

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2013-KA-0336
VERSUS	*	
GERALD SEVERIN	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 500-908, SECTION "D"
Honorable Frank A. Marullo, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Madeleine M. Landrieu)

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SEPTEMBER 18, 2013

AFFIRMED

In this appeal, the State seeks review of the trial court's judgment that granted the motion to quash of defendant-appellee, Gerald Severin. Because the State failed to meet its burden of proof to show that the prosecution of the defendant was timely, we affirm the judgment.

STATEMENT OF CASE

On October 2, 2010, the State of Louisiana charged the defendant, Gerald Severin, with one count of theft in the amount of five hundred dollars (\$500.00) or more, in violation of La. R.S. 14:67. The bill of information alleged that the theft occurred between June 1, 2006 and December 31, 2006.

On October 17, 2011, the defendant filed a motion to quash the bill of information, claiming the time period for prosecuting him under La. C. Cr. P. art. 572(A) (2) had expired.¹ The matter came for hearing on November 28, 2011.² The trial court granted the motion to quash, reasoning: "[T]his belongs in the Civil

¹ La.C.Cr.P. art. 572(A)(2) imposes a limitation of four years from the date an offense has been committed to initiate prosecution of a felony offense not necessarily punishable by imprisonment at hard labor.

District Court for the Parish of Orleans... That's where it used to always belong (sic) until this new D.A. I am granting the Motion to Quash on that basis.”

The State objected and appealed the trial court's ruling. The State argued that the trial court erred as a matter of law when it granted the motion to quash on the grounds that the matter belonged in Civil District Court, rather than Criminal District Court. The State noted that reason was not one of the grounds enumerated in defendant's motion. As such, the judgment contravened La. C.Cr.P. art. 536 that provides in part that the court shall not hear any objection based on grounds not stated in the motion. The State also contended that the trial court improperly granted the motion to quash because the employment/fiduciary relationship between the defendant and Merrion Severan (Severan), the alleged victim, continued until December 2006; and hence, the four-year prescriptive period had not run. *See* La. C.Cr.P. art. 573(1).³

On appeal, this Court found that the trial court erred by denying the State the opportunity to establish that the time period for prosecution had not expired. The judgment granting the motion to quash was reversed; and the matter was remanded to the trial court to afford the State the opportunity to present evidence to rebut the defendant's allegations of untimely prosecution.⁴

² The defendant also filed an addendum to his motion to quash on the same day. The addendum argued that the criminal district court had no jurisdiction under La. C.Cr.P. art. 532(8); however, the trial court only considered the grounds set forth in the October 17, 2011 motion.

³ La. C.Cr.P. art. 573 provides:

The time limitations established by Article 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist when:

- (1) The offense charged is based on the misappropriation of any money or thing of value by one who, by virtue of his office, employment, or fiduciary relationship, has been entrusted therewith or has control thereof.

⁴ State v. Severin, unpub., 2012-0205 (La. App. 4 Cir. 10/17/12), 2012 WL 6619009.

On December 18, 2012, the trial court conducted the rehearing of defendant's motion to quash. The State argued that the alleged theft continued until the end of 2006; therefore, its prosecution was timely. The State produced no witnesses or introduced any documents into evidence.

In opposition, the defendant introduced into evidence a copy of a document entitled "Contractor Fraud Investigation." It was generated by Glenn Green, an investigator for the Orleans Parish District Attorney, and was dated December 15, 2009. On the second page of his report, Mr. Green wrote:

"On Tuesday, December 8, 2009, Investigator Green contacted the Louisiana State Board of Licensing for Contractor[s] to inquire as to the contract as stated by Mr. Sever[a]n. Investigator Green spoke to a Ms. Kris Fitch who advised Green that a hearing had in fact been held July 11, 2008 on a complaint made against Gerald Seisran (Severin), doing business as "Gerald Construction Company 5816 Providence Place, New Orleans, Louisiana 70117, phone (504) 210-6422, by a Merion Seven[a]n. Ms. Fitch stated that **Mr. Seisran was found guilty and was ordered to pay a fine of \$3,164.00.** Ms. Fitch advised that **the fine was paid and was collected by the Orleans Parish District Attorney's Office (OPDA)** on behalf of the State Contractors Board. No evidence of the OPDA having collected any fine in reference to this matter could be located or verified.

On Tuesday, December 15, 2009, at approximately 2:00 P.M., Investigator Green attempted to contact Investigator (Lynwood) Allemore relative to the requested copies of the contract between Mr. Severin and Mr. Seisran. No contact was made and copies of the contract have still not been received from Mr. Allemore or Ms. Fitch." (Emphasis added).

The defendant also introduced into evidence a document, captioned "Proposal And Contract," dated May 12, 2006. This document was purportedly the roofing contract between the defendant and Severan. It showed June 7, 2006 as the date of Severan's last payment under the contract.

