NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2013-KA-0539**
VERSUS	*	
		COURT OF APPEAL
STEVEN SERVIN	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 445-175, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome, Judge Sandra Cabrina Jenkins)

Leon A. Cannizzaro, Jr.
District Attorney
Scott G. Vincent
Assistant District Attorney
Donna Andrieu
Assistant District Attorney
Parish of Orleans
619 South White Street
New Orleans, LA 70119
COUNSEL FOR APPELLANT, STATE OF LOUISIANA

NOVEMBER 6, 2013

AFFIRMED

The State asserts that the trial court abused its discretion in granting defendant's, Steven Servin's ("Servin"), motion to quash the bill of information based upon prescription. The State asserts that interruption occurred under La. C.Cr.P. art. 579(A), when Servin failed to appear at hearings despite the fact that the Orleans Parish Criminal Sheriff's Office sent notices to his residence in San Antonio, Texas. Because we do not find that the State successfully met its burden of proof that it exercised due diligence to locate and secure Servin's presence in court for the necessary proceedings, we hereby affirm the judgment of the trial court.

FACTS

On November 28, 2003, Servin was arrested and charged with possession of four hundred or more grams of cocaine. On January 28, 2004, Servin was released from custody without bond obligation pursuant to La. C.Cr.P. art. 701. The following day, January 29, 2004, the State of Louisiana charged Servin by bill of information with one count of possession of four hundred or more grams of cocaine in violation of La. R.S. 40:967(F)(3).

Arraignment was initially set for February 17, 2004, but was reset for March 8, 2004 because Servin failed to appear in court. On March 8, 2004, when Servin failed to appear in court, the Court issued an alias capias for Servin's arrest in an amount of $100,000. The bond forfeiture hearing was set for March 22, 2004. On March 22, 2004, the bond forfeiture hearing was reset for April 12, 2004 due to Servin's failure to appear. On April 12, 2004, defense counsel appeared in court without Servin for the bond forfeiture hearing. A hearing on the motions was set for April 14, 2004, but Servin failed to appear in court. The trial judge then ordered the alias capias to remain in effect for Servin's arrest, and the matter was continued without a date.

Upon direction of the trial judge, for each arraignment and hearing set, notice was to be served on Servin at his residence, 6115 Rose Valley Drive, San Antonio, Texas, by the Orleans Parish Criminal Sheriff's office. Each notice that was served by mail was accompanied by a return card which was to be signed by the receiver acknowledging receipt of the notice. However, the return cards were never received by the Orleans Parish Criminal Sheriff's office. The alias capias for Servin's arrest remained in effect until October 17, 2012 when Servin was arrested on the alias capias and taken into custody by the Orleans Parish Criminal Sheriff's office.

After continuances by both the State and defense counsel, on January 25, 2013, defense counsel filed a motion to quash the bill of information based on untimeliness. Servin asserted in his motion to quash that the State failed to commence trial within the prescriptive period as set forth by La. C.Cr.P. art. 578(A)(2), thereby forcing the charge to be quashed. He argued that after his arrest and release from custody without bond obligation, during the course of

proceedings he continued to reside at his San Antonio, Texas address until his arrest on October 17, 2012, and the State failed to serve him with actual notice of proceedings. The court subsequently granted this motion on February 27, 2013. The State now appeals this final judgment.

DISCUSSION

The State instituted proceedings against Servin on January 29, 2004, by filing a bill of information charging him with the possession of four hundred or more grams of cocaine, a felony punishable by imprisonment at hard labor up to thirty years. La. R.S. 40:967(F)(3); La. Code Crim. Proc. Art. 382(A). La. C.Cr.P. art. 578(A)(2) sets forth the time period in which the State was required to commence the trial. The article provides that no trial shall be commenced in other felony (non-capital) cases after two years from the date of institution of the prosecution. As such, the State had until January 29, 2006 to bring Servin to trial.

