

STATE OF LOUISIANA

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NO. 2017-KA-0145

VERSUS

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COURT OF APPEAL

DENONTA THADISON A/K/A

\*

FOURTH CIRCUIT

DEMONTA DEMARCUS

\*

THADISON

STATE OF LOUISIANA

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 510-361, SECTION "B"

Honorable Tracey Flemings-Davillier, Judge

\* \* \* \* \*

**Judge Terri F. Love**

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(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Rosemary Ledet)

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**AFFIRMED**  
**June 28, 2017**

The State appeals the trial court’s ruling granting defendant’s motion to quash the bill of information. We find the State has failed to demonstrate that the appointment of the Orleans Parish Public Defenders Office (“OPD”) to represent the defendant was in error, that the prescriptive period to commence trial was interrupted, and that notification pursuant La. C.Cr.P. art. 579(C) applies in this case. We also find the trial court committed legal error in its analysis because it failed to determine whether the prescriptive period was interrupted before its consideration of La. C.Cr.P. art. 579(C). However, because the trial court reached the correct outcome, the defendant was not prejudiced by the error. Accordingly, we affirm the trial court’s granting of the motion to quash the bill of information.

***PROCEDURAL HISTORY AND FACTUAL BACKGROUND*<sup>1</sup>**

Defendant Denonta Thadison, aka “Demonta Demarcus Thadison,” (“Mr. Thadison”) was arrested on September 5, 2011, with one count of simple criminal damage to property and one count of illegal use of weapons or dangerous

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<sup>1</sup> The facts of the underlying offense are not pertinent to this Court’s review of the State’s assigned errors.

instrumentalities. During the course of the follow up investigation, the New Orleans Police Department (“NOPD”) learned that Mr. Thadison had multiple previous arrests and open charges in two counties in Mississippi. Mr. Thadison was released from jail on September 12, 2011, after signing a surety bond instrument, providing an address in Wesson, Alabama.

On February 1, 2012, the State filed a bill of information that charged Mr. Thadison with one count of possession of a firearm by a felon, in violation of La. R.S. 14:95.1, and one count of illegal discharging a weapon during a violent crime, in violation of La. R.S. 14:94(F). On the same date, the trial court issued an alias *capias* for Mr. Thadison’s arrest with a bond set in the amount of \$35,000.00.

Arraignment was set for February 13, 2012; however, Mr. Thadison failed to appear in court. As a result, the trial court ordered that Mr. Thadison’s bond be forfeited, an alias *capias* be issued without bond, and the matter continued without date. On March 13, 2012, the State filed a motion and order for writ of habeas corpus *ad prosequendum*, informing the trial court that Mr. Thadison was in the physical custody of the Mississippi Department of Corrections, and arraignment was reset for March 28, 2012. For more than two years, Mr. Thadison failed to appear on scheduled court dates due to his incarceration in Mississippi, notwithstanding the State’s repeated representation that it would file the necessary paperwork to have Mr. Thadison extradited to Louisiana.

Meanwhile, on April 27, 2012, private defense counsel appeared in court and filed a motion to withdraw as counsel of record. The motion was apparently

granted even though the order included with the motion to withdraw was not signed by the trial judge. Neither the docket master nor the minute entries reflect that Mr. Thadison was represented by counsel until October 3, 2014, when OPD appeared in court on Mr. Thadison's behalf for a pre-trial conference. Defense counsel then filed a motion to quash the bill of information on October 20, 2014, and the State filed an opposition to the motion to quash on or about November 5, 2014.<sup>2</sup> At the conclusion of the November 14, 2014 hearing on the motion to quash, the trial court granted the motion. On the same date, the State filed a motion for appeal and designation of the record. However, the State re-filed its motion for appeal on October 6, 2016, and the trial court granted the motion for appeal on the same date. The State's timely appeal follows.

#### ***REPRESENTATION OF MR. THADISON***

In its first assignment of error, the State avers that the trial court erred by appointing OPD to represent Mr. Thadison. "A defendant is presumed indigent when the trial court appoints a public defender to represent him." *State v. Carter*, 589 So. 2d 1212, 1213 (La. App. 4th Cir. 1991) (citing *State v. Jackson*, 492 So. 2d 1265 (La. App. 4th Cir. 1986)); *See also State v. Collins*, 588 So. 2d 766, 768 (La. App. 4th Cir. 1991).

At the hearing on the motion to quash, the State argued that before the trial court may appoint OPD to represent a defendant, a determination of indigency must be made. The State argued that the trial court was required to question Mr.

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<sup>2</sup> Absent from the record is a copy of the State's opposition to the motion to quash.

