Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #041

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **20th day of October, 2020** are as follows:

PER CURIAM:

2019-K-01732 STATE OF LOUISIANA VS. NICHOLAS REVISH (Parish of East Baton Rouge)

We reverse the ruling of the court of appeal, which considered a claim that was not properly before it and erred in its analysis of that claim. Because the State failed to carry its heavy burden of showing the time to commence trial was either interrupted or suspended, we reinstate the district court's ruling, which granted defendant's motion to quash.
REVERSED.

Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4.

Retired Judge Jimmie C. Peters appointed as Justice ad hoc sitting for Crain, J., recused in case number 2019-K-01732 only.

10/20/20

SUPREME COURT OF LOUISIANA

No. 2019-K-01732

STATE OF LOUISIANA

versus

NICHOLAS REVISH

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

PER CURIAM:[*]

In this matter, we are compelled to reinstate the decision of the district court, which granted defendant's motion to quash the indictment for second degree murder, because the State miscalculated the time afforded by statute to retry defendant following mistrial.

Defendant was found guilty of the second degree murder of Latrell Davis and the attempted second degree murder of Jamond Rougeau. All three were in Rougeau's parked vehicle on March 26, 2012, in Baton Rouge when violence erupted from a dispute over cocaine. Rougeau's weapon was used to shoot Rougeau and Davis. Rougeau identified defendant as the shooter. Defendant, however, turned himself in to police, admitted he shot Rougeau and Davis, but claimed he did so in self-defense.

The district court sentenced defendant to serve concurrent terms of life imprisonment at hard labor without parole eligibility for second degree murder and 25 years imprisonment at hard labor for attempted second degree murder. The court of appeal vacated the convictions and sentences because it found trial counsel

[*] Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4. Retired Judge Jimmie C. Peters, appointed Justice ad hoc, sitting for Crain, J., recused.

provided ineffective assistance sufficient to deprive defendant of a fair trial by failing to object to a defective jury instruction on self-defense. *State v. Revish*, 15-0470 (La. App. 1 Cir. 11/9/15), 185 So.3d 8 (*Revish-1*), *writ denied*, 15-2247 (La. 5/20/16), 191 So.3d 1066. The court of appeal remanded for a new trial.

While awaiting retrial and after several delays, defendant filed a motion to quash the indictment in which he contended that the State failed to timely commence the new trial. In opposing this motion, the State argued that it was entitled to a full two years from the date the court of appeal's opinion became final, by operation of La.C.Cr.P. art. 582 in conjunction with La.C.Cr.P. art. 578(A)(2).[1] In essence, the State argued that when the court of appeal's order of a new trial became final, the slate was wiped clean, the clock restarted, and the State had a new two-year period to commence trial. The parties also disputed whether the time to commence trial was

---

[1] Code of Criminal Procedure art. 582, pertaining to time limitations and the effect of a new trial, provides:

> When a defendant obtains a new trial or there is a mistrial, the state must commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer.

Code of Criminal Procedure art. 578, pertaining to the general rule governing the time limits to commence trial, provides:

> A. Except as otherwise provided in this Chapter, no trial shall be commenced nor any bail obligation be enforceable:
>
> (1) In capital cases after three years from the date of institution of the prosecution;
>
> (2) In other felony cases after two years from the date of institution of the prosecution; and
>
> (3) In misdemeanor cases after one year from the date of institution of the prosecution.
>
> B. The offense charged shall determine the applicable limitation.

It was the State's view that, when a defendant obtains a new trial, the State should always have a new two-year period to commence that trial because two years from the grant of a new trial is certainly longer than one year from the date the new trial is granted. Such an unlikely reading of Article 582 ignores the language "from the date of institution of the prosecution" in Article 578(A)(2) and would eliminate the one-year period established in Article 582 altogether.

interrupted by the filing of various motions, and, if so, when the interruptions ceased.

The district court rejected the State's interpretation of Articles 578 and 582 and granted defendant's motion to quash. The State appealed. On appeal, the State persisted in its implausible reading of the articles but otherwise altered its tactics. The State's new arguments on appeal were the following. First, the State contended that the original two-year period afforded by La.C.Cr.P. art. 578(A)(2) was suspended and remained so because defendant had filed a pro se motion for discovery before his first trial, which the record did not necessarily reflect had been satisfied and, regardless, was somehow kept unresolved by the State's ongoing obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Second, the State contended in the alternative that a continuance granted by the district court on its own motion on December 5, 2016, should be construed as a joint continuance of the parties, which was a preliminary plea that suspended the time limit and afforded the State no less than one more year to commence trial in accordance with La.C.Cr.P. art. 580(A).[2]

The court of appeal reversed the district court's ruling, denied defendant's motion to quash, and remanded for the second trial to proceed. *State v. Revish*, 19-0423 (La. App. 1 Cir. 9/27/19), 289 So.3d 61 (*Revish-2*).[3] The court of appeal first

---

[2] Code of Criminal Procedure art. 580, pertaining to suspension of the time limitations, provides:

> A. When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial.
>
> B. The periods of limitation established by Article 578 shall also be suspended if the court grants a continuance in accordance with the provisions of Paragraph B of Article 709.

