court granted the Motion to Quash. On August 10, 2005, the State's Motion to Appeal was granted.

The facts of this case are unknown and irrelevant.

First, the State first argues that the district court erred in granting Bailey's Motion to Quash because of the State's failure to file a Motion for Continuance pursuant to La. C.Cr.P. art. 707. Second, the State argues that the district court erred in granting the Motion to Quash because it reinstated charges.

A notation at the bottom of the Motion to Quash shows that the district court granted the motion because of noncompliance with Article 707.

However, as the State correctly notes, this specific ground was not raised in the Motion to Quash. La. C.Cr.P. art. 536 provides that the court shall not entertain objections based on grounds not specifically stated in the Motion to Quash. Hence, we find that the district court erred in granting the Motion on this basis.

The only ground raised in the Motion to Quash was the reinstatement of charges after the State's Motion to Continue was denied and a nolle prosequi entered.

The State is correct that it 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 overborne under the circumstances of any given case by the defendant's constitutional right to a speedy trial. See State v. Love, 00-3347 (La. 5/23/03), 847 So. 2d 1198, and State v. Scott, 04-1142 (La. App. 4 Cir. 7/27/05), 913 So. 2d 843. In Scott, this court discussed the factors to be considered with regard to a defendant's constitutional right to a speedy trial rights:

The right to a speedy trial is guaranteed by both the federal and State constitutions. U.S. Const. Amendment 6; La. Const. Art. I, § 16. In addition to the statutory right to a speedy trial recognized by La.C.Cr.P. art. 701(A), a defendant also has a fundamental, constitutional right to a speedy trial. In analyzing a constitutional speedy trial violation claim, the four factor test forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct.

2182 (1972) is applied; to wit: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. The initial factor, the length of the delay, is often referred to as the "triggering mechanism" because absent a "presumptively prejudicial" delay, further inquiry into the *Barker* factors is unnecessary. See *State v. Santiago*, 03-0693 (La. App. 4 Cir. 7/23/03), 853 So.2d 671. Under *Barker*, the peculiar circumstances of the case determine the weight to be ascribed to the length of the delay and the reason for the delay. *State v. Reaves*, 376 So.2d 136, 138 (La. 1979). Something that is acceptable in one case may not be acceptable in another because the complexity of the case must be considered. *Gray v. King*, 724 F.2d 1199, 1202 (5th Cir.1984), citing *Barker*, 407 U.S. at 531. The manner of proof must also be considered, as must the gravity of the alleged crime. *Id.*

A defendant challenging the State's dismissal and reinstatement of charges has the burden of showing a violation of his constitutional right to a speedy trial. *State v. Henderson*, 00-0511, p. 7 (La. App. 4 Cir. 12/13/00), 775 So.2d 1138, 1142.

Scott, p 11-12, 913 So. 2d at 850-51.

In Love, (847 So. 2d at 1206) the Court discussed the relationship of the appellate and trial courts and stated:

Because 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.

In addition, in State v. Batiste, 2004-1200 (La. App. 4 Cir. 5/11/05), 904 So. 2d 766, 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.

Id., at pp. 7-8, 904 So. 2d at 770.

Recently, in State v. Batiste, 05-1571, p. 5 (La. 10/17/06), 939 So. 2d 1245, 1249, 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.

Under Barker, 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, the defendant made three court appearances prior to the filing of the motion to quash; one was for arraignment, one was a motion hearing, and on the third, the State entered its nolle prosequi. On the day of his scheduled arraignment in the reinstated case, the district court granted the motion to quash.

Furthermore, this court has more recently determined that delays of less than a year were not sufficient to trigger a consideration of the other Barker factors. For example, in State v. Pham, 97-0459 (La. App. 4 Cir. 3/26/97), 692 So. 2d 11, the court found that a nine-month delay for a

defendant forced to travel from Houston to New Orleans after being charged with cheating at gaming did not merit the granting of a motion to quash. In State v. Keller, 03-0986 (La. App. 4 Cir. 10/1/03), 859 So. 2d 743, the court found that a six and one-half month delay between the filing of the first bill of information and the granting of the motion to quash the reinstated bill was not presumptively prejudicial and that the trial court had abused its discretion when it granted the motion to quash. In State v. Gray, 98-0347 (La. App. 4 Cir. 10/21/98), 766 So. 2d 550, there was an eleven-month delay. The court suggested that the delay may not be presumptively prejudicial as most prior cases considered by the court had involved delays of more than one year. However, the court evaluated the remaining Barker factors because of Reaves and ultimately reversed the district court's decision granting the motion to quash finding that the State had not attempted to gain a tactical advantage and that the defendants had failed to show sufficient prejudice.

Unlike in Batiste, 939 So.2d 1245, the State's reasons for filing its Motion to Continue on March 29, 2005 are 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 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, the defendant was in custody only until March 29, 2005, 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, we find that the district court's decision to quash the prosecution was an abuse of discretion.

Decree

For the reasons stated above, we reverse the trial court's ruling and remand the matter.

REVERSED AND REMANDED