

**STATE OF LOUISIANA**

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**NO. 2008-KA-0967**

**VERSUS**

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**COURT OF APPEAL**

**TONY GAINES**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 469-362, SECTION "K"  
Honorable Arthur Hunter, Judge

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**Judge Max N. Tobias, Jr.**

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(Court composed of Judge Max N. Tobias, Jr., Judge Edwin A. Lombard, Judge Paul A. Bonin)

**BONIN, J., DISSENTS WITH REASONS.**

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**REVERSED AND REMANDED.**

**FEBRUARY 11, 2009**

On 20 March 2007, the defendant, Tony Gaines (“Gaines”), was charged with possession of heroin. A plea of not guilty was entered on 30 March 2007. On 30 November 2007, counsel was appointed and several pretrial motions were filed. A hearing on motions was held on 18 January 2008; the district court found probable cause and denied the motion to suppress the evidence. On 1 and 22 February 2008, the defense filed a motion for subpoena duces tecum. Gaines’ trial that was scheduled for 3 March 2008 was continued at the request of the defense because it had yet to receive a response to the motion for subpoena duces tecum. Trial was then rescheduled for 24 April 2008. On 14 March 2008, the defense filed a motion to quash the bill of information, asserting that Gaines’ constitutional right to a speedy trial was violated. The trial court granted the motion on 11 April 2008, and the state’s timely motion to appeal the ruling was granted on 14 April 2008.

### *FACTS*

Because this appeal pertains to the granting of a motion to quash based upon the denial of the right to a speedy trial, the facts relating to Gaines’ arrest are not pertinent.

## DISCUSSION

The only issue in this appeal is whether the district court erred when it granted Gaines' motion to quash the indictment. In the motion and supporting memorandum, he argued that his constitutional right to a speedy trial had been violated.

In *State v. Batiste*, 05-1571, pp. 6-7 (La. 10/17/06), 939 So. 2d 1245, 1250, the Court discussed the legal principles which pertain to a claim that a defendant's constitutional right to speedy trial has been denied:

The constitutional right to a speedy trial is imposed upon the states by the Due Process Clause of the Fourteenth Amendment. *Klopper v. North Carolina*, 386 U.S. 213, 223, 87 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967). The underlying purpose of this constitutional right is to protect a defendant's interest in preventing pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972). The Supreme Court has set forth the following four factors for courts to consider in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right to speedy trial; and (4) the prejudice to the accused resulting from the delay. *Id.* at 531-532, 92 S.Ct. at 2192-93; *see also State v. Reaves*, 376 So.2d 136 (La.1979) (adopting *Barker* factors). The specific circumstances of a case will determine the weight to be ascribed to the length of and reason for the delay because "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." [*State v.*] *Reaves*, 376 So.2d at 138 (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192).

The United States Supreme Court made the following observations concerning a defendant's Sixth Amendment right to a speedy trial in *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972):

Finally, and perhaps most importantly, the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the value the right protects. It is impossible to do more than generalize about when those circumstances exist.... Thus, as we recognized in *Beavers v. Haubert*, ...[198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905)], any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights of a defendant. It does not preclude the rights of public justice." 198 U.S. at 87, 25 S.Ct. at 576, 49 L.Ed.2d 958.

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

*Barker*, 407 U.S. at 522-23, 92 S.Ct. at 2187-2188.

In addition, the first of the four *Barker v. Wingo* factors, the length of the delay, is the "triggering mechanism," and if the length of the delay is not "presumptively prejudicial," the court need not inquire into the other three *Barker* factors. See *State v. Scott*, 04-1142 (La. App. 4 Cir. 7/27/05), 913 So. 2d 843; *State v. Santiago*, 03-0693 (La. App. 4 Cir. 7/23/03), 853 So.2d 671.

In the case at bar, Gaines was arrested on 10 January 2007. The bill of information was filed on 20 March 2007. The motion to quash was filed on 14

March 2008, and the court granted the motion on 11 April 2008. Thus, the delay from Gaines' arrest to dismissal was approximately fifteen months, and the delay from the institution of prosecution to dismissal was approximately thirteen months.

Most cases discussing whether the time limits are presumptively prejudicial considered the time between the filing of the bill of information or indictment and the granting of the motion to quash. In *State v. Leban*, 611 So. 2d 165 (La. App. 4<sup>th</sup> Cir. 1992), the state appealed the quashing of an arson charge against the defendant. This court found the sixteen-month delay between the filing of the bill and the quashing of the charge to be presumptively prejudicial, thereby triggering consideration of the three remaining *Barker* factors. In *State v. Johnson*, 622 So.2d 845 (La. App. 4<sup>th</sup> Cir.1992), a delay of twenty-two months was found not to be excessive. This court in *State v. Brown*, 93-0666 (La. App. 4 Cir. 7/27/94), 641 So.2d 687, did not specifically state that nineteen months was presumptively prejudicial, but we nevertheless considered all the *Barker* factors. This court reversed the granting of the motion to quash, finding that the defendant did not show any prejudice resulting from the nineteen-month delay. The Louisiana Supreme Court in *State v. Love*, 00-3347 (La. 5/23/03), 847 So. 2d 1198, found that a twenty-two-month delay was presumptively prejudicial but the defendant's right to a speedy trial was still not violated. Again, here, the delay between the filing of the bill of information and the granting of the motion to quash was only thirteen months and not prejudicial when compared to the cases cited above.

Although we do not find the delay in this case to be prejudicial, we find it appropriate to consider the remaining *Barker* factors, recognizing that a reviewing court might find them appropriately considered.

The foremost reason causing the delay in the proceedings against Gaines was the failure of the district court to appoint counsel until 30 November 2007. Gaines argued in his motion to quash that the delay was the fault of the state because the state failed to adequately fund the Orleans Public Defender's Office. Notably, five continuances occurred during the period in which Gaines was without counsel: 30 April 2007, 7 May 2007, 8 June 2007, 10 August 2007, and 28 September 2007.<sup>1</sup> The state counters that the fault should be placed on the public defender's office for filing the motion to withdraw as counsel.

Gaines also asserted in his motion to quash that the state caused delays with discovery. The record shows that in response to the supplemental motion for discovery filed by the defense, the state indicated that it did not have in its possession certain items that the defense sought and informed the defense that it should file a subpoena duces tecum with the police department. The trial court agreed. Apparently the clerk of the district court delayed forwarding the subpoena to the sheriff to be served on the police department. After receiving the subpoena, the police department did not respond immediately.<sup>2</sup> Gaines argues that the delays caused by the clerk and the police department should be attributed to the state. However, we find no Louisiana case that specifically attributes either delay to the state.

Gaines cites only one case, *State v. Van Dyke*, 03-437 (La. App. 3 Cir. 10/1/03), 856 So. 2d 187, in support of his contention that the failure to appoint counsel should be attributed to the state. The *Van Dyke* case involved the

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<sup>1</sup> Gaines posted bond on 10 May 2007 and was not in custody through at least 10 August 2007. On the scheduled court dates of 8 June 2007 and 10 August 2007, he appeared in court without counsel.

difficulty in securing capital certified counsel to represent the defendant because of a lack of funding. Without specifically holding that the problems securing certified counsel were attributable to the state, the Third Circuit noted that most of the delays were attributable to the defense because of the numerous defense motions that were filed. It also found that the defendant did not timely assert his right to a speedy trial and that he did not show that he was prejudiced by the six years, five months delay. Thus, the district court's judgment granting the motion to quash was reversed.

Even assuming that both delays are attributable to the state, the delay in this case is not as egregious as those in the cases cited above. Also, once counsel was appointed, some of the delay was caused by the filing of pretrial motions, including a supplemental motion for discovery and an application for subpoena duces tecum.

Regarding whether Gaines asserted his right to a speedy trial, the record shows, and the state concedes, that Gaines timely invoked his right to a speedy trial.<sup>3</sup>

The final factor to consider is whether Gaines was prejudiced by the delay. In this regard, he argues that he does not have to make any specific showing of prejudice. Instead he argues that prejudice is shown by the simple fact that he was deprived of his right to counsel for eight months post-arraignment when an effective investigation may have been made. He likens his case to that of *State ex rel. Miller v. Craft*, 337 So. 2d 1191 (La. 1976). In *Craft*, the state moved *ex parte* to secure determination of the defendant's mental capacity prior to formally

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<sup>2</sup> As noted, the only defense continuance requested was because it had yet to receive a response to the subpoena duces tecum.

charging him, but failed to bring the examination to a timely conclusion. Though the trial court signed the order in May of 1974, he remained incarcerated for nearly two years without being transferred to the forensic facility, as ordered, to have an examination performed. Counsel was not appointed until after the defendant was formally charged in February of 1976. In finding that the defendant's right to a speedy trial had been violated, the court found that the state was solely responsible for the delay. The court also noted that physicians, who finally examined the defendant in 1976, found that he was disoriented and confused as to why he was in prison and that he was mentally retarded. The court speculated on the anxiety suffered by the defendant, who was of low intelligence and never formally charged. It also noted that because no counsel was appointed during that nearly two-year period, no investigation was conducted to exonerate him from the crime; the defendant indicated that within that two-year period, he had forgotten the names of people who might have been able to assist him with his defense.

The circumstances in the case at bar are distinguishable. Here, Gaines was formally charged, and there is no evidence that he did not understand the reason for his incarceration. Also, he was released on bond for at least three months during that eight-month, post-arraignment delay. The only anxiety he alleges to have suffered pertained to *when* counsel would be appointed counsel. Unlike in *Craft*, Gaines has not asserted that any particular evidence was lost or that he is unable to locate any potential defense witnesses because of the delay.

Gaines also cites *State v. Harris*, 03-0524 (La. App. 4 Cir. 9/10/03), 857 So. 2d 16, in support of his premise that he need not show any specific prejudice;

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<sup>3</sup> Gaines asserted his right to a speedy trial sometime in March 2007 by filing a motion and again on 30 November 2007.



however, that case is considerably different from the case here. In *Harris*, the trial court attributed a twenty-four-month delay to the state because it was unable to get its witnesses to appear. On the last scheduled trial date in the original case, it moved for a continuance for this same reason; the trial court denied the motion and the state nolle prosequed the charges only to reinstitute them in another case. This court affirmed the trial court's granting of the motion to quash because of the lack of preparedness by the state and numerous continuances it requested despite the lack of information on the defendant from which it could determine whether prejudice was shown. Here, the record does not show that the state sought to intentionally delay Gaines' case because it was unprepared.

In sum, after reviewing the *Barker* factors, we find that the district court erred by granting the motion to quash. The delay in this case is not flagrant, and some of the delay is attributable to the defense. Further, Gaines has not shown that he was prejudiced by the delays.

#### *CONCLUSION*

We reverse the judgment of the trial court's ruling dismissing the case against Gaines. We reinstate the case against Gaines and remand the matter to the trial court for further proceedings.

**REVERSED AND REMANDED.**