[3] Judge Guidry dissented:

> I respectfully dissent from the opinion of the majority for the following reasons.

found that its prior decision in *Revish-1*, which granted defendant a new trial, became final by operation of La.C.Cr.P. art. 922(B) on June 3, 2016, i.e. after the rehearing delay provided by La.C.Cr.P. art 922(A) expired following this court's denial of writs.[4] The court of appeal quickly rejected the State's view that it had a new two-

---

> Inherent in the trial court's decision in this matter is its determination that its *ex proprio motu* order setting the trial date beyond the one-year statutory time period was not an action by the defendant nor for his benefit, or agreed to by him. The state was the party that should have objected to this setting, but failed to do so. Also inherent in the trial court's decision is that it did not find that the May 25, 2017 joint motion to convert the trial date to a status hearing served as a retroactive agreement by the defendant to the trial date that had previously been set by the court beyond the allowed period of time.
>
> These findings by the trial court should not be reversed in the absence of a clear abuse of the trial court's discretion. It was the state's heavy burden to prove that there was a suspension or interruption of the time delays, and I cannot say that the trial court erred in finding that it did not meet that burden, especially in light of the state's failure to object to the trial court's setting of the date beyond the year limitation in the first place.
>
> For these reasons, I respectfully dissent.

Revish-2, 19-0423, p. 1, 289 So.3d at 68 (Guidry, J., dissenting).

[4] Code of Criminal Procedure art. 922, pertaining to finality of judgment on appeal, provides:

> A. Within fourteen days of rendition of the judgment of the supreme court or any appellate court, in term time or out, a party may apply to the appropriate court for a rehearing. The court may act upon the application at any time.
>
> B. A judgment rendered by the supreme court or other appellate court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.
>
> C. If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied.
>
> D. If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.

In support of its view that La.C.Cr.P. art. 922(B) applied, the court of appeal cited *State v. Brown*, 451 So.2d 1074 (La. 1984). The court of appeal erred. In *Brown*, 451 So.2d at 1077, this court noted that, in accordance with La.C.Cr.P. art. 922, its "judgment becomes final when the rehearing is denied, or the fourteen day period lapses without an application for rehearing." However, in *Brown* "rehearing was not applied for after this Court ordered a new trial . . . ." *Id.* Unlike in *Brown*, this court merely denied the State's application when it sought review of the court of appeal's ruling in *Revish-1*. Court rules provide, "An application for rehearing will not be considered when the court has merely granted or denied an application for writ of certiorari or a remedial or other supervisory writ, ..." La.S.Ct. Rule IX § 6. Thus, if the State had filed a motion

year period to commence trial, running from June 3, 2016, and instead concluded that the State, in accordance with La.C.Cr.P. art. 582, had to commence the second trial within one year from the date the new trial was granted (and that ruling became final), i.e. by June 3, 2017, unless that time was suspended or interrupted. The court of appeal did not explicitly reject the State's view that a discovery motion filed by defendant pro se before his first trial, somehow suspended the original two-year period allowed by La.C.Cr.P. art. 578 indefinitely.[5]

However, the court of appeal found the district court nonetheless erred in not construing the continuance it granted on its own motion on December 5, 2016, as a preliminary plea that caused a brief suspension and thereby afforded the State an additional year to commence the new trial, which was then further extended by subsequent actions.[6] In reaching that conclusion, the court of appeal considered the continuance granted by the court on its own motion to be tantamount to a continuance jointly requested and agreed upon by the parties. In accepting the State's argument that the district court erred, the court of appeal did not acknowledge that the State never presented this argument to the district court.

In this court, the State concedes that the court of appeal erred in calculating the date the court of appeal's ruling in *Revish-1* became final. The State also

---

for rehearing, this court could not have considered it. Therefore, the court of appeal's ruling became final in accordance with La.C.Cr.P. art. 922(D) when this court denied the State's writ application on May 20, 2016. However, the court of appeal's 14-day miscalculation is inconsequential to our analysis.

[5] Because the State abandoned this argument in this court, we need not address it either.

