

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2015-KA-0192**
VERSUS *
AARON VERDIN * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 478-807, SECTION "A"
Honorable Laurie A. White, Judge
* * * * *

Judge Terri F. Love
* * * * *

(Court composed of Judge Terri F. Love, Judge Paul A. Bonin, Judge Sandra Cabrina Jenkins)

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AFFIRMED
September 30, 2015

This appeal arises from the attempted 2014 prosecution, which commenced in 2008, of the defendant for drug possession. The defendant filed a motion to quash the bill of information contending that the time period within which to prosecute him had elapsed. The trial court agreed and granted the defendant's motion. The State of Louisiana appeals asserting that the time period for prosecution was interrupted when the defendant failed to appear in the trial court. We find that the record reveals that the defendant was present in the trial court. The State contends that the docket master incorrectly reflected that the defendant appeared in court, and attached a court reporter's affidavit to the appellant brief in support. However, appellate courts do not consider evidence outside of the record. Accordingly, we find that the trial court did not abuse its discretion by granting the defendant's motion to quash the bill of information because the State of Louisiana did not meet its burden, and affirm the judgment of the trial court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Aaron Verdin¹ was charged by bill of information filed on June 18, 2008, with one count of possession of cocaine, a violation of La. R.S. 40:967(C)(2), and one count of possession of alprazolam, a violation of La. R.S. 40:969(C)(2). The

¹ The record does not contain a police report or gist sheet recounting the factual circumstances surrounding Mr. Verdin's criminal charges.

minute entry of July 9, 2008, states that Mr. Verdin did not appear for arraignment, and indicates that no bond was on file. Instead, service was sent to an address found on Mr. Verdin's screening form. On July 30, 2008, Mr. Verdin appeared for arraignment and entered a plea of not guilty. Also on that day, Mr. Verdin was held in contempt of court resulting from a positive drug test, and a subsequent drug test was scheduled for August 1, 2008. Mr. Verdin was notified in open court of the drug test and hearing set for August 29, 2008. Mr. Verdin made a \$100.00 contempt payment, but no bond was set. Mr. Verdin failed to appear for the court-ordered drug test on August 1, 2008, and the trial court issued an alias capias. Mr. Verdin also failed to appear at an August 29, 2008 hearing. The minute entry on that date states: "matter handled when court was closed due to Hurricane Gustav. Capias to remain in effect." The matter was continued without date.

On October 20, 2008, Mr. Verdin "did not appear for set sheet filed." The court set a pre-trial conference for November 3, 2008, and ordered that notice be sent to Mr. Verdin. Mr. Verdin appeared in court on November 3, 2008, and the trial court set a pre-trial conference for November 5, 2008. The November 5, 2008 minute entry states that the matter was reset to November 17, 2008, because Mr. Verdin was not served. On November 17, 2008, the matter was reset again, because Mr. Verdin was not served. The trial court reset the matter to December 11, 2008 and ordered that notice be sent to Mr. Verdin. Mr. Verdin failed to appear on December 11, 2008, and the trial court issued an alias capias.

Six years later, on February 26, 2014, Mr. Verdin appeared in court following a filed arrest pursuant to the alias capias. The trial court transferred the case from Section "C" to Section "A." Defense counsel appeared before Section "A" that day, and the trial court set a hearing for March 6, 2014. Defense counsel

received service for Mr. Verdin, and the trial court recalled the alias capias. Mr. Verdin appeared in court on March 6, 2014. Because no bond had been set at any point in the proceedings against him, Mr. Verdin was arraigned a second time, again pleading not guilty. Mr. Verdin posted a personal surety bond in the amount of \$1,000.00. The trial court set a discovery hearing for April 17, 2014.

Mr. Verdin did not appear at the April 17, 2014 hearing, and the trial court set a hearing for June 13, 2014. On June 13, 2014, defense counsel appeared on behalf of Mr. Verdin. The trial court granted the State's request for a continuance and set the matter for July 17, 2014. On July 17, 2014, Mr. Verdin did not appear, but the minute entry states that the court was "attending Angola" that day. The matter was reset to August 25, 2014. On August 25, 2014, Mr. Verdin appeared, but the trial court judge was out sick. The matter was reset for October 6, 2014.

On October 3, 2014, Mr. Verdin appeared in court to file his Motion to Quash the Bill of Information, and the hearing on the motion was set for October 6, 2014. On October 6, 2014, Mr. Verdin appeared, and the trial court granted the defense counsel's Motion for Continuance. The trial court continued its ruling on the motion to October 20, 2014. On October 20, 2014, Mr. Verdin did not appear, but defense counsel appeared on his behalf. Because the trial court judge was attending a conference that day, and following a joint motion to continue, the trial court continued the ruling on the motion to October 23, 2014. The minute entry notes that Mr. Verdin's presence was not required for that date. On October 23, 2014, Mr. Verdin did not appear, but defense counsel appeared on his behalf. Because the trial court judge had a family matter, the ruling on the motion was continued to October 27, 2014. The entry notes that Mr. Verdin's presence was not required. On October 27, 2014, defense counsel appeared on behalf of Mr.

Verdin, and the trial court granted his Motion to Quash. The State's appeal followed.

The State contends that "[t]he trial court abused its discretion in granting the defendant's motion to quash the bill of information."