Thadison to determine whether he is indigent and whether he qualifies for representation by OPD. In that a determination of indigency did not occur, the State averred that the appointment of OPD is not proper in this case. On appeal, the State claims that because Mr. Thadison was initially represented by private counsel and had the resources to post bond after his September 5, 2011 arrest, the facts further prove that a determination of indigency was required before Mr. Thadison was appointed a public defender to represent him.

The trial court found no merit to the State's contention. It noted that on March 13, 2012, the State advised the trial court that Mr. Thadison was in the custody and control of the Mississippi Department of Corrections and that it was seeking an order to extradite Mr. Thadison. The matter was then set on a monthly basis. Mr. Thadison, however, remained incarcerated in Mississippi. In that Mr. Thadison's private defense counsel had previously withdrawn, Joshua Schwartz ("Mr. Schwartz") from OPD appeared on the record on October 20, 2014, for a pre-trial conference and to file a motion to quash on behalf of Mr. Thadison. The trial court acknowledged that the minutes do not reflect that there was a formal appointment of OPD. Nevertheless, the trial court reasoned that "the appearance of [Mr. Schwartz] on behalf of [Mr. Thadison] at that time reflects the [trial court's] intention to have appointed the Office of Public Defender's [sic]." The trial court further determined Mr. Thadison to be indigent because he remained in the physical custody of the Department of Corrections of Mississippi for over two years and was not working or generating any income during that time.

The trial court recognized that evidence of OPD's formal appointment is not reflected in the record. The trial court explained at the hearing on the motion to quash its reasons for appointing OPD. Taking into consideration that Mr. Thadison's private counsel withdrew from the instant case, likely as a result of Mr. Thadison's incarceration in Mississippi,<sup>3</sup> and the State's knowledge of Mr. Thadison's incarceration for more than two years without legal representation, the trial court deemed Mr. Thadison qualified to be represented by OPD, which had "standing" to do so at the motion hearing.

We find no error on the part of the trial court in ruling that Mr. Thadison met the requirements for the appointment of OPD to represent him in the instant matter. Moreover, it is unclear from the State's appellate brief what relief it seeks in response to this assigned error or whether it has standing to raise the complaint on appeal. Therefore, we find no basis for reversal under the State's first assigned error.

### ***MOTION TO QUASH***

In its second assigned error, the State's contention that the trial court erred by granting the motion to quash is two-fold. First, the State avers the two-year time limitation to commence trial was interrupted when Mr. Thadison failed to appear in court for his scheduled arraignment. Second, the State claims Mr. Thadison failed to file into the record written notice of his incarceration or provide certification of the notice to the district attorney pursuant to La. C.Cr.P. art.

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<sup>3</sup> The motion to withdraw as counsel indicates that Mr. Thadison failed to appear in court on several occasions and had not been in contact with defense counsel's office.

579(C), and as a result, the time limitation to commence trial did not begin to run anew even though the State knew he was incarcerated in Mississippi. Conversely, Mr. Thadison asserts in his motion to quash that more than two years has passed since the State filed the bill of information against him. Considering the State failed to bring him to trial within the two-year period outlined in La. C.Cr.P. art. 578(A)(2), the bill of information should be quashed.

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). This Court has held that "[t]he district court decision to grant a motion to quash is a discretionary one and on review shall be given 'great' deference." *State v. Barahona*, 15-0979, p. 2 (La. App. 4 Cir. 3/23/16), 192 So. 3d 191, 193 (citing *State v. Thomas*, 13-0816, p. 6-7 (La. App. 4 Cir. 3/19/14), 138 So. 3d 92, 97). Louisiana appellate courts "generally review trial court rulings on motions to quash under an abuse-of-discretion standard." *State v. Brown*, 15-1319, p. 7 (La. App. 4 Cir. 4/20/16), 193 So. 3d 267, 271 (citing *State v. Love*, 00-3347, p. 9-10 (La. 5/23/03), 847 So. 2d 1198, 1206). *See also State v. Batiste*, 05-1571 (La. 10/17/06), 939 So. 2d 1245.

"Once a defendant asserts a facially meritorious motion to quash based on a failure to timely commence trial, the district attorney 'bears the heavy burden' of showing that the running of this prescriptive period was interrupted." *Thomas*, 13-0816, p. 5, 138 So. 3d at 96 (quoting *State v. Bobo*, 03-2362, p. 4 (La. 4/30/04), 872 So. 2d 1052, 1055); *See also State v. Groth*, 483 So. 2d 596, 599 (La. 1986).

