NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-1473**
VERSUS	*	**COURT OF APPEAL**
MARVIN THOMAS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 466-936, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Roland L. Belsome)

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REVERSED AND REMANDED

FACTS

On June 22, 2005, the defendant was charged by a bill of information with two counts of possession with intent to distribute alzprazolam and one count of possession of methadone in case number 460-539 "C."[1] Defendant pled not guilty at arraignment. On July 6, 2005, the defendant appeared for a status hearing, and the court set a lunacy hearing for July 21, 2005. On that date, the defendant was found incompetent to stand trial and was remanded to the forensic facility at East Feliciana State Hospital.

On August 25, 2005, a second lunacy hearing was held, and the district court again found the defendant incompetent to stand trial. On April 13, 2006, a third lunacy hearing was held, and the court found the defendant competent to stand trial. Defendant was ordered held on the medical tier so that he could receive medication. Hearing dates on defense motions were set but not heard on three occasions during May and June. A July 13, 2006 trial date was continued. Also

[1] The bill of information also charged Deborah Costa with possession of Alprazolam in a separate count. After appearing for arraignment Costa failed to appear at every subsequent setting. An alias capias was issued on September 18, 2006.

on that date, the defendant was evaluated by the mental health case manager, and a release from custody was issued.

Two status hearings were held in late July 2006, and a trial date of September 18, 2006 was selected. On September 12, the defendant filed written motions for discovery and inspection and to appoint a special process servers.

On September 18, the State requested a continuance on the basis that several ATF officers were in Lafayette, Louisiana testifying in another case. Additionally, one New Orleans police officer did not appear who the court noted had been served. The trial court denied the State's motion, at which time the State entered a nolle prosequi. At this point, defendant requested that the dismissal be entered with prejudice, arguing that the nolle prosequi was entered to circumvent the denial of the State's request for a continuance. The trial court granted the request.

On September 21, 2006, the state reinstituted the case under case no. 466-936, and the case was allotted to Section "J." At the initial arraignment on October 23, 2006, the defendant failed to appear, the was case transferred back to Section "C," and continued without date. Defendant's arraignment was not set until April 13, 2007, at which time the defendant failed to appear, and an alias capias was issued. The defendant was returned to custody on May 29, 2007 and was arraigned two days thereafter. At that time, the case was transferred to Section "E" under the aegis of the Criminal District Court's mental health program.

On June 4, 2007, a sanity commission was appointed and a hearing was set for June 14, 2007, on defense motion. On June 13, 2007, the defendant filed a motion to quash the bill of information and bar prosecution. Defendant argued principally that the bill of information should be quashed because the State had flaunted its authority by previously entering a nolle prosequi and reinstituing the

charges. Defendant also argued that his speedy trial rights were violated, noting that he had been incarcerated for fourteen months, that his defense had been severely impaired by the passage of time, and that the reinstitution of the charges had significantly heightened his anxiety. On June 14, 2007, the trial court granted the motion to quash and granted the State's motion for appeal.

ASSIGNMENT OF ERROR

In its sole assignment of error the State argues that in entering a nolle prosequi and reinstituting the charges it acted well within its authority and that the district court abused its discretion in granting the motion to quash.

The granting of a defendant's motion to quash the bill of information is a discretionary ruling by the trial court, and absent abuse, the ruling should not be disturbed by the appellate court. *See*, *State v. Love*, 00-3347, p. 12 (La. 5/23/03), 847 So.2d 1198, 1208.

In *State v. Batiste*, 2005-1571 (La. 10/17/06), 939 So.2d 1245, the Louisiana Supreme Court granted *certiorari* 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."[2] 2005-1571, pp. 4-5, 939 So.2d at 1249. However, the court

[2] La. C.Cr.P. art. 17 provides:

> A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

La. C.Cr.P. art 61 provides:

> Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.

determined that it was unnecessary to reach the issue. Nevertheless, the Court 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 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*.

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

The charges against Mr. Thomas were instituted in June of 2005 and the case was dismissed in September of 2006, long before the limitation period for commencing trial was set to expire. Clearly, the nolle prosequi was not entered to circumvent the provisions of La. C.Cr.P. art. 578.

With respect to whether the prosecution was flaunting its authority for reasons to favor the State at the expense of the defendant, the record clearly

reflects that the State was not prepared for trial because none of the federal agents or state law enforcement officers associated with defendant's arrest was present in court on the morning of trial. Apparently, the federal ATF agents associated with the case were in Lafayette, Louisiana testifying in another case, and the one New Orleans police officer who was also needed for trial, although served, did not appear. This was only the second time which the case had been set for trial. The record does not adequately reflect the cause for the first continuance. On this record, we cannot say that there is any indication that in dismissing the case the district attorney was "flaunting his authority for reasons that show that he want[ed] to favor the State at the expense of the defendant, such as putting the defendant at risk of losing witnesses." To the extent that the district court granted the motion to quash on this basis, it was error.

In his brief to this Court, the defendant raises the novel argument that the State is procedurally barred from challenging the district court's ruling on the motion to quash. Defendant incorrectly states that the Section "C" judge granted a motion to quash at the time the State entered a nolle prosequi. Under defendant's appreciation of the procedural history of the case, two motions to quash were entered and granted. The record does not support this assertion.

However, in essence, the defendant suggests that when the Section "C" judge granted the defendant's request that the case be dismissed with prejudice, the State was required to seek review from the ruling at that time, and that this unchallenged ruling became the "law of the case." The argument is without merit. As noted previously, 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. *See State v. Batiste; State v. Anderson*, 2005-1116 (La. App. 4 Cir. 8/23/06), 940 So.2d 682, *cert. denied*, 2006-2325 (La. 12/20/06), 944 So.2d 1288. Defendant suggests no codal or jurisprudential basis for a district court to grant a defendant's motion requesting that a nolle prosequi be entered with prejudice, and we have been unable to find any. Once the State enters a nolle prosequi to the charges against a defendant, the district court is without authority to place any limitation on the State's ability to reinstitute at that time. Once a case is reinstituted, the district court may then act on a motion to quash.

The defendant also suggests that the defendant's speedy trial rights were violated. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a … speedy trial…." The U.S. Supreme Court has qualified the literal sweep of the provision by adopting a balancing test in which the conduct of the State and the defendant are weighed. Specifically, the Court recognized the relevance of four separate inquiries which courts should assess in determining whether a defendant has been deprived of his right to a speedy trial: whether the delay between accusation and trial is uncommonly long; whether the prosecution or the defendant is more to blame for the delay; whether, in due course, the defendant asserted his right to a speedy trial; and whether he suffered prejudice as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). Of the four factors, the second has been characterized as the most pivotal. *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 656 (“The flag all litigants seek to capture is the second factor, the reason for delay.”)

The Court also recognized that the first inquiry, the length of the delay, is to some extent a threshold requirement, noting that until there has been some delay which has been "presumptively prejudicial," there is nothing to trigger a speedy

trial analysis, and no necessity for further inquiry. *Barker,* 407 U.S. at 530, 92 S.Ct. at 2192. Furthermore, the length of delay must be judged relative to the peculiar circumstances of the case such as the complexity and seriousness of the crime. *Id.*, 407 U.S. at 530-31, 92 S.Ct. at 2192.

In *Doggett v. U.S.*, 505 U.S. 647, 112 S.Ct. 2686 (1992), the Court noted that "depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Id.* at 652, n.1 (citations omitted). From the date when the bill of information was filed until the motion to quash was granted two years elapsed. Accordingly, an examination of the remaining factors is warranted.

Turning to the second factor, it is clear from the record that a substantial part of the delay in Thomas's proceedings was caused by either Hurricane Katrina's disruption of the judicial process or the defendant's competency proceedings. All told, these delays lasted for approximately nine months. Neither of the delays caused by the hurricane or defendant's competency proceedings is rightly attributable to the State. *See* La. C.Cr.P. art. 579(A)(2) (excluding times during which the defendant cannot be tried due to "insanity" and due to "any other cause beyond the control of the state" from the two year limitation for commencement of trials); La. C.Cr.P. art. 642 (prohibiting any further steps in the prosecution until the question of mental capacity to proceed is resolved); *State v. Brazile,* 2006-1611 (La. App. 4 Cir. 5/30/07), 960 So. 2d 333, *writ denied,* 2007-1339 (La. 1/7/08), 973 So.2d 733 (finding Hurricane Katrina was a cause beyond the control of the state for purposes of La. C.Cr.P. art. 579); *State v. Hamilton*, 2007-0581 (La. App. 4 Cir. 3/5/08), ___ So.2d ___ , 2008 WL 615922 (finding that the interruption caused by Hurricane Katrina ceased on June 5, 2006); *State v. Stewart*, 2007-0850

(La. App. 4 Cir. 4/9/08), ___ So.2d ___ , 2008 WL 1043154 (finding no speedy trial violation where defendant's competency issues and Hurricane Katrina caused substantial delays).

Perhaps a small measure of negligence may be attributed to the state in failing to muster its witnesses for trial; however, conflicts in trial settings do occur and cannot always be avoided. Indeed the U.S. Supreme Court noted that, "our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable," *Doggett*, 505 U.S. at 656, 112 S.Ct. at 2693, and the Louisiana Supreme Court has held that the unavailability of a state witness was a legitimate reason for delaying trial under the Speedy Trial Clause. *State v. Love*, 00-3347, p. 5 (La. 5/23/03), 847 So.2d 1198, 1204; *State v. Batiste*, 2005-1571, p. 8 (La. 10/17/06), 939 So.2d 1245, 1251. Given that the probable result of the State's unpreparedness for trial was likely a short delay, we do not attribute any significant weight against the State on the basis of its unpreparedness for trial on September 18, 2006, especially when the lion's share of the delay up to that point was brought about by Hurricane Katrina and the need to establish Mr. Thomas' competency.

Additionally, a lengthy delay of some six months occurred after the charges were reinstituted while the case was being transferred back to Section "C" from Section "J." It is not clear whether the defendant should be apportioned any fault for this delay. Although the defendant did not appear at the initial arraignment, no capias was issued, which tends to suggest that Thomas was not served. Also, in allowing the case to languish between sections of court, the State displayed what the U.S. Supreme Court characterized as "official negligence," which means the State was neither diligent nor malicious. *Doggett*, 505 U.S. at 656, 112 S.Ct. at

2693. Although delays due to such negligence are weighed against the State more lightly than deliberate delays, they nevertheless "fall on the wrong side if the divide between acceptable and unacceptable reasons for delaying a criminal prosecution." *Id*. at 657.

With respect to the third factor, defendant's assertion of his right to a speedy trial, the record reflects the defendant did not assert any speedy trial concerns prior to objecting to the State's September 18, 2006, request for a continuance. Additionally, after the State reinstituted the charges, defendant did not raise any speedy trial concerns until he filed the motion to quash. Given the limited frequency and force of defendant's objections, if this factor weighs in Thomas' favor, it does not do so heavily.

The fourth Barker factor involves an inquiry into the degree of prejudice suffered by the defendant due to delay in prosecution. Any prejudice to the defendant must be assessed in light of his interest (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. In *Barker*, the Court noted that the most important consideration in the prejudice factor is whether the defendant's defense was impaired by the delay. *Id*.

In *Doggett*, the Court modified its analysis of the prejudice factor. Noting that “affirmative proof of particularized prejudice is not essential to every speedy trial claim,” the Court pointed out that there are situations when “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify.” *Id*. at 654-655, 112 S.Ct. at 2692-2693. However, the Court found that the defendant's degree of proof in each situation varies inversely with the government's degree of culpability for the delay. *Id*.

Accordingly, where the State demonstrates reasonable diligence in its efforts to bring the defendant to trial, the defendant must show "specific prejudice to his defense," no matter how great the delay. *Id*. Conversely, the longer the delay, the greater the presumption of prejudice. *Id*. at 656, 112 S.Ct. 2686.

Relative to the delays that occurred prior to entering a nolle prosequi, there is certainly no basis to consider a bad faith delay on the part of the State, and for all intents the State's actions certainly appear diligent enough in prosecuting the case.

Finally, the question arises whether the period of official negligence, lasting approximately six months, warrants a finding of presumed prejudice. In *U.S. v. Serna-Villarreal*, 352 F.3d 225 (5th Cir. 2003), the court reviewed federal jurisprudence on the issue and found that courts had presumed prejudice only in cases in which the post-indictment delay lasted at least five years. Accordingly, the court ruled the delay of three years and six months was too short a period to presume prejudice. Our own courts have found periods of three and one half years and five months to be too short a period of time from which prejudice could be presumed. *See State v. Willis,* 94 0056 (La. App. 1 Cir. 3/3/95), 652 So.2d 586, (three and one half years); *State v. Shorts*, 97-0050 (La. App. 4 Cir. 1/07/98), 705 So.2d 1237 (five months).

In the instant case, the six month delay attributed to State's official negligence is considerably less than required in order to presume negligence as noted by the cases cited above. Accordingly no prejudice should be presumed.

As to the question of any actual prejudice, in his motion to quash, the defendant suggested that his defense had been severely impaired by the passage of time; however, he offered no particularized basis for raising the assertion. Indeed,

on appeal defendant does not the raise the prejudice issue at all. Accordingly, no weight can be placed in Thomas' favor on this factor.

Having evaluated the four *Barker* factors both independently and collectively, to the extent required, it is clear that defendant failed to establish any violation of his Sixth Amendment right to a speedy trial. To the extent that the trial court granted defendant's motion to quash on this basis, it abused its discretion.

CONCLUSION

For the reasons recited above we reverse the trial court's ruling granting defendant's motion to quash and remand the matter for further proceedings consistent with the views expressed herein.

REVERSED AND REMANDED