In its sole assignment of error, the State of Louisiana contends that the trial court erred in granting the motion to quash because the two-year time limitation period for commencement of trial was interrupted by Servin's failure to appear in court for arraignment and bond forfeiture hearings for which he was given actual notice. For this reason, the State contends that the prescriptive period did not commence to run anew until October 17, 2012, when Servin was arrested.

Louisiana law dictates that a motion to quash is the proper procedural vehicle for challenging the State's untimely commencement of trial. La. C.Cr.P. art. 532(7). When a trial court rules to grant a defendant's motion to quash, the ruling is based upon the discretion of the trial court judge. When an appellate court is requested to review a trial court's ruling, great deference shall be given to a trial court's discretionary decision. Therefore, the trial court's ruling on a motion

to quash shall not be disturbed on appeal absent a finding of abuse of discretion by the trial court. State v. Ramirez, 2008-0292 (La. 3/13/09), 976 So. 2d 204, 207, citing State v. Love, 2000-3347, pp. 9-10 (La. 5/23/03), 847 So.2d 1198, 1206. "When a 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.1/14/94), 630 So.2d 1284, 1286. This burden of proof requires the State to exercise due diligence in discovering the whereabouts of the defendant as well as in taking the appropriate steps to secure his presence for trial once he has been found. State v. Chadbourne, 98–1998, p. 1 (La.1/8/99), 728 So.2d 832 (internal quotation marks omitted). The State bases its argument primarily upon La. C.Cr.P. art. 579(A)(3). The article provides in part:

> A. The period of limitation established by Article 578 shall be interrupted if:
>
> (2)The defendant cannot be tried…because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state; or
>
> (3)The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record.
>
> B. The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.

The period of limitation is also subject to suspension pursuant to La. C.Cr.P. art. 580, but suspension is not an issue in this matter.

In the present case, the record reflects that several hearings were set on February 17, 2004; March 8, 2004; March 22, 2004; April 12, 2004; and April 14, 2004. Servin failed to appear in court for all above listed hearings due to the State's failure to perfect service upon him. Upon Servin's release from custody on January 28, 2004, he returned to his San Antonio, Texas residence, without bond

obligation, where he contends he remained throughout the proceedings and until his arrest on October 17, 2012.

The provisions of La. C.Cr.P. art. 735 state in part:

> A. Unless otherwise directed by the state or defendant, subpoenas shall be served by domiciliary service, personal service, or United States mail as provided in Paragraph B. Personal service is made when the sheriff tenders the subpoena to the witness. Domiciliary service is made when the sheriff leaves the subpoena at the dwelling house or usual abode of the witness with a person of suitable age and discretion residing therein as a member of the domiciliary establishment of the witness.
> B. (1) The criminal sheriff for the parish of Orleans…may serve all subpoenas directed to him to be served by mailing the said subpoenas in the United States Post Office, by either certified mail, return receipt requested, or first class mail to the addressee at the address listed on the subpoena.
> (2) Service by first class mail shall include a request that the enclosed return form be signed by the addressee and mailed to the sheriff. If a signed return is not received by the sheriff, the subpoena shall be served by domiciliary or personal service as provided in Paragraph A.

Here, the trial court ordered prior to each hearing that notice of the proceeding was to be served upon the defendant. The State, through the Orleans Parish Criminal Sheriff's Office, sent notices to Servin at his San Antonio, Texas address by U.S. first class mail. In conformity with the law, the notice included a request that the defendant (addressee) sign and return (mail or deliver) the postage paid card to the court. Since none of the notices sent was returned signed by Servin, the provisions of Article 735 directed the State to subsequently attempt service upon Servin by personal or domiciliary service.

The State also cites La. C.Cr.P. art. 579(A)(2) in its appellant brief. While the State's reasons for citing the subsection do not appear in its appellant brief, mere citation indicates that the State argues the defendant's presence for trial could not be "obtained by legal process, or for any other cause beyond the control of the state." It is important to note that since Servin, at the time, was an out of state

resident, Louisiana criminal procedure rules fail to provide a concrete remedy for this issue. Due to the fact that Servin resided out of state, the sheriff could not have "tendered" the subpoena to him (personal service), nor could he have left the subpoena with a person of suitable age and discretion at Servin's place of residence (domiciliary service). As a result, the State argues that failure to perfect service upon Servin was due to lack of legal process or for reasons beyond its control.

In order to determine whether the State met its burden of proving the prescriptive period for commencing trial against Servin was interrupted, it is essential to analyze the degree of due diligence that is necessary to satisfy such burden. As noted by the Supreme Court in State v. Romar, 2007-2140 (La. 7/1/08), 985 So. 2d 722, 726:

> The courts of appeal have split over the question of whether the state bears the same burden under La. C.Cr.P. art. 579(A)(3) of showing that it exercised due diligence in determining the whereabouts of the defendant and in securing his presence for trial as it does under La. C.Cr.P. art. 579(A)(1) and (A)(2). Compare State v. Malone, 610 So. 2d 148, 150 (La. App. 1 Cir. 1992)("The period of limitation in Article 578 begins to run anew when the State knows or should know of a criminal defendant's whereabouts, where the defendant can be served or arrested.") with State v. Buckley, 2002–1288, p. 8 (La. App. 3 Cir. 3/5/03), 839 So.2d 1193, 1199 ("In our view, a defendant who has chosen to ignore actual notice, should not receive any benefit from his action; by the same token, the State should not bear the burden of finding and re-serving (or arresting) such defendants...."). In the present case, the First Circuit panel agreed in principle with the Third Circuit that La. C.Cr.P. art. 579(A)(3), "does not require proof that the State searched for a defendant who failed to appear." Romar, 2007–0789 at 4 (citing Buckley). We agree with the First and Third Circuits that La. C.Cr.P. art. 579(A)(3) does not impose on the state the affirmative duty to search for a defendant who has failed to appear for trial after receiving actual notice. The 1984 amendment of La. C.Cr.P. art. 579 made a defendant's contumacious failure to appear for trial after receiving notice, a direct contempt of court, a ground of interruption of the time limits in La. C.Cr.P. art. 578 for bringing him to trial, without regard to whether he thereby intended to avoid prosecution altogether by rendering himself a fugitive from justice, or whether he had otherwise placed himself beyond the control of the state to secure his presence for trial.

Based upon the appellate courts' reasoning, it is apparent that the State bears a different burden of proof where Article 579(A)(1) and (2) are applicable than where subsection (3) is applicable. When a defendant has been given actual notice that his presence is required in court and the defendant subsequently fails to appear, the State has satisfied its obligation of due diligence since the defendant is actually and personally aware of the proceedings. There is no requirement that the State attempt to notify the defendant by other methods. However, the State does not satisfy its obligation of due diligence simply by attempting to perfect service upon a defendant on numerous occasions, and a defendant has moved or is located out of the State's jurisdiction. The State has an affirmative duty to provide proof that a defendant has taken steps to avoid service at his given address, or that a defendant cannot be located and served for reasons beyond its control. State v. Sorden, 2009-1416 (La. App. 4 Cir. 8/4/10), 45 So. 3d 181, 189; State v. Drummer, 2011-1729 (La. App. 4 Cir. 10/17/12), 107 So. 3d 666, 668.

In the present matter, the State chose to notify Servin that he was required to appear in court for arraignment and bond forfeiture hearings through U.S. first class mail. For the State to show it exercised adequate due diligence to locate Servin and secure his presence for trial under Article 579(A)(2), the State must have presented evidence that the defendant's address was unknown or changed at some point throughout proceedings, or for reasons beyond the State's control, he could not be located and served with notice. The record reveals that Servin's address never changed throughout the proceedings. Furthermore, since he was released from custody on January 28, 2004 without bond obligation, Servin did not

have an actual duty to return and appear in court. See La. C.Cr.P. art. 311; State v. Dillon, 2011-0188 (La. App. 4 Cir. 8/24/11), 72 So. 3d 473, 477.

On the following date, January 29, 2004, the State filed a bill of information against Servin and mailed the notice requiring his presence in court to his San Antonio, Texas address. According to Servin, no such notice was ever received, and no signed return form was ever received by the State. At this point, there was still no duty for Servin to appear in court.[1] Such duty arose on March 8, 2004, when Servin failed to appear in court for arraignment. At that time, an alias capias was issued for Servin's arrest and bond was set in the amount of $100,000. Prior to the issuance and setting of the bond, Servin was unaware of any requirement of him to return to Louisiana and to appear in court on the charge indicated in the bill of information.

Likewise, the State cannot assert the claim that it exercised due diligence in attempting to notify Servin of the proceedings in Orleans Parish due to the lack of legal process or for reasons beyond its control. Although the State attempted service through U.S. first class mail, and due to Servin's absence from the state, service could not be perfected by personal or domiciliary service, Article 735 provides the State with the option to perfect service by certified mail. The record does not indicate that the State attempted service by certified mail, nor does the appellant's brief state these facts. As such, the State did not exercise due diligence or make reasonable efforts to perfect service upon Servin. Since five different notices were mailed and no return forms were received for any of the notices, a

[1] The motion to quash hearing transcript indicates that the defense counsel argued that since there was no bond obligation, and since the State failed to serve the defendant with actual notice of the arraignment hearings, he had no duty to return to Louisiana court.

reasonable person under the circumstances would have at some point thought to attempt service by certified mail.

The State further attempts to support its argument that Servin received actual notice of the proceedings in Louisiana by asserting the "Mailbox Rule."[2] The State cites several cases concerning this rule, but all cases are civil matters that bear no relation or similarity to the present matter. The State argues that since the notices to Servin were properly addressed, postage paid, properly mailed, and Servin's address remained the same, Servin must have received the notices. While the "Mailbox Rule" is known to be applicable in civil matters, in certain instances it can be applied in criminal matters as well.[3] However, such facts and circumstances do not exist here. Servin was not incarcerated throughout the proceeding, thus the State's burden of proving that the prescriptive period in Article 578 was interrupted still existed and there remained the duty of the State to perfect service upon Servin. For these reasons, the State's attempted use of the "Mailbox Rule" fails for lack of applicability to the present matter, and the State has not met its burden of proof.

Pursuant to Article 579(A)(3), to prove the prescriptive period set forth in Article 578 was interrupted by Servin's failure to appear in court, the State must have presented evidence that Servin received actual notice of the proceedings, and proof of such notice is in the record.

---

[2] Restatement (Second) of Contracts § 63, 66 (1981). This rule is rooted in Contract law, applicable to bilateral contracts where acceptance of a contract is effective upon dispatch.

[3] The "Prisoner Mailbox Rule" is applicable in pro se prisoner appeals: Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), 29; State ex rel. Egana v. State, 2000-2351 (La. 9/22/00), 771 So. 2d 638 enforcement denied, 2000-2351 (La. 4/4/03), 840 So. 2d 1212; Skipper v. Boothe, 2008-1292 (La. 10/3/08), 991 So. 2d 462.

The State cites State v. Gibson, 2007-0530 (La. App. 4 Cir. 10/24/07), 971 So. 2d 389, in its appellant brief in an effort to strengthen its argument that the defendant received actual notice to appear in court. In Gibson, the defendant was charged by a bill of information with an offense in violation of La. R.S. 40:966(A)(1). The defendant appeared at his arraignment and entered a plea of not guilty. After numerous hearings having been reset, the defense counsel filed a motion to quash based upon the State's failure to act in accordance with Article 578 time limitations, and the trial court granted such motion. The State subsequently appealed the ruling asserting that the period of limitation was interrupted by the defendant's failure to appear at proceedings after having received actual notice of such proceedings. The record in Gibson indicates that the defendant was given actual notice of one of the hearings in open court. As such, this court reasoned that the period limitation in which the State had to commence trial against Gibson was interrupted by Gibson's subsequent failure to appear at the proceeding for which he received actual notice.