Generally, 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 it has found him.*” *State v. Jones*, 13-1216, p. 5 (La. App. 4 Cir. 5/7/14), 144 So. 3d 1092, 1095 (quoting *State v. Chadbourne*, 98-1998, p. 1 (La. 1/8/99), 728 So. 2d 832, 832) (emphasis added).

The trial court found the State’s actions, (i.e. informing the trial court of Mr. Thadison’s incarceration in Mississippi) constituted a waiver of the notice requirement under La. C.Cr.P. art. 579(C). Because more than two years had passed since the State became aware of Mr. Thadison’s whereabouts and because the State had not taken affirmative steps to bring him to trial, the trial court granted the motion to quash. A review of the record demonstrates, however, that the trial court made no determination of whether the prescriptive period was interrupted, which is required to trigger application of La. C.Cr.P. art. 579(C). The trial court committed legal error when its analysis omitted this initial inquiry. We therefore address whether the State has shown that the prescriptive period was interrupted before discussing whether the trial court was correct in its application of La. C.Cr.P. art. 579(C) in light of recent case law.

#### *Interruption of the Prescriptive Period*

La. C.Cr.P. art. 578(A)(2) provides in pertinent part that the State has two years from the date of institution of prosecution within which to commence trial in non-capital felony cases. The State filed a bill of information against Mr. Thadison on February 1, 2012; thus, the State had until February 1, 2014, to bring Mr.



Thadison to trial. The State claims, however, that the two-year time limitation to commence trial was interrupted on February 13, 2012, when Mr. Thadison failed to appear in court for arraignment.

While Mr. Thadison concedes that he failed to appear for arraignment, he submits the State has not met its burden of proving the two-year time limitation was interrupted. Mr. Thadison notes that the State had been aware of his incarceration in Mississippi since March 13, 2012, when the State notified the trial court of his whereabouts by filing the writ of habeas corpus *ad prosequendum*. In support of his contention, Mr. Thadison relied on the holding in *State v. Romar*, which stated, “when the defendant’s absence results from his imprisonment in another jurisdiction, the state must take affirmative steps to secure his presence for trial in Louisiana once his whereabouts have come to its attention, or prosecution beyond the time limits of La. C.Cr.P. art. 578 may lapse.” *Id.*, 07-2140, p. 4 (La. 7/1/08), 985 So. 2d 722, 725 (citing *State v. Devito*, 391 So. 2d 813, 816 (La. 1980)) (holding the state failed to meet its burden to prove it was unable to secure defendant’s presence for trial after receiving notice of defendant’s incarceration in New Jersey and susceptible to extradition); *See also State v. Amarena*, 426 So. 2d 613, 618 (La. 1983) (“Any interruption of the period of limitation which existed under La. C.Cr.P. art. 579(1) ceased when the state learned of the incarceration, location and availability of the defendant, and the two year prescriptive period began to run anew from that time”).

The March 13, 2012 minute entry indicates that the State filed a writ for

habeas corpus *ad prosequendum*, noting that “defendant is at the Mississippi Corrections Department.” The record also reflects numerous minute entries throughout 2012, 2013, and 2014, where the State indicated that it would file the necessary paperwork to have Mr. Thadison extradited to Louisiana for arraignment.

La. C.Cr.P. art. 579 provides in pertinent part, “[t]he period of limitation established by Article 578 shall be interrupted if...[t]he defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record.” La. C.Cr.P. art. 579(A)(3). Relying on La. C.Cr.P. art. 579(A)(3), the State contends that “despite actual notice [of his incarceration in Mississippi]” Mr. Thadison’s failure to appear in court for arraignment on February 13, 2012, interrupted the two-year time limitation. The State claims that in accordance with La. C.Cr.P. art. 322,<sup>4</sup> the address provided on the bond was presumed to be accurate, and therefore, “mailing the notice of arraignment to the address listed on the bond constituted ‘actual notice.’”

La. C.Cr.P. art. 329 requires the defendant and personal surety signing a bail bond to provide the address at which each can be served as well as the mailing address, if different. La. C.Cr.P. art. 329(A). Additionally, each address provided “shall be conclusively presumed to continue for all proceedings until the party providing the address changes it by filing a written declaration in the matter for which the bail undertaking was filed.” La. C.Cr.P. art. 329(D).

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<sup>4</sup> Effective January 1, 2017, La. C.Cr.P. art. 322 is re-codified as La. C.Cr.P. art. 329.

According to the bond instrument, Mr. Thadison indicated his address as “2856 James Drive, Wesson, Alabama 38191.” There is no evidence that Mr. Thadison made any changes to his address pursuant to La. C.Cr.P. art. 329(D). Nevertheless, the record is void of any evidence that Mr. Thadison received actual notice of the arraignment. The State claims that mailing of the notice of arraignment to the address listed on the bond instrument constitutes “actual notice.” However, this Court has held that “the mere mailing of notice is insufficient to establish an interruption under La. C.Cr.P. art. 579(A)(3), as it explicitly requires proof of actual notice, which must appear in the record.” *State v. Kelly*, 13-0715, p. 8 (La. App. 4 Cir. 1/8/14), 133 So. 3d 25, 30 n. 6. Therefore, because there is no proof in the record of actual notice of the February 13, 2012 arraignment, we find no merit to the State’s contention that the two-year time limitation was interrupted.

*Notice Requirement of La. C.Cr.P. art. 579(C)*

Even if we agreed that Mr. Thadison’s failure to appear interrupted the prescriptive period, which we do not, the State’s corresponding argument is also meritless. Mr. Thadison averred in his motion to quash that any interruption ceased and began anew on March 13, 2012, when, according to the minute entry on that date, the State informed the trial court that Mr. Thadison was being held in Mississippi. The State argued in opposition to the motion that La. C.Cr.P. art. 579(C) is the controlling authority.

La. C.Cr.P. art. 579(C), enacted in 2013, sets forth the notice requirements

for incarcerated persons and provides in relevant part: “[i]f the defendant fails to appear in court [...] and the defendant is subsequently arrested, [the two-year prescriptive period] *shall not commence to run anew* until the defendant appears in person in open court [...] or the district attorney [...] has notice of the defendant's custodial location.” (emphasis added). “Notice” as referenced in the statute is defined as either:

(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)(1) and (2).

As noted above, the trial court made no specific finding as to whether the time limitations were interrupted, which is required to trigger application of Subpart (C). The trial court nevertheless concluded that the State’s actions constituted a waiver of the notice requirement.<sup>5</sup> The trial court found that by the State’s own acknowledgment on March 13, 2012, it was aware that Mr. Thadison was in the custody of the Mississippi Corrections Department. Likewise, the record shows that throughout 2012, 2013, and 2014, the State represented to the trial court that it was “trying to extradite Mr. Thadison to Louisiana and had not

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<sup>5</sup> Implicit in the trial court’s factual determination is the trial court’s legal conclusion that Subpart (C) applies retroactively. In other words, but for the State’s actions, which “waived the notice requirement,” Subpart (C) would have applied in this case. As explained herein, we find the trial court erred when it considered La. C.Cr.P. art. 579(C) in this case.

been able to complete the paperwork or make those arrangements as required by law.” In light of the circumstances, the trial court reasoned it “would not make sense to say that the State did not have actual notice as to Mr. Thadison’s whereabouts, when the State in fact was the party entering the information on the record, over and over again.” By virtue of the State’s own acknowledgment of Mr. Thadison’s incarceration in Mississippi and the State’s representations to the court of its intent to extradite him, the trial court deemed the notice requirement under La. C.Cr.P. art. 579(C) waived. Thus, the two-year prescriptive period began anew on March 13, 2012, and the State had until March 13, 2014, to commence trial. In that the State failed to extradite and prosecute Mr. Thadison within two years of March 13, 2012, the trial court granted the motion to quash.

After thorough review, we find the trial court reached the correct result by granting Mr. Thadison’s motion to quash. However, we decline to extend the application of La. C.Cr.P. art. 579(C) to the instant matter because: (1) the provisions of Subpart (C) become relevant only after it has been established that the prescriptive period was interrupted; and (2) the Louisiana Supreme Court recently held that La. C.Cr.P. art. 579(C) does not apply retroactively.

In this case, the State has not demonstrated that Mr. Thadison’s failure to appear for arraignment on February 13, 2012, interrupted the period of limitation under La. C.Cr.P. art. 579(A). The provisions of La. C.Cr.P. art. 579(C) therefore are inapplicable. Furthermore, notwithstanding more than 20 representations in the record in which the State indicated its intent to initiate the extradition process, it

has not shown that it made any affirmative steps to secure Mr. Thadison's presence.

This Court addressed the applicability of La. C.Cr.P. art. 579(C) in *State v. Stewart*, 15-0135 (La. App. 4 Cir. 9/9/15), 176 So. 3d 465, *aff'd but criticized*, 15-0845, 15-0846 (La. 5/12/17), -- So. 3d --, 2017 WL 2061720. This Court held that the two-year time limitation for bringing the defendant to trial was interrupted by the defendant's failure to appear in court after receiving actual notice of his arraignment, proof of which was evident from the record in accordance with La. C.Cr.P. art. 579(A)(3). *Id.*, 15-0135, p. 19, 176 So. 3d at 475-76. This Court further found La. C.Cr.P. art. 579(C) applied retroactively and held that the prescriptive period remained interrupted until the surety filed into the record a certificate of the defendant's incarceration in Arkansas pursuant to Subpart (C)(2). *Id.*, 15-0135, p. 19, 176 So. 3d at 476.

While the Louisiana Supreme Court affirmed the result this Court reached in *Stewart*, it disagreed with this Court's analysis. The Supreme Court found it "immaterial whether the more specific notice requirements of La. C.Cr.P. art. 579(C) were met, because Subpart C did not go into effect until August 1, 2013, after the commencement of prosecution in [*Stewart*]." *Stewart*, 15-1845, 15-1846, p. 4, -- So. 3d at --, 2017 WL 2061720 at \*4. It held: "[g]iven that Subpart C imposes new substantive obligations on a defendant, and because those obligations impact a defendant's constitutional right to a speedy trial, ***it does not apply retroactively.***" *Id.* (emphasis added).

In *Stewart*, the defendant made several appearances in court after receiving actual notice for each appearance in open court. The defendant failed to appear at a subsequent hearing because he was incarcerated in another state. By contrast, Mr. Thadison never made an appearance in court, and the record does not reflect proof that he received actual notice of appearance. Likewise, the State has failed to produce evidence to support its claim that Mr. Thadison received actual notice of arraignment so as to interrupt the time limitations period under La. C.Cr.P. art. 579(A)(3). Therefore, the provisions of La. C.Cr.P. art. 579(C) are inapplicable because the State failed to meet its heavy burden of proving the two-year prescriptive period was interrupted.

Notwithstanding the State's failure to show there was an interruption, the Louisiana Supreme Court's decision in *Stewart* demonstrates that the trial court's consideration of La. C.Cr.P. art. 579(C) was legally erroneous. We agree that the State, by its own acknowledgment, had notice as early as March 13, 2012, of Mr. Thadison's custodial location when it filed its motion and order for writ of habeas corpus *ad prosequendum*. However, we now have guidance from the Louisiana Supreme Court that La. C.Cr.P. art. 579(C) does not apply retroactively. Therefore, determination of whether the more specific notice requirements of Subpart (C) were met or waived, as the trial court found, is immaterial because the substantive obligations imposed on a defendant by the statute did not go into effect until August 1, 2013, after the commencement of the prosecution in this case. *Stewart*, 15-1845, 15-1846, p. 4, -- So.3d at --, 2017 WL 2061720 at \*4 (reasoning

that the holding “is consistent with the Court’s prior decision that La. C.Cr.P. art. 579(A)(3) could not be retroactively applied”).

Moreover, the Supreme Court recognized that when the State “become[s] aware (whether by its own efforts or otherwise) of an absent defendant’s location, that awareness is sufficient in a case initiated before Subpart C’s effective date to trigger the commencement of a new limitations period.” *Id.*; *See also State v. Vernon*, 16-0692, p. 12 (La. App. 4 Cir. 12/21/16), 207 So. 3d 525, 531 (finding the State’s knowledge of defendant’s location is sufficient where case was initiated before enactment of La. C.Cr.P. art. 579(C) to start the running of a new two-year prescriptive period).

Here, the record supports a finding that the State was aware of Mr. Thadison’s custodial location as of March 13, 2012. Had the State successfully proved that the prescriptive period was interrupted by Mr. Thadison’s failure to appear for arraignment, the time limitations period would have begun to run anew on the date the State became aware of his custodial location, March 13, 2012. Notwithstanding the State’s numerous representations to the trial court that it would extradite Mr. Thadison, the State failed to take affirmative steps to secure his presence in Louisiana. Therefore, while the trial court reached the correct outcome by granting the motion to quash, its application of La. C.Cr.P. art. 579(C), finding that the State waived the notice requirement, is immaterial because the statute does not apply retroactively.



***DECREE***

Based on the foregoing, we find the State has failed to demonstrate that the trial court erred in the appointment of OPD to represent Mr. Thadison, that the prescriptive period to commence trial was interrupted, and that notification pursuant La. C.Cr.P. art. 579(C) applies in this case. Additionally, while we find the trial court committed legal error in its analysis because it failed to determine whether the prescriptive period was interrupted before its consideration of La. C.Cr.P. art. 579(C), the trial court reached the correct outcome by granting the motion to quash. Therefore, Mr. Thadison was not prejudiced by the error. Accordingly, we affirm the ruling of the trial court granting of the motion to quash the bill of information.

**AFFIRMED**