

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2014-KA-0653**
VERSUS *
PAULA S. BRYANT * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 517-870, SECTION "D"
Honorable Frank A. Marullo, 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 Max N. Tobias, Jr.)

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REVERSED AND REMANDED

DECEMBER 10, 2014

The State appeals the trial court's decision to grant the motion to quash of the defendant, Paula Bryant. For the reasons that follow, we reverse and remand.

STATEMENT OF CASE

On December 2, 2010, the defendant was charged by bill of information with one count of bank fraud, a violation of La. R.S. 14:71.1. The date of the alleged offense was November 6, 2010. Thereafter, the defendant agreed to enter the State's Diversion Program on February 23, 2011. In return, the State entered a *nolle prosequi* on March 11, 2011, wherein it promised to completely dismiss the charges upon the defendant's successful completion of that program. The record showed that the parties agreed that failure to complete the program would result in re-institution of the bank fraud charge.

On October 17, 2013, the State re-instituted the charge, citing the defendant's discharge from the program for alleged non-compliance and her failure to pay program fees. The defendant was arraigned on December 16, 2013. At that time, at the urging of the trial court, a court-appointed attorney made an oral motion to quash; and subsequently, filed a hand-written motion to quash pursuant

to La. C.Cr.P. art 701,¹ the article that guarantees the defendant's right to a speedy trial, and La. C.Cr.P. art 578,² the article that outlines the time period to commence trial. The trial court granted the motion to quash and denied the State's motion to set a hearing date on the motion to quash.

The present appeal followed.

¹ La. C.Cr.P. art. 701 provides:

- A. The state and the defendant have the right to a speedy trial.
- B. The time period for filing a bill of information or indictment after arrest shall be as follows:
 - (1)(a) When the defendant is continued in custody subsequent to an arrest, an indictment or information shall be filed within forty-five days of the arrest if the defendant is being held for a misdemeanor and within sixty days of the arrest if the defendant is being held for a felony.
 - (b) When the defendant is continued in custody subsequent to an arrest, an indictment shall be filed within one hundred twenty days of the arrest if the defendant is being held for a felony for which the punishment may be death or life imprisonment.
 - (2) When the defendant is not continued in custody subsequent to arrest, an indictment or information shall be filed within ninety days of the arrest if the defendant is booked with a misdemeanor and one hundred fifty days of the arrest if the defendant is booked with a felony. Failure to institute prosecution as provided in Subparagraph (1) shall result in release of the defendant if, after contradictory hearing with the district attorney, just cause for the failure is not shown. If just cause is shown, the court shall reconsider bail for the defendant. Failure to institute prosecution as provided in Subparagraph (2) shall result in the release of the bail obligation if, after contradictory hearing with the district attorney, just cause for the delay is not shown.
- C. Upon filing of a bill of information or indictment, the district attorney shall set the matter for arraignment within thirty days unless just cause for a longer delay is shown.
- D. (1) A motion by the defendant for a speedy trial, in order to be valid, must be accompanied by an affidavit by defendant's counsel certifying that the defendant and his counsel are prepared to proceed to trial within the delays set forth in this Article. After the filing of a motion for a speedy trial by the defendant and his counsel the time period for commencement of trial shall be as follows:
 - (a) The trial of a defendant charged with a felony shall commence within one hundred twenty days if he is continued in custody and within one hundred eighty days if he is not continued in custody.
 - (b) The trial of a defendant charged with a misdemeanor shall commence within thirty days if he is continued in custody and within sixty days if he is not continued in custody.
 - (2) Failure to commence trial within the time periods provided above shall result in the release of the defendant without bail or in the discharge of the bail obligation, if after contradictory hearing with the district attorney, just cause for the delay is not shown.
- E. "Just cause" as used in this Article shall include any grounds beyond the control of the State or the Court.
- F. A motion for a speedy trial filed by the defendant, but not verified by the affidavit of his counsel, shall be set for contradictory hearing within thirty days.