At the conclusion of the hearing, the trial court again granted the defendant's motion to quash. The trial court noted in part, "The Motion to Quash is granted again, if that is what I have to do. They settled for three thousand some-odd

dollars that the District Attorney's Office got and now they want to prosecute him. That doesn't make any sense to me."

This appeal followed by the State.

STATEMENT OF FACT

The theft charge arises from a construction contract the parties entered on May 12, 2006. In the contract, the defendant agreed to repair the roof of Severan for \$12,000. The defendant was to be paid \$6,000 up front and the remainder upon completion of the repairs. The defendant was paid \$6,000 on May 16, 2006; the remaining \$6,000 was paid on June 7, 2006.

The State alleges that in July of 2006, Severan became aware that shingles had not been installed when his roof began to leak. He then contacted the defendant to fix and/or finish the contracted work. The State represents that the defendant promised Severan that he would return to the property to complete the repairs. In November of 2006, the State claims that Severan again contacted the defendant to repair the roof; however, the defendant failed to return or attempt to finish the work. The State suggests that the alleged employment/fiduciary relationship between the defendant and Severan did not cease to exist until that date or some reasonable time thereafter. Therefore, its initiation of defendant's prosecution on October 7, 2010 was timely.

Defendant counters that the document entitled, "Proposal And Contract," dated May 12, 2006, which bore the inscription, "Const Paid in full finish 6/7/2006," sets June 7, 2006 as the date when work on the contract was completed. Thus, based on La. C.Cr.P. art. 572(A)(2), the time limit to prosecute the defendant for theft began to run four years from that date. Therefore, defendant maintains that because the bill of information was filed on October 7, 2010, four years and

four months after the June 7, 2006 contract completion date, the time to prosecute him for the alleged theft had expired.

ASSIGNMENT OF ERROR

The State argues that the trial court erred in granting the defendant's motion to quash because it went beyond the limited scope set by this Court on remand.

ARGUMENT

The State contends that in its rehearing, the trial court erred by exceeding the limited scope set by this Court in its remand of this case- which was to grant the State an opportunity to present evidence to rebut the defendant's allegation that the State's prosecution was untimely.⁵ The State avers that the trial court failed to broach the issue of timeliness. Instead, it considered whether concerns as to the "quality" of the defendant's work in performing the contract made this matter a civil, rather than criminal issue. The State asserts that the trial court erroneously chose to focus its attention upon an alleged payment of a fine to the Orleans Parish District Attorney's Office as the basis for granting the motion.⁶ Thus, the State submits that the trial court exceeded the scope of the remand in granting the motion to quash on the basis that the matter belonged in civil court, rather than on the issue of timeliness. Notwithstanding, the State claims the trial court's decision was an error of law because it was not based on grounds stated in defendant's

⁵ La. C. Cr. P. art. 532(7) provides:

A motion to quash may be based on one or more of the following grounds:

(7) The time limitation for the institution of prosecution or for the commencement of trial has expired.

⁶ The State cites the Louisiana Supreme Court's ruling in *State v. Williams*, 2005-1556, p. 2 (La. 2/17/06), 921 So. 2d 105, 106, in which the Court held:

However, the re-vesting of jurisdiction in the district court was no broader than the "sole" question for which we remanded the case.

motion to quash nor was it based upon any of the enumerated grounds for a motion to quash as enumerated in La. C.Cr.P. art. 532.

In response, the defendant acknowledges that the purpose of this Court's remand was to allow the State an opportunity to present evidence that the offense alleged in this matter had not prescribed prior to the filing of its bill of information. However, the defendant asserts that the State did not present any evidence at the rehearing. Defendant suggests that the State was given ample opportunity to present evidence and that although it was well aware of the purpose of the rehearing, the State chose not to offer any evidence in support of its timeliness argument, and allowed the hearing to conclude without objection. Defendant points out that under La. C. Cr. P. art. 577, the State has the burden of proving the facts necessary to show that its prosecution was timely instituted and it failed to do so.

Defendant also argues that in contrast to the State, the defense not only introduced evidence that the State's prosecution was untimely, but also that it offered evidence in support of its addendum to the motion to quash that the criminal district court lacked jurisdiction to prosecute the defendant for theft.

DISCUSSION

The motion to quash is essentially a mechanism by which to raise pretrial pleas of defense, i.e., matters which do not go to the merits of the charge. La. C.Cr.P. art. 531, *et. seq.*; *State v. Byrd*, 96-2302, pp. 18-19, (La. 3/13/98), 708 So.2d 401, 411; *State v. Perez*, 464 So.2d 737 (La. 1985); *State v. Carter*, 2011-0859, p. 3 (La. App. 4 Cir. 3/21/12), 88 So.3d 1181, 1182; *State v. Fox*, 2009-1423, p. 4 (La. App. 4 Cir. 7/7/10), 43 So.3d 318, 320. In considering a motion to quash, a court must accept as true the facts contained in the bill of information and

in the bills of particulars, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged. While evidence may be adduced, such may not include a defense on the merits. *Byrd*, 96–2302, pp. 18-19, 708 So.2d at 411, citing *State v. Gerstenberger*, 255 So.2d 720 (1971) and *State v. Masino*, 38 So.2d 622, 750 (1949); see also, *Carter*, 2011-0859, p. 3, 88 So. 3d at 1182; *Fox*, 2009-1423, p. 4. 43 So. 3d 318, 320.

A trial court’s ruling on a motion to quash is a discretionary one, which should not be disturbed absent a clear abuse of discretion. *State v. Sorden*, 2009-1416, p. 3 (La. App. 4 Cir. 8/4/10), 45 So.3d 181, 183; *State v. Hill*, 2005-1123, p. 7 (La. App. 4 Cir. 5/10/06), 931 So. 2d 1146, 1150; *State v. Kitchens*, 2009-0834, 2009-0835, p. 4 (La. App. 4 Cir. 3/24/10), 35 So.3d 404, 406-07; *State v. Ramirez*, 2007-0652, p. 4 (La. App. 4 Cir. 1/9/08), 976 So.2d 204, 207; *State v. Love*, 2000-3347, pp. 9-10 (La. 5/23/07), 847 So.2d 1198, 1206 (“[b]ecause 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”).

In the case at bar, the defendant has been charged with violation of La. R.S. 14:67, to wit, theft over five hundred dollars. The time frames to prosecute him for this offense are outlined as follows:

La. C. Cr. P. art. 572 (A) provides:

- A. Except as provided in Articles 571 and 571.1, no person shall be prosecuted, tried, or punished for an offense not punishable by death or life imprisonment, unless the prosecution is instituted within the following periods of time after the offense has been committed:

- (2) Four years, for a felony not necessarily punishable by imprisonment at hard labor.

La. C. Cr. P. art. 573 provides:

The time limitations established by Article 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist when:

- (1) The offense charged is based on the misappropriation of any money or thing of value by one who, by virtue of his office, employment, or fiduciary relationship, has been entrusted therewith or has control thereof.

La. C. Cr. P. art. 577 provides:

The issue that a prosecution was not timely instituted may be raised at any time, but only once, and shall be tried by the court alone. If raised during the trial, a hearing thereon may be deferred until the end of the trial.

The state shall not be required to allege facts showing that the time limitation has not expired, **but when the issue is raised, the state has the burden of proving the facts necessary to show that the prosecution was timely instituted.** [Emphasis added].

Our review of the transcript of the December 18, 2012 hearing reveals that the State made no attempt to either call witnesses or to introduce evidence. The State argues that the employment between the parties began in May of 2006 and ended with the last communication between the parties in November of 2006. However, because no evidence was actually entered into evidence during the hearing by the State in support of that contention, this case may be distinguished from the result in *State v. Averette* cited by this Court in its earlier ruling. In *Averette*, the evidence adduced at the motion to quash hearing established an ongoing pattern of dealing between the parties that lasted from 1993 to 1995.⁷

⁷ The Court in *State v. Averette*, 1999-2054, p. 5 (La. App. 1 Cir. 6/23/00), 764 So. 2d 349, 351 held as follows:

While the defendant did obtain the money from the victims and execute promissory notes promising them repayment of the money in 1993, the defendant had an ongoing relationship with the victims wherein he negotiated

Instead, the present matter is more akin to the facts outlined in *State v. Brumfield*, 2011-1599, (La. App. 4 Cir.11/29/12), 104 So.3d 701. In *Brumfield*, the defendant was charged with theft, arising out of his alleged failure to complete repair work for homeowners; he also filed a motion to quash that challenged the timeliness of his prosecution. The opinion noted that on the motion to quash, the State has the burden of proof. In reversing the trial court that had denied the motion to quash, this Court found that the State failed to carry its burden of proof at the motion to quash hearing by its failure to offer any evidence. *Id.* at p. 21, 104 So.3d at 714.

CONCLUSION

As referenced by both parties herein, the stated purpose of this Court's remand was to provide the State with an opportunity to present evidence to rebut the defendant's allegations of untimely prosecution. Contrary to the State's assertions, the hearing on remand did not exceed the scope set forth by this Court on remand. The trial court did what was ordered by this Court-to conduct a hearing to afford the State the opportunity to put on its evidence.

The record showed that the defendant put on evidence to support its motion and supplemental motion to quash that the prosecution was not timely and that the criminal court lacked jurisdiction to prosecute the defendant. On the other hand, the State put forth no evidence in support of its contention that an on-going business relationship existed between the defendant and Severan that extended the time period for which the State to initiate its prosecution; the State only offered

with them, promised them repayment, and issued checks to them drawn on a closed bank account. Included in the documents introduced into evidence by the defendant were receipts signed by Bisso regarding cash payments made in 1995.

argument. Therefore, the State failed to carry its burden of proof as required by La. C. Cr. P. art. 577.

Based on the evidence offered by the defendant and the lack of evidence offered by the State, we cannot say that the trial court abused its discretion in granting defendant's motion to quash. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED