

**NOT DESIGNATED FOR PUBLICATION**

<b>STATE OF LOUISIANA</b>	*	<b>NO. 2013-KA-1265</b>
<b>VERSUS</b>	*	
<b>CURTIS P. BORDENAVE, JR.</b>	*	<b>COURT OF APPEAL</b>
	*	<b>FOURTH CIRCUIT</b>
	*	<b>STATE OF LOUISIANA</b>

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 460-098, SECTION "A"  
Honorable Laurie A. White, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

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(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard)

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**STATE'S MOTION TO SUPPLEMENT DENIED; JUDGMENT  
VACATED; REMANDED**

**MARCH 19, 2014**

The state appeals the July 16, 2013 judgment of the trial court granting the defendant's, Curtis Bordenave ("defendant"), motion to quash. The state contends that the trial court did not afford it the opportunity to review and prepare an argument against the motion to quash and that the prosecution was timely. After reviewing the record on appeal, we hereby vacate the trial court's judgment and remand the case so that the state may be granted the chance to defend against the motion to quash.

#### **PROCEDURAL HISTORY**

On June 7, 2005, the state filed a bill of information against the defendant, charging him with six counts of issuing worthless checks in an amount greater than five hundred dollars. The defendant was arraigned and entered a plea of not guilty on June 30, 2005. On September 26, 2006, defendant failed to appear for a status hearing, and the court issued an alias capias. Approximately seven years later, on May 17, 2013, the defendant was arrested on that alias capias. On July 16, 2013, the trial court granted defendant's motion to quash, and the state noted its intent to file an appeal.

The state lodged its appeal with this Court on September 18, 2013. Subsequently, the state filed its appellant brief and a motion to supplement the record on October 30, 2013. The state's motion to supplement the record was designated to be determined with the merits of the case. Defendant filed his appellee brief on November 18, 2013 as well as his own motion to supplement the record. On November 19, 2013, the defendant filed an opposition to the state's motion to supplement the record. This Court denied the defendant's motion to supplement the record on November 19, 2013.

## **DISCUSSION**

In its sole assignment of error, the state argues that the trial court abused its discretion in granting the defendant's motion to quash based on two assertions: (1) the state was denied an opportunity to adequately respond to defendant's motion to quash; and (2) prosecution was timely.

Considering the determinations involved in the underlying case, the applicable standard of review is abuse of discretion: "In cases involving [ ] types of motions to quash involving factual determinations—such as speedy trial violations and *nolle prosequi* dismissal-reinstitution cases—this court applies an abuse of discretion standard. *State v. Hall*, 13-0453, p. 11 (La. App. 4 Cir. 10/9/13); 127 So.3d 30, 39 (citations omitted).

La. C.Cr.P. art. 572 states in pertinent part:

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. 576, which addresses the filing of new charges after dismissal by the prosecution, states:

When a criminal prosecution is timely instituted in a court of proper jurisdiction and the prosecution is dismissed by the district attorney with the defendant's consent, or before the first witness is sworn at the trial on the merits, or the indictment is dismissed by a court for any error, defect, irregularity, or deficiency, a new prosecution for the same offense or for a lesser offense based on the same facts may be instituted within the time established by this Chapter or within six months from the date of dismissal, whichever is longer.

A new prosecution shall not be instituted under this article following a dismissal of the prosecution by the district attorney unless the state shows that the dismissal was not for the purpose of avoiding the time limitation for commencement of trial established by Article 578.

La. C.Cr.P. 577 establishes that the state has the burden of proof to show timely prosecution:

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.

The state first argues that it was not afforded an opportunity to prepare an argument against the motion to quash, because the motion to quash was filed the same day the hearing on it was conducted. To bolster its argument, the state cites *State v. Watts*, 99-57, p. 3 (La. App. 5 Cir. 5/19/99); 738 So.2d 628, 629:

On appeal, the state points out that when a defendant has brought an apparently meritorious motion to quash based on prescription, the state bears a heavy burden to show that prescription was interrupted or

suspended. *State v. Joseph*, 93-2734 (La.6/3/94), 637 So.2d 1032. The state argues that because of this heavy burden, the state should be given time to respond and satisfy its burden. We agree.

The state's reliance on *Watts* has merit. In *Watts*, the defendant made an oral motion to quash for the first time at the hearing. The state requested that the motion be submitted in writing and a future court date on which to argue the motion. The trial court granted the oral motion that day, but the appellate court reversed.

In the instant case, an examination of the hearing transcript reveals that the state's first time to review the motion to quash was most likely not until the hearing. The state requested a day's recess to better prepare to defend against the motion, but the court denied that request and granted the motion. Although the motion to quash is not in the record<sup>1</sup>, the docket master indicates that the motion was filed on July 3, 2013 in the Clerk of Court's Office. However, there is no indication that the state was served with a copy of the motion. A mere filing of a motion in the Clerk of Court's office does not certify that the opposing party receives it. Moreover, the docket master indicates that on June 14, 2013, the court set a date for hearing on motions for July 16, 2013. That hearing date was set before the motion to quash was filed at the Clerk of Court's office, which is another indication that the state was likely not aware that the motion had been filed, much less that it would be argued that day. Since there is no indication that the state received the motion to quash prior to the July 16, 2013 hearing, it is

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<sup>1</sup> The motion to quash was not introduced into evidence at the motion hearing. The defendant filed a motion to supplement the record, but this Court denied that motion.

doubtful that the state was able to prepare to meet its high burden of proof regarding the timeliness of the prosecution.

The state also argues that prescription had not expired on at least one count in the bill of information. In connection to this argument, it is necessary to consider the state's motion to supplement the record. Although the record lacks information on previous cases against the defendant, the June 7, 2005 bill of information is apparently the second reinstatement of charges originally filed against the defendant on November 6, 2000. Between then and the institution of charges in this case, the state alleges it *nolle prosequi* charges against the defendant twice. In its motion to supplement the record, the state seeks to introduce bills of information and screening action forms in order to prove that prosecution was timely instituted. However, the state failed to introduce those documents at the hearing, and the documents were not subjected to adversarial challenge. See *State v. McQuirter*, 12-0486, p. 1 (La. App. 4 Cir. 1/23/13); 108 So.3d 370, 371 (“[W]e hereby reverse the judgment of the trial court and deny the State's motion to supplement the record because the material contained in the supplement was not presented to the trial court or subjected to adversarial challenge.”) Accordingly, we hereby deny the state's motion to supplement the record.

After reviewing the record, we find that the state lacked the opportunity to prepare to meet its heavy burden on the motion to quash and to introduce documents into evidence that would have aided its case. For these reasons, we vacate the trial court's judgment and remand the case so that the state may have an opportunity to present its case against the motion to quash.

**STATE'S MOTION TO SUPPLEMENT DENIED; JUDGMENT  
VACATED; REMANDED**