² La. C.Cr.P. art. 578 provides:

- A. Except as otherwise provided in this Chapter, no trial shall be commenced nor any bail obligation be enforceable:
 - (1) In capital cases after three years from the date of institution of the prosecution;
 - (2) In other felony cases after two years from the date of institution of the prosecution; and
 - (3) In misdemeanor cases after one year from the date of institution of the prosecution.
- B. The offense charged shall determine the applicable limitation.

STATEMENT OF FACT

A motion to quash is based on procedural matters. Accordingly, this Court need not consider the underlying facts/merits of this case in determining whether the trial court properly granted the motion. *See e.g., State v. Gerstenberger*, 260 La. 145, 255 So.2d 720 (1971).

ASSIGNMENTS OF ERROR

The State argues that the trial court erred in 1) granting the defendant's motion to quash where the motion failed to present a facially meritorious argument; 2) in failing to set a hearing date on the motion to quash when requested to do so by the State; and 3) in granting the motion to quash where the State timely re-instituted the bill of information following the defendant's unsuccessful discharge from the State's Diversion Program.

STANDARD OF REVIEW

This Court discussed the standard of review of a trial court's judgment on a motion to quash in *State v. Schmolke* as follows:

Because the alleged facts are accepted as true, the decision on a motion to quash under Article 485 is solely a question of law, *see State v. Byrd*, 708 So.2d 401 at 411, and thus we review the trial judge's ruling in this case under the *de novo* standard. Under this standard of review, we do not defer to any factual findings by the trial judge, and even more so here because any factual determinations by a trial judge at this time regarding the merits of the defense are unauthorized. *See Byrd*, 708 So.2d at 412.

2012-0406 (La. App. 4 Cir. 1/16/13), 108 So.3d 296, 299.

LAW AND DISCUSSION

Motion Lacks Merit On Its Face

In support of its position that the motion to quash lacked merit on its face, the State avers that the defendant's motion failed to specify the ground upon which

it was based as required by La. C.Cr.P. art. 532³ and La. C.Cr.P. art. 536.⁴ The State represents that in order for the burden of proof to shift to the State to show that the time limitation under La. C.Cr.P. art. 572⁵ has not lapsed, the defendant has the burden of bringing a meritorious motion to quash based on prescription. *See State v. Rome*, 1993-1221 (La. 1/14/94), 630 So.2d 1284, and *State v. Joseph*, 2012-1176, p. 2 (La. App. 4 Cir. 3/20/13), 112 So.3d 363, 365. In the present matter, the State contends that the defendant's motion was deficient as it made no showing or cited any facts to demonstrate that the relevant time period had lapsed to re-institute prosecution under art. 572.

Moreover, the State asserts that the defendant could not rely on La. C.C.P. art. 701 to obtain the motion to quash as the defendant had never filed a motion for

³ La. C.Cr.Pr. art. 532 provides:

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

- (1) The indictment fails to charge an offense which is punishable under a valid statute.
- (2) The indictment fails to conform to the requirements of Chapters 1 and 2 of Title XIII. In such case the court may permit the district attorney to amend the indictment to correct the defect.
- (3) The indictment is duplicitous or contains a misjoinder of defendants or offenses. In such case the court may permit the district attorney to sever the indictment into separate counts or separate indictments.
- (4) The district attorney failed to furnish a sufficient bill of particulars when ordered to do so by the court. In such case the court may overrule the motion if a sufficient bill of particulars is furnished within the delay fixed by the court.
- (5) A bill of particulars has shown a ground for quashing the indictment under Article 485.
- (6) Trial for the offense charged would constitute double jeopardy.
- (7) The time limitation for the institution of prosecution or for the commencement of trial has expired.
- (8) The court has no jurisdiction of the offense charged.
- (9) The general venire or the petit jury venire was improperly drawn, selected, or constituted.
- (10) The individual charged with a violation of the Uniform Controlled Dangerous Substances Law has a valid prescription for that substance.

⁴ La. C.Cr.P. art. 536 provides:

A motion to quash shall be in writing, signed by the defendant or his attorney, and filed in open court or in the office of the clerk of court. It shall specify distinctly the grounds on which it is based. The court shall hear no objection based on grounds not stated in the motion.