The circumstances in Gibson differ from the present matter in that here, there is no evidence or proof which appears in the record that Servin received actual notice of his arraignment. Additionally, in Gibson, the court noted in a footnote that Gibson failed to appear at a hearing on another date, but since there was no proof or evidence in the record to reflect that Gibson actually received the notice that was mailed to him advising him of his hearing date, the period limitation set forth in Article 578 was not interrupted as required by Article 579(A)(3).

Applying such reasoning to the present matter, the State's argument that because notices to the defendant were properly addressed and mailed, he

presumptively received them, is without merit as the record does not reflect such evidence or proof.

In another Fourth Circuit case, State v. Williams, 2011-1231 (La. App. 4 Cir. 5/23/12), 95 So. 3d 554 writ denied, 2012-1447 (La. 1/18/13), 107 So. 3d 623, the defendant was charged by bill of information for an offense in violation of La. R.S. 40:967. He did not appear for a status hearing since he was incarcerated in Jefferson Parish at the time. Eventually the defendant appeared for arraignment, but there was admittedly some discrepancy on the actual date the bond hearing was set. This court reasoned that while there was a discrepancy in the trial court's instruction as to the date of the hearing, neither the defendant nor his counsel made an effort to clarify the discrepancy in court. Thus, the Court held that issuance of a subpoena was unnecessary since the defendant received sufficient actual notice in open court despite the trial court's discrepancy as to when the actual date of the next hearing would be conducted.

The facts in Williams differ from the matter at hand in that the defendant here never appeared in court for arraignment or bond forfeiture hearings. Servin was never incarcerated during proceedings as was Williams. Furthermore, since Servin never appeared in court, the State cannot assert the element of actual notice. Consequently, the State's reference to Williams does not strengthen its contention that the trial court abused its discretion in granting the defendant's motion to quash for failure to timely commence trial against him.

The State has failed to successfully meet the burden of proof that it exercised due diligence to locate and secure Servin's presence in court for the necessary proceedings. The State claims Servin received actual notice of such proceedings since notices were mailed to his San Antonio, Texas address and no return forms

were signed and received by the Court.[4] Since there is no proof in the record indicating that Servin received actual notice, this claim fails. The State also attempts to apply the "Mailbox Rule" to this case, but such rule is inapplicable. In the transcript of the motion to quash hearing, the State argued that Servin still had an obligation to return to Louisiana and face the charges against him even though he did not have a bond obligation. This is incorrect since the law dictates that there is a heavy burden placed upon the State to prove it made reasonable efforts to notify the defendant of the proceedings in Louisiana. Since Servin's address remained the same throughout proceedings and the State was aware of his whereabouts, it cannot be said that the State made such reasonable efforts. Furthermore, Servin was released from custody without bond obligation, meaning he had no further duty to appear in court absent notice thereof. The trial court did not err by granting Servin's motion to quash, and this assignment of error is without merit.

Accordingly, we hereby affirm the trial court's ruling granting Servin's motion to quash.

AFFIRMED

[4] Although the State supplemented the appeal record with copies of notices sent to the defendant, it does not appear in the record that such documents were presented to the trial court or subjected to adversarial challenge. As such, the materials cannot be considered here. See State v. Jordan, 2012-0930, p. 1 (La. App. 4 Cir. 6/5/13), 118 So. 3d 1235; State v. McQuirter, 2012-0486 (La. App. 4 Cir. 1/23/13), 108 So. 3d 370, 371.