

STATE OF LOUISIANA

*

NO. 2017-KA-0681

VERSUS

*

COURT OF APPEAL

CELIO DACRUZ

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 524-917, SECTION "C"
Honorable Benedict J. Willard, Judge

* * * * *

Judge Roland L. Belsome

* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Roland L. Belsome,
Judge Joy Cossich Lobrano)

Leon Cannizzaro
DISTRICT ATTORNEY
Donna Andrieu, Chief of Appeals
ASSISTANT DISTRICT ATTORNEY
J. Taylor Gray
ASSISTANT DISTRICT ATTORNEY
Scott G. Vincent
ASSISTANT DISTRICT ATTORNEY
ORLEANS PARISH
619 S. White Street
New Orleans, LA 70119

COUNSEL FOR APPELLANT/STATE OF LOUISIANA

Juan Bernal
4902 Canal Street
Suite 201
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED
December 13, 2017

The State of Louisiana appeals the trial court's judgment granting the second motion to quash the bill of information filed by the Defendant, Celio DaCruz. For the following reasons, we reverse and remand for proceedings consistent with this opinion.

STATEMENT OF THE CASE

This case stems from a fiduciary relationship between a contractor/construction company and a property owner. On January 31, 2012, Detective Shannon Carr of the New Orleans Police Department filed an affidavit concerning the alleged offense. Based on an interview with the victim, Detective Carr alleged that the Defendant violated La. R.S. 14:67; Felony Theft. In the affidavit, Detective Carr requested warrants for the Defendant and attested to the following:

The victim told the Detective that she entered into an agreement with Celio Da Cruz [sic], to renovate and make repairs to her property, which is a double unit. The victim stated she paid Da Cruz [sic] \$15,000.00. The victim stated the work Da Cruz [sic] failed to complete at 128 N. Johnson Street, included: the framing of the addition, the install of the walls, the install of the sheetrock, the install of the roof, and the painting of the interior. The victim stated the work Da Cruz [sic] failed to do at 130 N. Johnson St. included: the install of the bath, the install of the plumbing, the install of the deck, and the install of the porch and rails.

On the same day Detective Carr filed the affidavit, the trial court issued an arrest warrant for the Defendant.

By bill of information filed on May 22, 2015, the State charged the Defendant with theft of over \$1,500.00 a violation of La. R.S. 14:67(B)(1).¹ The bill of information alleged that the theft occurred between November 5, 2010, and June 6, 2011. Subsequent to the filing of the bill of information and the issuance of an alias capias for his failure to appear at arraignment, the Defendant was arrested in January of 2016. The Defendant later pled not guilty at arraignment.

On May 3, 2016, the Defendant filed a motion to quash, urging that the time limit to institute prosecution had elapsed. After a hearing on July 27, 2016, the trial court denied the Defendant's motion to quash the bill of information.² The case was later transferred from Division L (Judge Franz Zibilich) to Division C (Judge Benedict Willard) on September 13, 2016.³ Trial was initially set for March 15, 2017.

On the day of trial, the Defendant filed a second motion to quash the bill of information, again claiming that the time limit to institute prosecution on the charged offense had prescribed. Trial was continued due to the pending motion.

¹ At the time of the alleged offense, La. R.S. 14:67 provided:

A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

B. (1) Whoever commits the crime of theft when the misappropriation or taking amounts to a value of one thousand five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both....

² Though the State designated the July 27, 2016, transcript as part of the record on appeal, the appeal does not contain the transcript. However, review of the aforementioned transcript is not necessary for consideration of the issues set forth in the current appeal.

The State opposed the Defendant's motion, arguing that the plain language of La. C.Cr.P. art. 577 prohibited the Defendant from challenging the timeliness of prosecution more than once. Two days later, the trial court heard and granted the Defendant's second motion to quash the bill of information, finding that the Defendant only filed one motion to quash in its section of court. This timely appeal followed.

STANDARD OF REVIEW

Because 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. *State v. Love*, 00-3347, pp. 9-10 (La. 5/23/03), 847 So.2d 1198, 1206. However, when the motion to quash involves solely a legal issue, the trial court's decision is subject to a *de novo* standard of review. *State v. Hamdan*, 12-1986, p. 6 (La. 3/19/13), 112 So.3d 812, 816; *State v. Smith*, 99-0606, p. 3 (La. 7/6/00), 766 So.2d 501, 504. This case presents both a question of law as to the proper interpretation of the meaning of the La. C.Cr.P. art. 577.

DISCUSSION

In its sole assignment of error, the State asserts that the trial court erred in granting the Defendant's second motion to quash the bill of information based on untimely institution of prosecution, arguing that an accused may only raise this issue once.

³ The minute entry from September 13, 2016, reveals that the instant case was consolidated with a separate case pending against Defendant in Division C with a lower docketed number.

The primary concern in this appeal is whether La. C.Cr.P. art. 577 prohibits a defendant from filing more than one motion to quash based upon untimely institution of charges. La. C.Cr.P. art. 577 provides, in pertinent part:

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.

(Emphasis supplied).

Where the words of a statute are clear and free from ambiguity, they are not to be ignored under the pretext of pursuing their spirit. *State v. Gray*, 16-0687, p. 11 (La. 3/15/17), 218 So.3d 40, 48. We find no ambiguity in the terms of Art. 577, which specifies that an accused may raise the issue of timeliness of prosecution “at any time, but only once[.]” The clear wording of the statute limits a defendant to raising a prescription issue based upon untimely institution of prosecution only one time.