⁵ La. C.Cr.P. art. 572 provides, 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:
 - (1) Six years, for a felony necessarily punishable by imprisonment at hard labor.
 - (2) Four years, for a felony not necessarily punishable by imprisonment at hard labor.
 - (3) Two years, for a misdemeanor punishable by a fine, or imprisonment, or both.
 - (4) Six months, for a misdemeanor punishable only by a fine or forfeiture.

a speedy trial. Notwithstanding, the State maintains that any reliance on art. 701 is misplaced because the present case involves the re-institution of a case and not the commencement of trial as contemplated by art. 701. In particular, the State iterates that it timely re-instituted the original bill of information in accordance with the provisions of La. C.Cr. P. art. 576,⁶ the article that allows for the re-institution of charges. The State argues that the defendant's bank fraud charge was timely reinstated because the defendant did not successfully fulfill her obligations as required by her participation in the Diversion Program. The State notes that included within the document, entitled "Diversion Program Agreement of Conditions for Participation and Waiver of Time Limitations," are stipulations that both defendant's rights to speedy trial and to any applicable time limitations are effectively interrupted upon entry into the program.

This Court agrees with the State that the defendant's written motion to quash lacked merit on its face. Our review of the record also supports that the defendant did not make any oral argument to demonstrate that the motion to quash should have been granted under arts. 578 and 701; consequently, the burden of proof never shifted to the State to show that the time limitations for prosecution had not lapsed.

⁶ La. C.Cr.P. art. 576 provides:

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.

Denial of Request For Hearing; Time to Re-institute Charges

Having found that the trial court abused its discretion in granting the motion to quash because the motion lacked merit on its face, we need not consider the State's claims that the trial court abused its discretion in granting the motion to quash by its refusal to set a hearing date for the State to respond to the motion; and in not considering that sufficient time remained for the State to re-institute the bank fraud charge under La. C.Cr.P. art. 572(A) and La. C.Cr.P. art. 576. Nevertheless, our jurisprudence has established that the State should have been afforded an opportunity to review and prepare an argument against the motion to quash. *See State v. Watts*, 99-57, p. 3 (La. App. 5 Cir. 5/19/99), 738 So. 2d 628, 629 and *State v. Bordenave*, unpub., 2013-1265 (La. App. 4 Cir. 3/19/14), 2014WL1117973. We likewise determine that the State still had sufficient time to re-institute the bank fraud charge under La.C.Cr.P. art 572(A) (2) and La. C.Cr.P. art. 576. Due to the grade of the offense, the State had four years from the date of the offense, or until November 6, 2014, to re-institute prosecution. Here, the charge was timely re-instituted on October 17, 2013.

Defendant's Response

The defendant disputes the State's contention that the motion to quash fails to adequately specify the ground upon which it is based; however, the defendant concedes that La. C.Cr. P. art. 578 and La. C.Cr. P. art. 701, the articles upon which the trial court granted the motion to quash, do not apply in this matter. The defendant acknowledges that these articles reference the time to commence a timely prosecution; whereas, the present matter involves the reinstatement of formerly dismissed charges, a situation governed by La. C.Cr.P. art. 576.

The defendant also maintains that the State has only made “vague allegations” that she was non-compliant with the Diversion Program, based upon the application of art. 576; again, however, the defendant concedes that the time to reinstitute prosecution had not expired. Moreover, the defendant agrees with the State that the trial court erred in failing to set the matter for a hearing and joins in the State’s request to vacate the judgment.

CONCLUSION

We find that the trial court erred in granting the defendant's motion to quash based upon arts. 578 and 701 and in failing to afford the State the opportunity to conduct a hearing on the motion to quash. Although this Court makes no determination as to whether the defendant violated the terms of the Diversion Program, the State’s representation that she had violated its terms is sufficient to find that the time limitations to re-institute charges on the bank fraud charges had not expired pursuant to art. 576.

Wherefore, based on the foregoing reasons, the judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED