NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2015-KA-1140**
VERSUS	*	**COURT OF APPEAL**
DANA L. BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 525-024, SECTION "C"
Honorable Benedict J. Willard, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., Judge Madeleine M. Landrieu)

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JUDGMENT AFFIRMED

JUNE 29, 2016

This matter involves whether the State timely initiated prosecution of the defendant, Dana L. Brown, on one count of issuing worthless checks, a violation of La. R.S. 14:71. The State's appeal contends the trial court abused its discretion in granting the defendant's motion to quash. For the reasons that follow, we affirm the judgment.

STATEMENT OF THE CASE

On June 2, 2015, Defendant, Dana Brown ("Defendant"), was charged by bill of information with one count of issuing a worthless check in an amount between $500 and $1500 for an offense that happened on June 30, 2009. The punishment provides in part that the offender shall be imprisoned without or without hard labor. *See* La. R.S. 14:71 et. seq.

Defendant entered a not guilty plea when she appeared for arraignment on June 18, 2015. Thereafter, on June 30, 2015, Defendant filed a motion to quash the bill of information, claiming the four-year period for institution of prosecution had expired under La. C.Cr.P. art. 572(A)(2).[1] The State was served with the

[1] La. C.Cr.P. art. 572(A) provides in part:

motion on the same date. The trial court granted the motion to quash upon noting that the bill of information dated the offense to 2009; that the Code provides four years to initiate prosecution; and that the State did not initiate prosecution until 2015.

The State objected and requested a couple of days to respond. The trial court scheduled a hearing for July 2, 2015 to allow the State time to respond. The trial court indicated it could revisit its ruling. The transcript provided in relevant part the following:

> BY MR. MILLER [THE DEFENSE]: ... I've also filed a Motion to Quash. This charge is from 2009. I believe it has prescribed based off of Criminal Code of Procedure, Article 572.
>
> BY THE COURT: State?
>
> BY MR. POOLE [THE STATE]: Just give me a hearing date on the 13th. We'll respond in writing, please. I don't know that I've been served a copy of that.
>
> BY [DEFENSE COUNSEL]: I served Mr. Popovich [the State] this morning.
>
> BY [THE STATE]: We were served this morning.
>
> BY THE COURT: All right. Motion granted, State.
>
> BY MR. POPOVICH [THE STATE]: Judge, could we request a date of July 13 to give us time to respond to this in writing?
>
> BY THE COURT: I'm not going to prevent you from responding in writing. I'm reading the clear motion. I'm reading the Bill of Information. I'm reading the Code of Criminal Procedure.

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.

BY [THE STATE]: We were served this motion this morning, Judge. We haven't had a chance to put together a response.

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BY THE COURT: I'm not going to prevent you from objecting. I'm not going to prevent you from noticing your intent. I'm not going to prevent you from putting a response in writing.

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BY [THE STATE]: ... if you're quashing the Bill of Information, we're going to move for an appeal and ask that the record be designated.

BY THE COURT: That's fine.

BY [THE STATE]: But, out of courtesy, what the State is asking is to respond in writing because we literally walk into court, the man puts a motion on our desk in the morning, and then, you just quash the Bill of Information without giving us an opportunity to be heard. That's the issue. ...

BY THE COURT: Go ahead and respond to it.

BY [THE STATE]: May I please have an opportunity to respond to his motion in writing in a couple days, perhaps tomorrow, maybe the next day, maybe the day thereafter?

BY THE COURT: I'll revisit my ruling. I'll do that for you.

BY [THE STATE]: Thank you, sir. I really appreciate that.

BY THE COURT: No, I told you I was going to do that anyway. But it's cut and dry to me. In fact, you should've anticipated a motion to quash being filed on something that you filed a Bill of Information six years later.

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BY [THE STATE]: Since you did quash, maybe we'll set her for the 2nd, perhaps?

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BY [THE STATE]: She can come back and determine if it's going to stay quashed and if we're going to appeal it or not depending if we persuade you.

BY THE COURT: When, Thursday?

BY [THE STATE]: Yes, sir, Thursday. Is that okay?

> BY THE COURT: It doesn't matter to me. My job is done.
>
> BY [THE STATE]: Thank you, Judge.
>
> BY THE COURT: July $2^{nd.}$ Serve the lady for July $2^{nd.}$

When the parties appeared for the July 2, 2015 hearing, the State merely filed a motion for appeal and designation of record. It offered no verbal or written response to rebut Defendant's claim that the time to commence prosecution had prescribed. It also did not request an extension of time in which to file a response. The trial court reaffirmed its decision to grant the motion to quash and accordingly, released Defendant. The transcript from the hearing provides:

> BY MR POOLE [THE STATE]: You gave up [sic] until today. You ruled that it was quashed based upon [prescription]. Just note our objection, please. And we will just move for appeal and asked that the record be designated, 30 days date.
>
> BY THE COURT: What's the basis of the appeal if the law is clear as such that prescription had already run its course[?]
>
> BY [THE STATE]: Your Honor, we've looked at it. We understand the Court's ruling. We're just protecting the state's rights on the record. And in the event there's an issue as far as whether case may not be prescribed, we'd like to reserve our right to appeal.
>
> ***
>
> BY THE COURT: I'm just trying to figure out on what basis is the quash improper.
>
> BY [THE STATE]: In the event we see a reason or an argument that it may not be prescribed, we'd like to reserve our right to appeal it to a higher court if that's okay.
>
> BY THE COURT: You're saying two different things now. All right. But in any event, the matter is quashed. She's free to go. If they take an appeal and its overruled they'll get an indication.

Thereafter, the trial court granted the State's present motion for appeal.

STATEMENT OF FACT

The facts underlying the instant offense are not relevant as the issue on appeal is procedural in nature. *See State v.Gerstenberger*, 260 La. 145, 255 So.2d 720 (1971).

STANDARD OF REVIEW

This Court explained the appropriate standard of review of a district court's ruling on a motion to quash in *State v. Butler*, 2014-1016, p. 3 (La. App. 4 Cir. 2/11/15), 162 So. 3d 455, 459, as follows:

> The standard of review that we apply in reviewing a district court's ruling on a motion to quash varies based on the types of issues presented. When solely legal issues are presented… we apply a de novo standard of review. *State v. Olivia*, [20]13–0496, pp. 2–3 (La. App. 4 Cir. 3/26/14), 137 So.3d 752, 754; *State v. Schmolke*, [20]12–0406, p. 4 (La. App. 4 Cir. 1/16/13), 108 So.3d 296, 299; see also *State v. Hamdan*, [20]12–1986, p. 6 (La.3/19/13), 112 So.3d 812, 816 (noting that "[o]n appeal from the trial court's ruling on a motion to quash, the trial court's legal findings are subject to a de novo standard of review"). In contrast, when mixed issues of fact and law are presented—such as speedy trial violations and *nolle prosequi* dismissal—reinstitution cases—we apply an abuse of discretion standard. *State v. Hall*, [20]13–0453, pp. [20]11–12 (La. App. 4 Cir. 10/9/13), 127 So.3d 30, 39 (citing *State v. Tran,* [20]12–1219, p. 2 (La. App. 4 Cir. 4/24/13), 115 So.3d 672, 673, n. 3) (explaining that "[i]n reviewing rulings on motions to quash where there are mixed questions of fact … a trial judge's ruling on a motion to quash is discretionary and should not be disturbed absent a clear abuse of discretion"); *State v. Love*, [20]00–3347, pp. 9–10 (La.5/23/03), 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").

Id. (quoting *State v. Trepagni*er, 2014–0808, p. 5, n. 3 (La. App. 4 Cir. 11/19/14), 154 So.3d 670, 673).

When deciding a motion to quash based on prescription, a trial court is usually required to make factual determinations. Here, the only facts presented to the trial court were that the offense occurred on June 30, 2009 and that the State initiated its prosecution on June 2, 2015. The trial court then applied the law to the facts and determined that the bill of information was prescribed. As the trial court was presented with mixed issues of fact and law, based on case law cited herein, this Court must review the trial court's findings under the abuse of discretion standard.

LAW AND ARGUMENT

The State's sole assignment of error contends the trial court abused its discretion in granting Defendant's motion to quash because the State was not afforded the opportunity to be heard. The State represents it "did not have even a day – much less a week or month – to research the issue, respond in writing and/or gather evidence to present to the court" and thus, was not provided an opportunity by the trial court to meet its heavy burden of demonstrating that an interruption or a suspension of the time limit had occurred. It asks this Court to remand the matter to the trial court and reopen the motion to quash proceedings.

Our jurisprudence establishes that 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, p. 3 (La. 1/14/94), 630 So.2d 1284, 1286); *State v. Brumfield*, 2011-1599, pp. 7-8 (La. App. 4 Cir. 11/29/12), 104 So. 3d 701, 706. La. C.Cr. P. art. 577 adds that "[t]he 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 period of limitation established by Article 572 is interrupted if a defendant, for the purpose of avoiding 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 lacks mental capacity to proceed at trial and is committed. La. C.Cr.P. art. 575(1)(2).

In support of its position that the State was not given sufficient time to meet its burden of proof to rebut Defendant's motion to quash, the State cites *State v. Bryant*, *unpub*., 2014-0653, 2014 WL 6989388 (La. App. 4 Cir. 12/10/14); *State v. Bordenave, unpub*., 2013–1265, 2014 WL 1117973 (La. App. 4 Cir. 3/19/14), and *State v. Major*, 2013-1139 (La. App. 4 Cir. 4/9/14), 140 So.3d 174. In all three cases relied upon by the State, this Court found the State was denied the opportunity to adequately contest the motion to quash.[2] Accordingly, the trial

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[2] In *Bryant*, the Fourth Circuit reversed the trial court's granting of the defendant's motion to quash in part because it failed to afford the State the opportunity to conduct a hearing on the motion. The defendant was charged with bank fraud, but the State entered a *nolle prosequi*, wherein it agreed to completely dismiss the charges upon the defendant's completion of a diversion program. The defendant was discharged from the program due to non-compliance, and the State thereafter reinstituted the charge. The defendant filed a motion to quash. The trial court granted the motion to quash and denied the State's motion to set a hearing date. On appeal, the *Bryant* Court found that the State should have been permitted an opportunity to review and prepare an argument against the motion to quash. The trial court was reversed and the matter was remanded.

In *Bordenave,* the defendant had been charged with six counts of issuing worthless checks in an amount greater than five hundred dollars. The trial court granted the defendant's motion to quash because of an untimely prosecution on the same date that the motion was filed. It denied the State's request for a day's recess to better defend the motion. This court vacated the trial court's judgment and remanded the case to give the State the chance to defend against the motion to quash.

In *Major*, the defendant was charged with one count of theft in the amount of $500 or more. The State filed a response to the defendant's motion to quash on the same day of the hearing. The trial court granted the motion to quash after denying the State's request for an evidentiary hearing. The Fourth Circuit found that the trial court abused its discretion by granting the defendant's motion to quash. It reasoned that the trial court erred in declining to afford the State an evidentiary hearing to determine when the victim knew or should have known a theft occurred, a fact issue that could determine whether the State's prosecution was timely. As a

court's decisions to grant the motions to quash were reversed and the matters were remanded for further proceedings. However, we find those cases distinguishable because in the present matter, the trial court afforded the State the opportunity to oppose the motion.

Here, the trial court specifically stated that it was "not going to prevent" the State from filing a written response to the motion to quash. In support of that position, the trial court scheduled a hearing date two days later to allow the State time to file its opposition. Although the trial court admittedly indicated it would grant the motion to quash at the original hearing, it also agreed to "revisit" its decision at the new hearing date. The State seemingly acknowledged that the trial court would reconsider its position when the State espoused that the parties were going to return on July 2, 2015 to "determine if [the bill was] going to stay quashed and if [the State was] going to appeal it or not depending on if we persuade you."

However, at the second hearing, the State did not submit any written or oral argument to defend against the merits of granting the motion to quash. Instead, the State moved for appeal and failed to make any substantive argument or offer any evidence to show an interruption or a suspension of the time limitation to prosecute Defendant. Our examination of the record showed the trial court attempted to elicit argument from the State as to why its decision to grant Defendant's motion to quash was in error. However, the State presented no argument or evidence; instead, it insisted only on reserving its right to appeal. In particular, it did not ask for more time to prepare or move for a separate evidentiary hearing.

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result, the trial court's decision was reversed and the matter was remanded for an evidentiary hearing.

Based on the State's actions and inaction, for all intents and purposes, the State, on its own accord, effectively waived its opportunity to show that Defendant's prosecution was timely. Therefore, notwithstanding that the State was served with the motion to quash on the day of its filing and had not filed a response when the trial court initially granted the motion, we find the trial court's grant of the State's request for a follow-up hearing afforded the State a fair opportunity to oppose the motion and meet its burden of proof.

The parties do not dispute that the issuing of worthless checks offense for which Defendant was charged requires the State to initiate prosecution within four years from when Defendant committed the offense, absent an interruption of the time limitations. In considering a motion to quash, courts must accept as true the facts contained in the bills of information and in the bills of particulars. *State v. Gestenberger*, *supra*. In this case, the bill of information alleged that on June 30, 2009, Defendant "issued a worthless check to Roy Perez, in the amount of five hundred dollars or more." The State charged the defendant on June 2, 2015. Because the bill of information alleged Defendant issued a worthless check on June 30, 2009, on its face, the time period in which the State was permitted to seek prosecution expired on June 30, 2013. When afforded the opportunity, the State failed to present any evidence or argument to rebut these facts. Thus, we find the trial court did not abuse its discretion in granting the motion to quash under the facts presented.

Based on the foregoing, we affirm the judgment.

JUDGMENT AFFIRMED