NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2012-KA-0408**
VERSUS	*	
		COURT OF APPEAL
KIKYATOR JONES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 481-144, SECTION "B"
Honorable Lynda Van Davis, Judge
* * * * * *
Judge Max N. Tobias, Jr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., Judge Joy Cossich Lobrano)

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AFFIRMED.

The issue in this appeal is whether the time limitation for the institution of prosecution of the defendant had expired; accordingly, a detailed timeline of the events in this case must be set forth.

On 8 August 2008, the defendant/appellant, Kikyator Jones ("Jones"), was arrested by New Orleans Police and charged with the crime of aggravated battery by shooting. On 9 August 2008, Jones was charged by bill of information with attempted second degree murder. An alias capias was issued for Jones and bond was set at $100,000. A surety bond was filed on 15 October 2008. Jones failed to appear at his 13 November 2008 arraignment,[1] and the state filed a motion for bond forfeiture. An alias capias was then issued with no bond, and the matter was continued without date.

Jones finally appeared in court on 3 December 2008 for arraignment. After entering a plea of not guilty, he was remanded to the custody and his bond was again set at $100,000. A hearing to determine counsel was set for 8 December 2008, at which hearing Jones appeared without counsel. James Johnson, Esq., signed the record to represent Jones and a discovery hearing was set for 11

December 2008. Due to a rare New Orleans snowfall, the matter was reset to 6 January 2009 and then reset to 9 January 2009.

On 6 January 2009, John Fuller, Esq., appeared without Jones for discovery hearings. Jones' presence was waived, and the matter was reset for a bond hearing on 9 January 2009. On that date, the trial court reinstated the original bond, and Jones was released. Motion hearings were reset to 6 February 2009. Those motion hearings were continued by joint motion until 19 March 2009. On 20 February 2009, Kevin Boshea, Esq., appeared without Jones for a status hearing. Mr. Boshea filed motions to suppress evidence and identification, for a preliminary hearing, for a bill of particulars, for production of rap sheets, discovery and inspection, and for reduction of bail. The trial court set a new hearing date of 20 March 2009.

Jones appeared with Mr. Boshea on 20 March 2009, but the matter was reset until 15 May 2009 due to "court closing." On 8 May 2009, Jones' counsel appeared in court without his client to file a motion to continue the scheduled motions hearing and the court reset the matters for until 18 June 2009. On that date, Jones was present in court. The state requested and was granted a continuance until 24 July 2009.

On 22 July 2009, defense counsel appeared in court without Jones to request a continuance of the 24 July 2009 hearing date. The matter was continued until 7 August 2009. Jones appeared in court on 24 July 2009 without counsel and was served with the new hearing date.

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[1] We note a discrepancy in the docket master. The 15 October 2008 entry indicates that the arraignment was set for 3 November 2008, but the arraignment was apparently held on 13 November 2008.

On 7 August 2009, Mr. Boshea appeared in court without Jones because Jones was in custody in the Department of Corrections on another conviction and had not been brought to court. The trial court reset the matter until 9 September 2009, due to court closing.

Jones was in court on 9 September 2009 with counsel for motions hearing. However, the matter was continued on oral motion by the state until 15 September 2009. Due to another trial in progress on 15 September 2009, Jones' motions were again reset, this time to 29 October 2009.

On 29 October 2009, the motions hearing was held. The trial court found probable cause and denied Jones' motions to suppress evidence and identification. Trial was set for 27 January 2010.

On 16 November 2009, Jones appeared in court without counsel for a status hearing; the status hearing was reset until 20 November 2009. Jones and his counsel appeared on 20 November 2009. The trial court detained Jones pursuant to La. C. Cr. P. art 330.1, after determining that he represented a danger to the community. A bond hearing was scheduled for 4 January 2010, and Jones' presence was waived. Upon lifting the detainer, the trial court set Jones' bond at $125,000. Upon posting bond, Jones was confined to twenty-four hours house arrest. A new trial date of 27 January 2010 was set.

Jones was present on 27 January 2010, but his trial was reset by the court because a jury had been called for another trial in another case. A new trial date of 1 March 2010 was set.

Trial was again continued on 1 March 2010, this time until 11 May 2010, when the trial court reset the case because a motion for new trial was being heard

in another matter. On 11 May 2010, the matter was continued when Jones was not brought to court by the sheriff. Trial was again reset for 6 July 2010.

On 6 July 2010, the trial court once again reset Jones' trial to 25 August 2010 due to a trial in progress. On 25 August 2010, trial was reset again for 14 October 2010 due to "court closing."

On 14 October 2010, the trial court granted a motion by the state to continue Jones' trial due to a trial in progress, and a new trial date of 10 January 2011 was set.[2]

Jerrod Thompson-Hicks, Esq., appeared in court on 6 January 2011, without Jones for "court action without hearing." The trial date was reset again for 21 January 2011.

Mr. Boshea orally requested a continuance of Jones' trial on 21 January 2011. The motion was granted, and Jones was then sentenced in another case (number 484-501). Trial was continued until 23 March 2011.

On 23 March 2011, trial was reset for 8 June 2011 on motion of the state over the defense's objection. Because Jones was not brought into court on 23 March 2011, the matter was continued until 13 June 2011, on oral motion of the state due to a trial already in progress.

On 8 June 2011, Jones' motion to quash was filed.

Jones was not brought to court on 13 June 2011 and his case was continued on motion by the state. The state filed a motion and order for a writ of habeas corpus ad prosequendum, and the trial was continued until 1 September 2011. The Clerk's Office received Mr. Boshea's motion to withdraw Jones' motion to quash

[2] The record is unclear whether the new trial date was 10 January or 18 January 2011.

on 15 June 2011. The motion to quash was refiled by Mr. Boshea on 24 August 2011, and was set for hearing on 1 September 2011.

Jones was not brought to court by the state and therefore was not present for the hearing on his motion to quash on 1 September 2011. The state requested a continuance and filed a motion for habeas corpus ad prosequendum; the matter was reset until 12 September 2011.

On 12 September 2011, the matter was reset by the court. The state was ordered to re-file its writ and the court reset the matter for 20 September 2011. On 20 September 2011, Jones was not brought to court for the hearing on the motion to quash. The matter was continued on joint motion until the following day, 21 September 2011, when Jones appeared in court for the quashal hearing and the motion was denied by the trial court. The following exchange between Mr. Boshea and the court occurred:

THE COURT:

> Before I note that the guilty plea has been entered knowingly, intelligently and voluntarily made, I must rule on a motion to quash that is before this Court on the attempt second degree murder case, under case number 481-144. At this time I'm going to deny your motion to quash the bill of information under case number 481-144. I agree with you that there are some dates that were very close to the date of the case prescribing; however, this Court left town shortly before that date. I think that the date that was currently set, I found that there was just - I believe that there was just cause to still proceed on that particular date because it was not - it was only a few days past.

MR. BOSHEA:

> Point of information.

THE COURT:

> Um-hum.

MR. BOSHEA:

> I want to make sure I understand. Are you saying that my time line is correct, but that in the instance in question that there was a certain circumstance, on a certain date when the Court was - I want to make sure I got this right. The Court wasn't present and that that constituted just cause –

THE COURT:

> Correct.

MR. BOSHEA:

> -which was an exception to the prescription?

THE COURT:

> Correct.

MR. BOSHEA:

> Respectfully, note my objection to the denial of the motion to quash.

THE COURT:

> So noted.

Jones then pled guilty to attempted second degree murder, a crime of violence, reserving his right to appeal the denial of his motion to quash. He waived delays and was sentenced to serve twenty years in the custody of the Department of Corrections with credit for time served, concurrent with any other sentences, without benefit of probation, parole, or suspension of sentence. The record affirmatively reflects that the state agreed not to file a multiple offender charge against Jones

Mr. Boshea timely filed a motion for appeal and designation of the record.

The facts of the crime for which Jones was charged are not relevant to the issue raised in this appeal.

I.

A review of the record reveals no patent errors.

II.

In his sole assignment of error, Jones asserts that the trial court erred in denying his motion to quash of 24 August 2011.

La. C.Cr.P. art. 535 A(4) states in pertinent part :

> A motion to quash may be filed of right at any time before commencement of the trial, when based on the ground that:
>
> * * *
>
> (4) The time limitation for the institution of prosecution has expired;

Jones poses a statutory argument only; his constitutional right to a speedy trial is not argued. He argues that the trial court abused its discretion in denying his motion to quash after incorrectly calculating the two-year limit for prosecution under La. C.Cr.P. art. 578 in his non-capital case. The state, contrariwise, asserts that Jones has not demonstrated that the trial court abused its discretion in denying his motion to quash, claiming that the state had two months remaining in which to bring him to trial when that motion was denied on 21 September 2011.