MOTION TO QUASH

The State contends that the trial court abused its discretion in granting the Mr. Verdin's Motion to Quash. A motion to quash may be asserted on the grounds that the time limitation for the institution of trial has expired. La. C.Cr.P. art. 532(A)(7). At the time of the alleged crimes, both possession of cocaine and possession of alprazolam carried sentences of not more than five years at hard labor and fines of up to five thousand dollars; thus, both are non-capital felonies. La. R.S. 40:967(C)(2); La. R.S. 40:969(C)(2); La. C.Cr.P. art. 933(3). The State had two years from the date of the institution of prosecution to bring Mr. Verdin to trial. La. C.Cr.P. art. 578. The bill of information was filed on June 18, 2008, so the prosecution had until June 18, 2010, to commence trial.

However, the time period is interrupted when the following conditions exist:

- (1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or
- (2) The defendant cannot be tried because of insanity or 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.**

La. C.Cr.P. art. 579(A). (Emphasis added). The time period begins to run anew from the date that the cause of the interruption ceases to exist. La. C.Cr.P. art. 579(B). Specific provisions govern when the defendant fails to appear in court,

which is the case in the instant matter:

(C) If the defendant fails to appear in court pursuant to any provision of this Article and the defendant is subsequently arrested, the periods of limitations established by Article 578 of this Code shall not commence to run anew until the defendant appears in person in open court where the case on the original charge is pending, or the district attorney prosecuting the original charge has notice of the defendant's custodial location. For purposes of this Paragraph, "notice" shall mean either of the following:

(1) Filing in the court record by either the defendant or his counsel advising the court of his incarceration with a copy provided to the district attorney and certification of notice provided to the district attorney.

(2) Following the seventy-two hour hearing provided by Article 230.1 of this Code, actual notice of arrest is provided to the district attorney and filed in the record of the proceeding of which the warrant against the defendant was issued.

La. C.Cr.P. art. 579(C). (Emphasis added).

When the trial court's ruling on a motion to quash is based on a legal issue, appellate courts review the ruling on a *de novo* basis. *State v. Hall*, 13-0453, p. 11 (La. App. 4 Cir. 10/9/13), 127 So. 3d 30, 38-39. In the case *sub judice*, when the trial court's ruling is based on a finding of fact, i.e. whether prescription expired, the standard of review is an abuse of discretion. *Hall*, 13-0453, p. 11, 127 So. 3d at 39. "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. Major*, 13-1139, p. 4 (La. App. 4 Cir. 4/9/14), 140 So. 3d 174, 177, quoting *State v. Rome*, 93-1221 (La. 1/14/94), 630 So. 2d 1284, 1286.

The State asserts that the prescriptive period was interrupted when Mr. Verdin failed to appear for a drug test on August 1, 2008, and did not begin to run anew until February 26, 2014, when Mr. Verdin reappeared in court. The State

notes that Mr. Verdin was notified in open court of the drug test date on July 30, 2008. Nevertheless, the State iterates that when Mr. Verdin failed to appear, the trial court issued an alias capias. The State makes this assertion despite the fact that both the docket master and minute entry for November 3, 2008, indicate that Mr. Verdin was present in court that day, ostensibly triggering prescription to run anew. Because the State did not bring the matter to trial within two years of November 3, 2008, prescription expired.

However, the State contends that the docket master and minute entry are erroneous, and that Mr. Verdin was, in fact, not present in court on November 3, 2008. The State, in support of this argument, attached an affidavit from a court reporter to the brief. The affidavit was not part of the record. Appellate courts cannot consider exhibits attached to an appellant brief because it is outside of the record. *See State v. Pertuit*, 95-935, p. 5 (La. App. 5 Cir. 3/13/96), 673 So. 2d 1055, 1057. The minute entry of October 20, 2008, states that Mr. Verdin did not appear “for set sheet filed,” and that notice was to be sent to Mr. Verdin for the November 3, 2008 court date. The minute entry on November 3, 2008, indicates that Mr. Verdin was present in court, yet the court reporter wrote “send notice to the defendant” for the next court date on November 5, 2008, rather than “defendant notified in open court.” On November 5, 2008, Mr. Verdin was not present, and the entry states that the trial court reset the matter, because Mr. Verdin was not served.

If Mr. Verdin was served properly for either November 3, 2008, or November 5, 2008, and subsequently failed to appear, prescription would have been interrupted until 2014. However, the State failed to demonstrate any evidence of proper service or to conclusively show that prescription was

interrupted. Furthermore, even if the records and audio recording in connection with 479-837 indicated that Mr. Verdin failed to appear, it is possible that Mr. Verdin was present in court for one matter, but not for another. Moreover, the State failed to object to the Motion to Quash at trial, did not file a written opposition, presented no evidence, and made no argument against the motion.

This Court in *State v. Joseph*, 12-1176, p. 4 (La. App. 4 Cir. 3/20/13), 112 So. 3d 363, 365, established that in determining whether the trial court abused its discretion in granting the motion to quash, “where the State failed to present to the trial court any evidence (or even argument) that the time limitation had been suspended, we clearly cannot find that the trial court abused its discretion in granting the motion to quash.” *See also State v. Brown*, 14-0680, p. 4 (La. App. 4 Cir. 2/4/15, 4); 161 So. 3d 99, 101. Pursuant to *Joseph* and *Brown*, the State failed to meet its burden to show that the prescription period was interrupted in a way that preserved the prosecution of Mr. Verdin. For these reasons, we find that the trial court did not abuse its discretion, and affirm the judgment of the trial court.

DECREE

For the above-mentioned reasons, we find that the trial court did not abuse its discretion by granting Mr. Verdin’s Motion to Quash the Bill of Information because the State failed to meet its burden to show that the prescription period was interrupted in a way that preserved its prosecution of Mr. Verdin. Accordingly, we affirm the judgment of the trial court.

AFFIRMED