



**Fourth Court of Appeals**  
**San Antonio, Texas**

**OPINION**

No. 04-20-00248-CR

The **STATE** of Texas,  
Appellant

v.

Joe **DIAZ**,  
Appellee

From the County Court, Kinney County, Texas  
Trial Court No. 10176CR  
Honorable Tully Shahan, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Luz Elena D. Chapa, Justice  
Irene Rios, Justice  
Liza A. Rodriguez, Justice

Delivered and Filed: August 4, 2021

**REVERSED AND REMANDED**

The State appeals an order dismissing a misdemeanor complaint against Joe Diaz for want of prosecution. In three issues, the State argues the trial court erred by *sua sponte* dismissing the complaint without notice or a hearing, and for assessing court costs against the County Attorney of Kinney County. We reverse the trial court's order and remand the case for further proceedings.

## BACKGROUND

On March 26, 2018, Diaz was charged by a misdemeanor complaint with unlawful restraint. In March of 2020, the County Attorney of Kinney County, representing the State, filed several Article 39.14 disclosure forms.

On May 1, 2020, the trial court signed an “Order Dismissing for Want of Prosecution.”

The order reads as follows:

On this day, the 1st day of May, 2020 came on for consideration the above cases due to their age on the docket and without prosecution. This Court has made numerous attempts to communicate with the County Attorney of Kinney County, Mr. Todd Durden to ascertain the status of each case coming before this Court. See Letters 1- 4 attached hereto. Mr. Durden has refused and has instead engaged in protracted efforts to frustrate the proper functioning of the County Court of Kinney County, Texas.

Many of the cases identified above have been pending for 709 days or more and were on County Court docket March 11, 2020. Mr. Durden initially appeared but refused to remain in the Courtroom to perform the duties of County Attorney and prosecute these cases.

Therefore, reluctantly but in the firm conviction that those accused of violations of law should be afforded timely due process and that the procedures utilized by Mr. Durden deny that opportunity to these individuals, this Court hereby makes the following Orders, to be filed in each case identified above:

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that each case identified above be, and the same are hereby **DISMISSED** for **WANT OF PROSECUTION**. Any money paid or deposited by the identified individuals shall be returned to them upon personal appearance with the Clerk of the appropriate Court for such refunds. Notice of this Dismissal shall be provided to each individual identified above, or any attorney of record. Cost of Court, including the cost of transcripts prepared of the docket calls at Mr. Durden’s request, are charged to Mr. Durden individually and in [his] official capacity, to be reimbursed from Mr. Durden’s available deferred prosecution or diversion of prosecution funds as cost of administration. All other relief is denied, and this Order is Final.

The State filed a timely notice of appeal, a request for findings of fact and conclusions of law, and a notice of past due findings of fact and conclusions of law. The trial court did not sign findings of fact and conclusions of law.

### DISMISSAL FOR WANT OF PROSECUTION

In its first and third issues, the State argues the trial court erred by, *sua sponte* and without a hearing or notice to the parties, dismissing the misdemeanor complaint against Diaz for want of prosecution. Generally, we may not reverse a trial court's order or judgment without preserved reversible error. *See* TEX. R. APP. P. 33.1, 44.2. We first consider whether the State preserved error as "a prerequisite to presenting a complaint for appellate review." *See id.* R. 33.1.

#### A. Preservation of Error

"[P]reservation of error is a systemic requirement that a first-tier appellate court is obligated to address before reversing a conviction." *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020). When, as here, the State is the appellant, the error-preservation requirements that apply to a defendant before reversing a conviction apply to the State in seeking to reverse a trial court's order. *See Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002). "[T]he issue is not whether the appealing party is the State or the defendant . . . but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal." *Id.* "This 'raise it or waive it' forfeiture rule applies equally to goose and gander, State and defendant." *Id.*

In criminal cases, we apply error-preservation "rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Proenza v. State*, 541 S.W.3d 786, 792 (Tex. Crim. App. 2017) (quoting *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)). Category-one rights are systemic, exist independently of the litigants' wishes, and "can neither be forfeited nor even validly waived by the parties for appellate-review purposes." *Id.* Category-two rights enjoy special protection because they are fundamental to the proper functioning of the adjudicatory process and may be abandoned only if

the record reflects that they have been plainly, freely, and intelligently waived in the trial court. *Id.* Category-three rights are rights that may be asserted at the litigants' option, and ordinary error-preservation rules of procedural default (which is the loss of a right for failure to raise the matter by an objection), apply only to this category of rights. *Id.*

Neither the State nor Diaz filed a motion to dismiss, and thus neither party was aware the trial court was considering dismissing the misdemeanor complaint for want of prosecution. Considering such a dismissal on its own motion, the trial court did not hold a hearing or otherwise provide the parties an opportunity to submit arguments or object to dismissal for want of prosecution. The State's only opportunity to object to the trial court's dismissal for want of prosecution was to file a motion for new trial. But in criminal cases, "[a] motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record." *See* TEX. R. APP. P. 21.2; *London v. State*, 490 S.W.3d 503, 508 (Tex. Crim. App. 2016) (stating a party is ordinarily "required to file a motion for new trial to develop facts outside the record").

"Generally speaking, a court's authority to act is limited to those actions authorized by constitution, statute, or common law." *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991). Without the denial or violation of a defendant's constitutional right permitting a dismissal of a misdemeanor complaint, "a court does not have the authority to dismiss a case unless the prosecutor requests a dismissal." *Id.* at 613. And "there is no inherent power to dismiss a prosecution, since dismissal of a case does not serve to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity." *Id.* (quotation marks omitted). We hold that under the unique facts of this case—a trial court's *sua sponte* dismissal of a misdemeanor complaint for want of prosecution without notice or a hearing—implicates a category-two right. *See id.* While the State may waive a complaint about such an

improper dismissal by consenting to dismissal, the State's right to maintain a criminal prosecution enjoys special protection because it is fundamental to the proper functioning of the adjudicatory process. *See Proenza*, 541 S.W.3d at 792. We therefore hold the State was not required to preserve its objection to the trial court's dismissal for want of prosecution by filing a motion for new trial. Because the State did not affirmatively waive its rights by consenting to dismissal, we hold that under the unique circumstances of this case, the State may assert this right for the first time on appeal.

### **B. Reversible Error**

As stated previously, without the denial or violation of a defendant's constitutional right permitting a dismissal of a misdemeanor complaint, "a court does not have the authority to dismiss a case unless the prosecutor requests a dismissal." *Johnson*, 821 S.W.2d at 613. The record does not show the State requested a dismissal of the misdemeanor complaint against Diaz. The trial court's order acknowledges Diaz's due process rights. But such due process rights apply only to a prejudicial delay in accusing a defendant, through a formal charge or an arrest. *See United States v. MacDonald*, 456 U.S. 1, 7 (1982). Here, however, the due process concern articulated in the trial court's order was based on post-accusation delays, and the State was not provided notice of a claim arising out of Diaz's due process rights or an opportunity to develop evidence to rebut such a claim. Conversely, the right to a speedy trial is implicated by post-accusation delays. *See id.* To the extent the trial court's order intended to specify Diaz's right to a speedy trial as a basis for the dismissal, Diaz never asserted his constitutional rights to a speedy trial or sought dismissal on speedy trial or due process grounds. *See State v. Munoz*, 991 S.W.2d 818, 825 (Tex. Crim. App. 1999) (noting speedy trial rights are not waived by a failure to demand a speedy trial, but "a defendant still is responsible for asserting or demanding his right to a speedy trial"); *see also State v. Donihoo*, 926 S.W.2d 314, 315 (Tex. App.—Dallas 1994, no pet.) (stating a trial court has power

to dismiss a case without the State's consent when a defendant has been denied the right to a speedy trial). In sum, there was no basis for the trial court to dismiss the misdemeanor complaint against Diaz. We therefore hold the trial court erred in dismissing the complaint against Diaz for want of prosecution.

#### CONCLUSION

We reverse the trial court's order dismissing the misdemeanor complaint for want of prosecution and remand the case for further proceedings. Reversal of the dismissal also requires that we vacate the award of court costs against the County Attorney. We therefore need not address the State's second issue regarding court costs in this opinion. *See* TEX. R. APP. P. 47.1.

Luz Elena D. Chapa, Justice

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