Jones cites *State v. Jackson*, 40,376, pp. 2-3 (La. App. 2 Cir. 12/14/05), 916 So.2d 1274, 1276, in which the court held:

> For non-capital felony cases, the state must commence trial within two years from the date of institution of prosecution. La. C. Cr. P. art. 578 (2); *State v. Harris,* 29,574 (La. App. 2 Cir. 05/07/97), 694 So.2d 626. A motion to quash is the proper procedural vehicle for challenging an untimely commencement of trial. When the defendant has brought an apparently meritorious motion to quash based on prescription, the state bears a heavy burden to demonstrate either an interruption or a suspension of the time limit such that prescription will not have tolled. *State v. Rome,* 93-1221

(La. 01/14/94), 630 So.2d 1284; *State v. Caston,* 26,415 (La.App.2d Cir.10/26/94), 645 So.2d 1202,

> When a defendant files a preliminary plea, such as a motion for a bill of particulars, the time limitation established by La. C. Cr. P. art. 578 is suspended. La. C. Cr. P. art. 580; *State v. Brooks,* 505 So.2d 714 (La. 1987). This suspension lasts only from the time the motion is filed until the district court rules on the motion. *State v. Harris,* 29,574 (La. App. 2 Cir. 05/07/97), 694 So.2d 626. Where prescription is suspended, the relevant period is not counted toward the two year time limitation. After the trial court rules on the motion, the state has a minimum period of one year from the date of the ruling in which to commence trial. La. C. Cr. P. art. 580.

Jones calculates that 89 days elapsed from time the bill of information was filed by the state until the date that his motions for discovery and suppression were filed, and that 663 days elapsed from the date the court issued its ruling on those motions until his motion to quash was filed.[3] When the time periods are added together, he argues the total equals 752 days, a number which exceeds the La. C.Cr.P. art 578 two-year limit for prosecution of non-capital cases. He further asserts that the trial court erred in not crediting to him periods of time which represent continuances that the trial court granted to itself. Jones submits that from 3 December 2008 through the filing of his motion to quash on 24 August 2011, the only period during which the running of the two-year time limit was suspended was during the interval between the filing of pretrial motions on 20 February 2009 and the date on which the motions were heard, 29 October 2009. He asserts that the motion to quash did not create a suspension of time until 663 days later.

Jones argues that a review of the record reveals that the inordinate delays that occurred in bringing this matter to trial were, overwhelmingly, the result of the

[3] Filing of motions by a defendant suspends running of time. Running of time resumes when the court rules on the motions.

state's decisions, on multiple occasions, not to bring his case to trial, as is evidenced by the number of state requests for continuance. He asserts that it is the burden of the state to refute his argument that the time for prosecution of this bill of information has expired and should be quashed.

The Supreme Court in *State v. Chadbourne*, 98-1998 (La. 1/8/99), 728 So.2d 832, quoting *State v. Groth*, 483 So.3d 596, 599 (La. 1986), held that the state "bears the heavy burden of showing that it is excused from trying the accused on a charge later than the period mandated by Article 578." That burden requires the state to exercise due diligence in discovering the whereabouts of the defendant as well as in taking appropriate steps to secure his presence for trial once it has found him. *See State v. Taylor,* 439 So.2d 410 (La. 1983); *State v. Nations,* 420 So.2d 967 (La. 1982); *State v. Williams,* 414 So.2d 767 (La. 1982).

In *State v. Odom*, 06-0975 (La. 11/3/06), 941 So.2d 24, 26, the Court found that in general, once the two-year prescriptive period has lapsed, the state must demonstrate either an interruption or a suspension of the time limit to prove that prescription has not tolled. This principle, placing the burden of proving interruption or suspension upon the state, is repeated in *State v. Brazile*, 06-1611 (La. App. 4 Cir. 5/30/07), 960 So.2d 333, and *State v. Sorden*, 09-1416 (La. App. 4 Cir. 8/4/10), 45 So.3d 181.

With regard to the state's responsibility under La. C.Cr.P. art 578 A to seek out and/or locate a defendant who fails to appear for trial when a defendant's absence results from his imprisonment in another jurisdiction, the state must take affirmative steps to secure the defendant. The Supreme Court in *State v. Romar*, 07-2140, p. 3 (La. 7/1/08), 985 So.2d 722, 725, stated the following:

> The statutory periods of limitation "enforce the accused's right to a speedy trial and ... prevent the oppression caused by suspending criminal prosecutions over citizens for indefinite periods of time." *State v. Rome,* 93-1221 (La.1/14/94), 630 So.2d 1284, 1286; *see United States v. Marion,* 404 U.S. 307, 322, 92 S. Ct. 455, 464, 30 L.Ed.2d 468 (1971)(statutes imposing time limits on trial "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."). That period may be enlarged as the result of suspension, La. C. Cr. P. art. 580, or interruption, La. C. Cr. P. art. 579, but in either case, the state "bears the heavy burden of showing that it is excused from trying the accused on a charge later than the period mandated by [La. C. Cr. P. art.] 578." *State v. Chadbourne,* 98-1998, p. 1 (La.1/8/99), 728 So.2d 832 (internal quotation marks and citations omitted). That burden ordinarily "'requires the State to exercise due diligence in discovering the whereabouts of the defendant as well as taking appropriate steps to secure his presence for trial once it has found him.'" *State v. Bobo,* 03-2362, p. 5 (La. 4/30/04), 872 So.2d 1052, 1055–56 (quoting *Chadbourne*).

Jones additionally argues that all of his actual absences from court should be attributed to the state; he submits that the state had prosecuted him in a concurrent but unrelated narcotics case which resulted in his incarceration during the time in question. He asserts that the state's difficulties in locating him are difficult to understand; they certainly knew his location after having watched him being sentenced to the Department of Corrections. Further, he asserts that the sheriff's failures to bring him from Orleans Parish Prison to appear in court cannot be counted against him. Additionally, Jones avers that at least one of the continuances, which should serve to sustain the running of the time limitation in his favor, was the result of the trial court having improperly granting itself a continuance, arguing that "there is no such thing as a 'court continuance.'"

Jones denies having requested or agreed to hold trial on 21 January 2011, asserting jury trials are not scheduled in Orleans Parish Criminal District Court on Fridays. He argues that the scheduling of any such trial date could only have been done by the state, under the provisions of La. C.Cr.P. art. 61.

Accordingly, as noted above, Jones submits that from 3 December 2008 through the filing of his motion to quash on 24 August 2011, the only period during which the running of the two-year time limit was suspended was the interval between the filing of pretrial motions on 20 February 2009 and the date on which the motions were heard on 29 October 2009. The trial court's denial of his motion to quash was, he asserts, error.

Contrariwise, the state posits that Jones has not demonstrated that his statutory right to a speedy trial had been violated and submits that he has not demonstrated that the trial court abused its discretion in denying his motion to quash, as is required under *State v. Love*, 00-3347, p. 9-10 (La. 5/23/03), 847 So.2d 1198, 1206-07. The state argues that it had two months remaining in which to bring Jones to trial when that motion was denied on 21 September 2011. Furthermore, Jones has not demonstrated, or even alleged, that his constitutional right to speedy trial has been violated. The state argues that under *State v. Brown*, 05-1090 (La. App. 4 Cir. 3/22/06), 929 So.2d 182, Jones has the burden of proving that his right to a speedy trial has been violated.

The state avers that on 11 November 2008, Jones failed to appear for arraignment and an alias capias was issued for his arrest. Under La. C.Cr.P. art. 579, the time limitation established by La. C.Cr.P. art. 578 was interrupted when Jones failed to appear and began to run anew upon his return to court on 3 December 2008. Jones filed written motions to suppress evidence, statement, and

identification on 20 February 2009, and a new motions hearing date was set. Those pre-trial motions were not heard and denied until 29 October 2009. The state points out that one of the trials in progress which delayed the trial of Jones' case was his own jury trial in case number 484-501 heard on 14 October 2010.

The state argues that prescription was suspended on 6 January 2011 and did not begin to run again until the next setting, 23 March 2011.

Jones argues that the two-year time limitation "was again suspended on 6 January 2011, which suspension was extended when he secured a continuance on 21 January 2011. The state concedes that the record contains no transcript of the 6 January 2011 proceeding, but asserts that, "it seems reasonable to assume, since the matter was not on the docket, that appellant's counsel did not appear at the request of the State. Furthermore, the record is devoid of evidence that the State had anything to do with the choice of the January 21, 2011 date for trial." The state argues that the minute entry records an oral request for continuance by Jones on 21 January 2011, which constitutes a preliminary plea under La. C.Cr.P. art. 580. When that is added to Jones' filing of the motion to quash on 24 August 2011, which suspended the running of prescription until it was denied on 21 September 2011, the state had used only 669 days of its 730-day limit, with 61 days remaining before the case became prescribed.

Finally, the state argues that while Jones has not raised a constitutional speedy trial argument, no such contention is available to challenge the trial court's ruling because the circumstances as presented do not meet the threshold requirement in *Barker v. Wingo,* 407 U.S. 514 (1972). Citing *State v. Batiste*, 05-1571, p.7 (La. 10/17/06), 939 So.2d 1245, 1250, the state submits that because much of the delay is not attributable to it, the length of delay is not presumptively

prejudicial. However, because Jones has not raised this issue, the state's argument is immaterial.

Jones decided to offer only the statutory argument, thereby precluding consideration under *Barker*. His argument that the trial court had no authority to continue trials on its own motion is without merit. It is clear that a trial court has wide discretion in controlling its docket and case management.[4] A review of the proceedings as recorded in the transcript of 12 September 2011 reveals that the trial court independently computed the number of days which had elapsed since prosecution began. The court determined that while Jones' timeline was correct, prescription had not accrued because continuances taken by the trial court during the relevant period could not be counted in his favor, representing exceptions to the running of prescription.

In addition, the state's argument that the burden of proving that the time limitation for prosecution rests solely with a defendant is also without merit; in view of the jurisprudence, the burden rests squarely upon the state to disprove prescription.

In *State v. Brooks*, 02-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782, the Court opined as follows:

> For purposes of La. C.Cr.P. art. 580, a preliminary plea is any pleading or motion filed by the defense which has the effect of delaying trial. *State v. Cranmer,* 306 So.2d 698, 700 (La. 1975); *State v. Elfert,* 247 La. 1047, 175 So.2d 826, 828 (1965). These pleadings include properly filed motions to quash, motions to suppress, or motions for a continuance**,** as well as applications for discovery

[4] *See Chambers-Johnson v. Applebee's Restaurant,* 12-98 (La. App. 5 Cir. 9/11/12), __ So.3d __, 2012 WL 3968913 (a trial court's decision with regard to control of its docket and case management is to be set aside by an appellate court only when there has been an abuse of discretion; an appellate court's interference with trial court matters, such as control of a docket and case management, should be done so only with reluctance and in extreme cases). *See also* Krepps *v. Hindelang,* 97-980 (La. App. 5 Cir. 4/15/98), 713 So.2d 519, 527.

> and bills of particulars. *State v. Brooks,* 505 So.2d 714, 725 (La. 1987); *State v. Fabacher,* 362 So.2d 555, 556 (La. 1978). Joint motions for a continuance fall under the same rule. *State v. Jones,* 620 So.2d 341, 342 (La. App. 5th Cir.1993) (*citing State v. Simpson,* 506 So.2d 837 (La. App. 1st Cir.1987), *writ denied,* 512 So.2d 433 (La. 1987)); *see also State v. Rome,* 93-1221 (La.1/14/94), 630 So.2d 1284, 1288-89.

The minute entry of 21 January 2011 records that an oral request for continuance was made on that day by Jones. La. C.Cr.P. art. 580 A states:

> When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial.

When viewed in light of *Brooks* and La. C.Cr.P. art. 580 A, Jones' motion for continuance must be considered a preliminary plea which, in turn, grants the state a period of one year in which to bring the matter to trial. In his brief, Jones claims that he did not move for a continuance on 21 January 2011, citing to the transcript generated in his companion case also on the docket for 21 January 2011. However, his argument does not appear in the motion to quash hearing, and may not be considered on this appeal because it was not raised in the trial court. We note also that the minute entry of 21 January 2011 and the transcript quoted by Jones shows that he walked out of court after being sentenced in his older case, thereby forcing continuance of the matter *sub judice*. Therefore, we find that the state had until 21 January 2012 to try Jones on the charge at issue in this case. Jones' assignment is without merit.

III.

For the foregoing reasons, we affirm the trial court's judgment.

AFFIRMED.