STATE OF LOUISIANA	*	**NO. 2017-KA-0822**
VERSUS	*	**COURT OF APPEAL**
JIMMY BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOVE, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent from the majority in that I disagree with its application of *de novo* review as well as its interpretation of La. C.Cr.P. art. 736. In that the motion to quash in this case presents questions of fact and law, I find the appropriate standard of review is an abuse of discretion standard. *State v. Lawson*, 13-0812, p. 6 (La. App. 4 Cir. 11/20/13), 129 So.3d 792, 796. The issue in this case is whether the service return was valid in accordance with La. C.Cr.P. art 736. Here, the trial court's finding was based upon the contents of the return as no other evidence was offered at the hearing. The trial court determined that as a matter of law, the mere checking of a box "Subject Moved" does not comply with La. C.Cr.P. art. 736. On appellate review, the majority holds that nothing else is required under the statute. It concludes that to require anything more holds the sheriff serving the subpoena to "an arbitrary level of detail" that is contrary to the legislative intent behind Article 736. I disagree.

As a matter of general statutory interpretation, a statute cannot be interpreted so broadly that it defeats the purpose for which it was enacted or lead to absurd consequences. Further, provisions within a statute are to be read in conjunction and interpreted as to give meaning to each other. The State argued at the hearing on the motion to quash that once the service return is placed in the record it is presumed to be correct. However, the State also acknowledged that the

presumption created by subsection (B) of article 736 is a rebuttable presumption. That is, the party attacking the validity of the service return is allowed to present evidence to controvert the State's assertion. Mr. Brown points to the return itself as evidence to argue that the return is not valid on its face. Review of the return shows that: (1) the "Served Date" is blank; thus, it fails to indicate the date service was allegedly attempted; (2) the sheriff allegedly responsible for serving Mr. Brown failed to sign the return; and (3) the comments section of the return has been left blank. The only demarcation appearing anywhere on the return is an "X" next to "Subject Moved."

The presumption of validity created by subsection (B) is in place to eliminate the need for the sheriff to present evidence concerning the validity of the return. *See Hall v. Folger Coffee Co.*, 03-1734, p. 12 (La. 4/14/04), 874 So.2d 90, 99 n. 22 (considering La. C.C.P. art. 1292, a provision comparable to La. C.Cr.P. art. 736). Nevertheless, I find the statute should not be interpreted, as the majority's holding suggests, that so long as the return is received by the clerk and made a part of the record, failure to comply with ***all*** of subsection (A)'s requirements is irrelevant. As the trial court pointed out, such an interpretation begs the question why the legislature enacted subsection (A) in the first place. This Court should not construe La. C.Cr.P. art. 736 in a way that leads to such an absurd result and which is contrary to longstanding jurisprudence.

Notwithstanding the fact that the service return fails to provide articulable facts to justify the return, the failure to indicate the date service was allegedly attempted and the failure of the sheriff to sign the return is sufficient evidence upon which the trial court could conclude that the return is invalid. In this case, the State presents no other evidence but the return. In that the return fails to even include the sheriff's signature and the date of the alleged attempted service, a question is raised as to whether service was actually made. The State ultimately

bears the burden of establishing an interruption in the time limitations. Thus, where Mr. Brown establishes that the return fails to comply on its face, the State could have presented testimony or an affidavit from the sheriff serving the subpoena, and the State did not.

Additionally, I disagree with the majority's finding that an "X" next to "Subject Moved," in itself, is sufficient as to comply with subsection (A). The Comments of La. C.Cr.P. art. 736 state, "[t]his article should be construed in conformity with the jurisprudential rule that the sheriff or his deputy must exercise reasonable diligence in searching for the person designated in the subpoena. *See* La. C.Cr.P. art. 736—Official Revision Comments (C)(1966).

In *State v. Mizell*, 341 So.2d 385 (La. 1976), the Louisiana Supreme Court examined Article 736 and governing jurisprudential law. The *Mizell* court held:

> A return on a subpoena must show what steps have been taken to find [the accused], what inquiries have been made, from whom, and where those inquiries were made. ***It is not enough that an officer assert that [the accused] cannot be found***; he must state every fact which justifies this conclusion on his part. This done, ***the essential question is whether there has been on the part of the officer that diligent search without which the accused might be deprived of the right of compulsory process.***

Id., 341 So.2d at 388.

In *State v. Mills*, the Louisiana Supreme Court reiterated its finding in *Mizell* and concluded that while "the article is specifically addressed to the subpoenaing witnesses, the same diligence must be exerted to serve a defendant with notice of his trial." *Id.*, 390 So.2d 874, 877 (La. 1980). The State asks this Court to presume that in fact Mr. Brown had moved because the service return contains an "X" next to the words "Subject Moved." Under the circumstances presented, the alleged assertion that the "Subject Moved" is the same as an officer asserting that the accused cannot be found. The service return, for that reason, is no different than what the Supreme Court in *Mizell* and *Mills* expressly rejected. Therefore, where

the return fails to include any articulable fact(s) demonstrating that there has been a diligent search on the part of the officer, I find the requirements of subsection (A) have not been met in this regard either.

Given this Court is to construe Article 736 in conformity with Louisiana's longstanding jurisprudence, requiring the sheriff to exercise reasonable diligence in search of the person designated in the subpoena, I find the return, on its face, woefully lacking and fails to comply with Article 736. For these reasons, I dissent.