[6] We have simplified matters here for the sake of clarity. In actuality, the court of appeal's ultimate determination revolved around a hearing held on May 25, 2017. *See Revish-2*, 19-0423, p. 10, 289 So.3d at 67–68 ("Thus, the timeliness of the State's prosecution hinges on whether the defense's action on May 25, 2017, can be viewed as delaying trial or affecting the State's ability to prosecute in any respect."). However, that hearing is irrelevant unless the State's view regarding the district court's *ex proprio motu* action on December 5, 2016, is accepted first.

abandons its argument that, after the court of appeal granted defendant a new trial, the State had a new two-year period to commence trial under the State's misreading of Articles 578 and 582. The State also abandons any claim that a pro se motion for discovery made before defendant's first trial—perhaps in conjunction with the State's continuing obligations under *Brady v. Maryland*—somehow indefinitely suspended the clock. Instead, the State now relies entirely on the argument that gained traction in the court of appeal, i.e. that the district court's *ex proprio motu* continuance on December 5, 2016, gave the State an additional year to commence the new trial, and that subsequent actions further extended that time limit.

At the outset, we must express considerable doubt as to whether a party can shift positions as often as the State has here, and still prevail on appellate review. We note that the State failed to carry its heavy burden in the district court,[7] and therefore the district court correctly granted defendant's motion to quash. The State then sought appellate review of the district court's unfavorable ruling, and persuaded the court of appeal that the district court abused its discretion for a reason the State never presented to the district court. The State now admits the court of appeal also erred in at least one part of its analysis but maintains this court should affirm the court of appeal's ruling in the State's favor nonetheless.

"The jurisprudence is well settled that pleas and issues not made in the court of first instance cannot be raised on appeal." *Fried v. Bradley*, 219 La. 59, 87, 52 So.2d 247, 257 (1950) (collecting cases). Rephrased in contemporary language, "The general rule is that appellate courts will not consider issues raised for the first

[7] *See, e.g., State v. Rome*, 630 So.2d 1284, 1286 (La. 1994) ("When 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.").

time on appeal." *Segura v. Frank*, 630 So.2d 714, 725 (La. 1994) (citing *Fried v. Bradley*). In *State v. Butler*, 12-2359 (La. 5/1/13), 117 So.3d 87, we recognized an exception exists to the general rule when the successful proponent of a motion to suppress in the district court offers additional reasons a reviewing court should sustain the district court's ruling, which reasons can be evaluated by the reviewing court without venturing beyond the record:

> It is settled that a new basis for an objection may not be urged for the first time on appeal, *State v. Stoltz*, 358 So.2d 1249, 1250 (La. 1978), and the rule encompasses a new basis for suppressing evidence urged for the first time on appeal as a reason for overturning a trial court's denial of a motion to suppress. *State v. Montejo*, 06-1807, p. 22 (La. 5/11/10), 40 So.3d 952, 967 ("Louisiana courts have long held a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress.") (citations omitted). The rule does not, however, preclude the proponent of a ruling on a motion to suppress from offering additional reasons for sustaining the result on review that do not require going outside of the record in the trial court. *Cf.* La.C.C.P. art. 2133(B) ("A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert in support of the judgment, any argument supported by the record although he has not appealed, answered the appeal, or applied for supervisory writs."); *State v. Neisler*, 93-1942 (La. 2/28/94), 633 So.2d 1224, 1233 (court of appeal "reached the right result, but for the wrong reasons"); *State v. Welch*, 615 So.2d 300, 302 (La. 1993) (same).

Butler, 12-2359, pp. 4–5, 117 So.3d at 89. There is no obvious reason why the exception recognized in *State v. Butler* would be confined solely to the review of rulings on motions to suppress. Indeed, we have applied it to other district court rulings. *See, e.g., State v. Mayeux*, 19-0369, p. 3 (La. 1/29/20), — So.3d —, — ("While the State did not invoke Article 412.4 in the district court, it [as the prevailing party] is not precluded from doing so now, provided the State's new invocation of the article does not require going outside of the record.") (citing *State v. Butler*); *State in the Interest of E.S.*, 18-1763, p. 17 n.25 (La. 10/22/19), 285 So.3d 1046, 1059 ("This Court has generally permitted proponents of motions to offer

additional reasons on appeal why the ruling should be sustained.") (citing *State v. Butler* in the context of a district court's decision to exclude expert testimony).

However, the State was not the winning proponent of the motion to quash filed in the district court; the defendant was. Under *State v. Butler*, the defendant would have been free to offer additional reasons to the court of appeal as to why the district court's ruling should be sustained—provided those reasons did not require the court of appeal to go outside the record to evaluate them. The procedural posture now is quite different from the scenario addressed in *State v. Butler*: the State wishes this court to affirm the court of appeal's ruling in the State's favor when the court of appeal erred in considering an argument advanced by the State for the first time in that court. In short, we question whether the argument is properly before this court when it was not properly before the court of appeal (but the court of appeal nonetheless accepted it and ruled in the State's favor). To find it is now properly before us, would require this court to compound the court of appeal's mistake.

If we are able to set that doubt aside for a moment, we must reject the State's argument. The State concedes the court of appeal erred in calculating the time to commence the new trial. Using the correct portion of La.C.Cr.P. art. 922, the court of appeal's ruling, which granted defendant a new trial, became final on May 20, 2016, when this court denied the State's application for discretionary review. *See* La.C.Cr.P. art. 922(D) ("If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ."). The State then had one year to commence the retrial, which the State now concedes, because one year was the longer of the two periods available under La.C.Cr.P. art. 582.

The State mismanaged this prosecution and as a result did not commence the

new trial by May 20, 2017. Therefore, the State bears a heavy burden of demonstrating that time was either interrupted or suspended. *See, e.g., State v. Rome*, 93-1221 (La. 1/14/94), 630 So.2d 1284, 1286; *State v. Estill*, 614 So.2d 709, 710 (La. 1993). The State failed to satisfy that burden in the district court. The State believes, however, it carried that burden in the court of appeal with its new argument that the district court's *ex proprio motu* continuance on December 5, 2016, constituted either a joint continuance or an interruption. The court of appeal erred in not recognizing that argument had not first been presented to the district court, and, as noted above, we doubt an argument that was not properly before the court of appeal is properly before us now. But if we do consider it, we note that the district court's *ex proprio motu* action was not initiated by defendant, did not benefit defendant, was not agreed to by defendant, and did not appear to have anything to do with defendant at all, which was noted by the dissent in the court of appeal.[8] While defendant did not object to the district court's action, it was incumbent on the State to inform the district court of time remaining to commence trial, which was also recognized by the dissent in the court below.[9] The State failed in its duty to do so.

The State relies on *State v. Brooks*, 02-0792 (La. 2/14/03), 838 So.2d 778, to support its claim that the district court's own action should nonetheless be counted against defendant. *Brooks* is readily distinguishable. The district court there found it

[8] *See Revish-2*, 19-0423, p. 1., 289 So.3d at 68 (Guidry, J., dissenting) ("[The district court's] *ex proprio motu* order setting the trial date beyond the one-year statutory time period was not an action by the defendant nor for his benefit, or agreed to by him.").

[9] *See id.* (Guidry, J., dissenting) ("The state was the party that should have objected to this setting, but failed to do so.").

necessary to continue the matter to safeguard Brooks's right to counsel.[10] Here, the State does not even attempt to allege any manner in which defendant benefited from the district court's action on December 5, 2016.

For the reasons above, we reverse the ruling of the court of appeal, which considered a claim that was not properly before it and erred in its analysis of that claim. Because the State failed to carry its heavy burden of showing the time to commence trial was either interrupted or suspended, we reinstate the district court's ruling, which granted defendant's motion to quash.

REVERSED

---

[10] The chaotic situation that arose in *Brooks* was also quite different from the present case:

> [I]t is clear that the trial court continued the status conference and arraignment set for that day for purposes of providing respondent with the opportunity to substitute counsel for the missing [defense counsel] Hearin. The continuance on that date, solely for purposes of effectuating respondent's Sixth Amendment right to counsel and to accommodate the confusion in the defense caused by Hearin's baffling disappearance, suspended the running of the time limits because the state's ability to prosecute the case was actually affected until the matter of representation was settled and respondent again had counsel. Louisiana imposes on a prosecutor the ethical duty to "[m]ake reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel ...." As a matter of that ethical constraint, the state could not push this case forward until the question of respondent's representation by counsel was settled. Cummings could not have communicated or bargained directly with respondent regarding her open plea offer while he was ostensibly still represented by Hearin although attempting to retain other counsel, La. Rules of Professional Conduct, Rule 4.2; she could not have set a hearing on the open defense motion in limine which the First Circuit had directed the trial court to retry; nor, finally, could she have unilaterally set a trial date with any reasonable likelihood it would take place as scheduled to justify the issuing of subpoenas for the state's witnesses and preparing them for trial. The rapid pace with which plea negotiations were completed and a trial date was selected after Damico enrolled as respondent's counsel indicates that all this case needed in order to move forward in a manner consistent with the time limits imposed by La.C.Cr.P. art. 582 was a defense attorney.
>
> Under these circumstances, we conclude that the continuance of the status hearing on June 20, 2000, on respondent's behalf, for purposes of allowing him to substitute other retained counsel for the inexplicably missing Hearin, constituted a preliminary plea within the scope of La.C.Cr.P. art. 580 and gave the state at least until June 20, 2001 to bring the case to trial. The trial court therefore properly denied respondent's motion to quash the prosecution.

Brooks, 02-0792, pp. 8–9, 838 So.2d at 783–784 (citations omitted).