At the hearing on the second motion to quash, defense counsel acknowledged the limitation under Art. 577, but argued, “when I filed my first motion to quash it was under different facts, with a different judge, in a different venue.”⁴ Attached to his second motion to quash was a Certificate of Occupancy and Completion for work on a Palmetto Street address that the State had produced after the ruling on the first motion to quash.⁵ The State confirmed that the charges only involved the North Johnson Street property and explained that this additional evidence was produced in an abundance of caution. The State vehemently argued

⁴ Though the case was transferred into another division of court, all trial proceedings in this case have been conducted in Orleans Parish Criminal District Court, case no. 524-917.

⁵ The record from the second motion to quash hearing reflects that this evidence was disclosed to the Defendant on November 17, 2016, after the trial court disposed of the first motion to quash.

that the second motion to quash was improper under Art. 577, and the newly disclosed evidence was irrelevant.⁶ We agree.

Finding that “[t]he motion to quash was filed only once” in Division C, the trial court granted the Defendant’s second motion. Such a ruling is in direct violation of the restriction set forth in Art. 577, which prohibits an accused from raising the issue of prescription based on the time limit to institute charges more than once. The fact that the first motion was heard by a different trial court judge is inconsequential and the article makes no exceptions for cases transferred between divisions. The second motion, raising the identical issue, was filed in the same court and venue, with the same case number, concerning the same charge. Thus, the Defendant was prohibited by Art. 577 from raising this issue again.⁷

The record reflects that the Defendant filed a second motion to quash after the trial court already heard and denied the first one, triggering the application of

⁶ In brief, the Defendant responds that limiting him from challenging the timeliness of prosecution more than once violates his rights to present a defense and to due process. Notably, the Defendant did not raise these constitutional issues before the trial court. In support of his argument, the Defendant cites *State v. Gremillion*, 542 So.2d 1024 (La. 1984). In *Gremillion*, the Court held, “[w]hile hearsay should generally be excluded, if it is reliable and the exclusion would interfere with the defendant’s constitutional right to present a defense, it should be admitted.” *Id.*, 542 So.2d at 1078. This case is distinguishable in that it does not involve defending the substantive charge, or the admissibility of otherwise inadmissible evidence to defend against the substantive charge. Rather, Art. 577 merely limits the use of a procedural objection based on the untimely institution of prosecution to one filing. The Defendant exercised his statutory right to file a motion to quash based on the expiration of the time limit to institute prosecution. Under these circumstances, neither the Defendant’s right to present a defense nor his due process rights were implicated or violated.

⁷ The jurisprudence reveals two cases that addressed the specific issue at hand. In *State v. Major*, 13-1139, pp. 4-5 (La. App. 4 Cir. 4/9/14), 140 So.3d 174, 177, this Court found that prior oral motion to quash was not a properly filed motion to quash, as La. C.Cr.P. art. 536 requires such motions to be in writing. Thus, this Court found that a subsequently filed written motion to quash was not barred by La. C.Cr.P. art. 577. In *State v. Martin*, 14-0740 (La. App. 4 Cir. 2/4/15), 160 So.3d 1068, this Court rejected a claim that La. C.Cr.P. art. 577 prohibited the filing of multiple motions to quash based upon untimely commencement of trial. In doing so, this Court reasoned that La. C.Cr.P. art. 577 only limits the number of motions to quash based upon untimely institution of charges, and does not apply to motions based upon untimely commencement of trial. *Id.*, 14-0740, pp. 5-6, 160 So.3d at 1031. The instant case is distinguishable from both of the foregoing cases in that both of the motions to quash in this case were in proper form (i.e. written) and both raised the issue of untimely institution of the charge.

the restrictions set forth in Art. 577. Under these circumstances, we find that the trial court erred in granting the second motion to quash the bill of information after the prescription issue was raised for the second time.

Nevertheless, assuming *arguendo* that the Defendant could raise the issue for a second time due to the late disclosure of evidence, we find the State's prosecution to be timely. The governing statutory provision, La.C.Cr.P. art. 572(A)(2), provides a four-year prescriptive period within which the State may institute prosecution on the instant offense.⁸ Pursuant to La. C.Cr.P. art. 573, the four-year period does not commence until the fiduciary relationship between the defendant and the alleged victim ends.⁹ See *State v. Glasser*, 12-0159, p. 6 (La. App. 4 Cir. 11/28/12), 104 So.3d 663, 666 (prosecution for misapplication of payments by a contractor was not timely instituted, where state failed to establish that fiduciary relationship existed between complainant and defendants within prescription period). Moreover, in *State v. Brady*, 13-0863, pp. 4-5 (La. App. 4 Cir. 12/11/13), 131 So.3d 166, 170 (citing *State v. Averette*, 99-2054, p. 4-5 (La. App. 1 Cir. 6/23/00), 764 So.2d 349, 351), this Court held that the fiduciary

⁸ La. C.Cr.P. art. 572(A)(2) 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.

⁹ La.C.Cr. P. art. 573(1) provides:

The time limitations established by Article 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist when:

(1) The offense charged is based on the misappropriation of any money or thing of value by one who, by virtue of his office, employment, or fiduciary relationship, has been entrusted therewith or has control thereof.

relationship between the alleged victim and the defendant ends, and prescription commences, when an affidavit for the defendant's arrest is filed.

In this case, Detective Carr filed an affidavit for the Defendant's arrest on January 31, 2012. Thus, the fiduciary relationship between the Defendant and the alleged victim ended and the four-year prescriptive period commenced – on January 31, 2012. Therefore, the State had until January 31, 2016, to file the instant charges. The bill of information was filed on May 22, 2015, well within the time limit to institute charges. Accordingly, the record reveals that the State timely instituted prosecution.

CONCLUSION

Given the foregoing, we find that the charges were timely filed and the trial court violated Art. 577 when granting the motion to quash after the issue was raised for the second time. For these reasons, the trial court's judgment granting the Defendant's second motion to quash is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED