NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1334

STATE OF LOUISIANA

VERSUS

BERNARD TERRELL FORREST

Judgment Rendered: March 23, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Case No. 02-CR8-84705

The Honorable Larry Green, Judge Presiding

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* * * * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Welch J. concurs with reasons.

GAIDRY, J.

The defendant, Bernard Terrell Forrest, was charged by bill of information with possession of cocaine (a schedule II controlled dangerous substance), a violation of La. R.S. 40:967A. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant was sentenced to three years imprisonment at hard labor. The court further ordered that two years of said sentence be served without the benefit of parole, probation, or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, raising the following assignments of error:

1. The [t]rial court erred in denying defendant's [m]otion to [q]uash.

2. The trial court erred in prohibiting defense counsel from putting on demonstrative evidence in order to impeach a [S]tate's witness. ... specifically, a demonstration as to whether the evidence admitted at trial would in fact float as described by the State's witness.

3. The trial court erred by imposing an illegal sentence.

For the following reasons, we affirm the conviction, amend the sentence and affirm as amended, and remand to the trial court with instructions to correct the minutes to reflect the amended sentence.

STATEMENT OF FACTS

On or about April 22, 2002 (during the hours of daylight), Officer Charles McDaniel of the Bogalusa Police Department was on patrol. As the officer made a turn at the Napoleon Street and Ann Street intersection, the defendant drove through the intersection without stopping at the stop sign. Officer McDaniel veered off the road while making the turn in order to avoid a collision. Officer McDaniel activated the blue lights of his unit in an attempt to make a traffic stop,

but had to pursue the defendant as he continued to drive his vehicle for several blocks.

Eventually, the defendant stopped and exited his vehicle next to a wooded area, then fled on foot through the wooded area. Officer McDaniel pursued the defendant and commanded him to stop as they ran down the bank of Coburn Creek. The defendant jumped into the creek in an attempt to escape. Officer McDaniel remained on the bank, where he observed the defendant as he abandoned the suspected cocaine at the edge of the bank.

Officer Tervalon of the Bogalusa Police Department received a radio communication regarding the pursuit of the defendant and arrived at the scene just before the defendant jumped into the creek. When the defendant crossed the creek, Officer Tervalon found a shallow area to cross. Officer Tervalon ordered the defendant to stop. As the defendant failed to comply with several orders to stop, Officer Tervalon sprayed mace at the defendant's face, whereupon he stopped running. The officers then apprehended the defendant and Officer McDaniel recovered the pieces of rock-like substance which the defendant had abandoned. The substance was photographed and field-tested and determined to contain cocaine. The substance was further tested by the Louisiana State Police Crime Laboratory and again determined to contain cocaine.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant avers that the trial court erred in denying his motion to quash. The defendant specifically notes that he was arraigned on August 13, 2002. On October 12, 2002, the defendant failed to appear for pretrial conference and motions. The defendant contends that his failure to appear on said date interrupted the two-year period in which the State had to commence trial. The defendant contends that an attachment was wrongfully issued on December 5, 2002, claiming that there was no subpoena of record for the court date. According to the defendant, he reappeared on January 27, 2003, ending

the period of interruption and time limitations began to run.[1] The defendant further contends that he did not miss any scheduled court proceedings or request any continuances after January 27, 2003. The date of the trial was October 11, 2005. The defendant concludes that the case was prescribed and claims that the trial court failed to consider the motion to quash and erred in denying said motion.

A motion to quash is the proper vehicle to assert that the time limitation for the commencement of trial has expired. La. Code Crim. P. art. 532(7). When a 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 time such that prescription will not have tolled. *State v. Rome*, 93-1221 (La. 1/14/94), 630 So.2d 1284, 1286.

Louisiana Code of Criminal Procedure article 578(2) provides that trial of non-capital felonies must be held within two years from the date of the institution of the prosecution. "Institution of prosecution" includes the finding of an indictment, or, as in this case, the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. Code Crim. P. art. 934(7); *State v. Cotton*, 2001-1781, p. 4 (La. App. 1st Cir. 5/10/02), 818 So.2d 968, 971, *writ denied*, 2002-1476 (La. 12/13/02), 831 So.2d 982. Upon expiration of this time limitation, the court shall, on motion of the defendant, dismiss the indictment and there shall be no further prosecution against the defendant for that criminal conduct. La. Code Crim. P. art. 581. When the time limitation of Article 578 has apparently accrued, the burden shifts to the State to show an interruption or suspension of the prescriptive period. *State v. Guidry*, 395 So.2d 764, 765 (La. 1981); *see also State v. Haney*, 442 So.2d 696, 697-698 (La. App. 1st Cir. 1983).

[1] While the defendant argues that he re-appeared on January 27, 2003, the record does not contain a minute entry for said date. In response to a record supplement request by this court, the clerk's office of the 22nd Judicial District Court (Washington Parish) confirmed that their record does not contain a minute entry for said date. In its reasons for denying the defendant's motion to quash, the trial judge stated a subpoena was issued on the date in question. The trial court further noted that the defendant did not sign the subpoena and service by a deputy was not indicated.

Louisiana Code of Criminal Procedure article 579 states:

> A. The period of limitation established by Article 578 shall be interrupted if:
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> (1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or
>
> (2) The defendant cannot be tried because of insanity or because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state; or
>
> (3) The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record.
>
> B. The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.

Louisiana Code of Criminal Procedure article 580, concerning the suspension of the time limitation, states that "[w]hen 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." The prescriptive period is merely suspended until the trial court rules on the filing of preliminary pleas; the relevant period is not counted, and the running of the time limit resumes when the court rules on the motions. A preliminary plea is any pleading or motion filed by the defense that has the effect of delaying trial, including properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and bills of particulars. *State v. Brooks*, 2002-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (*per curiam*).

In the instant case, the defendant is charged with a non-capital felony, thus requiring commencement of trial within two years from the date of the filing of the bill of information on June 16, 2002. Barring any interruption or suspension of the statutory time limit, the State had until June 16, 2004, to commence the defendant's trial. Since the trial took place on October 11, 2005, the State had the

burden of showing an interruption or suspension of the prescriptive period. According to the minute entry for July 16, 2002, the defendant failed to appear for arraignment. The State filed the service for the court date and the trial court ordered the defendant's bond forfeited. Pursuant to La. Code Crim. P. art. 579A(3), the two-year time limitation was interrupted on July 16, 2002. On August 13, 2002, the defendant appeared for arraignment. Thus, the cause of interruption no longer existed and the two-year period commenced to run anew from August 13, 2002. At the arraignment hearing, the trial court set October 10, 2002, as the date for pretrial conference and October 21, 2002, as the trial date. The minute entry for the October 10, 2002 pretrial conference date indicates that the defendant again failed to appear and an attachment and bond were issued. Thus, the time limitation was again interrupted. The subsequent minute entry of record for December 5, 2002, indicates that the defendant was called to appear for pretrial conference and again failed to appear. An attachment was issued without bond. Thus, the two-year time limitation was again interrupted on December 5, 2002, and would commence to run anew from the date the cause of interruption was no longer in existence.

Minute entries for April 21, 2003, and November 15, 2004, indicate that no action was taken on those dates. On November 29, 2004, the defendant appeared and made an oral motion to quash to be followed up by a written motion to quash.[2] The trial court ordered the defendant and the State to submit a memorandum within twenty days. The matter was passed on December 2, 2004, and again on February 18, 2004. On February 28, 2005, the trial court granted the defendant's motion for a continuance of the pretrial and trial dates. The matter was passed on

[2] The defendant finally filed the written motion to quash on November 4, 2005, after the trial. We note that a motion to quash based on the ground that the time limitation for the commencement of trial has expired may be filed at any time *before* commencement of trial. La. Code Crim. P. art. 535(B) (emphasis added). The grounds for this motion are waived unless a motion to quash is filed in conformity with the governing provisions. La. Code Crim. P. art. 535(D). Nonetheless, we find that the statutory requirements were waived and the motion was timely filed as the trial court ruled on the defendant's oral motions to quash and reserved the defendant's right to raise the issue on appeal after the trial. The record does not reflect any objections by the State. See *State v. Garbo*, 442 So.2d 685, 687-688 (La. App. 1 Cir. 1983).

April 29, 2005, and continued on May 12, 2005. On May 27, 2005, the trial court granted an additional twenty days to submit a memorandum on the motion to quash. The trial court denied the defendant's motion to quash on June 30, 2005. As previously stated, the trial for the instant case commenced on October 11, 2005. The defendant re-urged his motion to quash on the date of the trial. The trial court again denied the motion to quash.

Based on the record before this Court, it appears that the statutory time limitations set forth in La. Code Crim. P. art. 578 did not expire. The defendant contests the December 5, 2002 interruption, stating that there was no subpoena of record for the court date. Nonetheless, the defendant received actual notice in court for the prior court date, October 10, 2002, and the defendant did not appear for that court date. Thus, the time limitation was indisputably interrupted on October 10, 2002. As the defendant was not present on the December 5, 2002 court date, the period of interruption continued. Thus, the two-year time limitation could not have expired before the defendant made his oral motion to quash on November 29, 2004, suspending the time limitation for at least a year after the ruling on the motion. As stated, the trial court denied the defendant's motion to quash on June 30, 2005. Thus, the State then had until June 30, 2006, to try the defendant. Since the defendant's trial commenced on October 11, 2005, the time limitation had not expired before the defendant was tried. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant avers that the trial court erred in prohibiting the defense from performing a demonstration to see if the evidence would in fact float in an attempt to impeach a State witness. The defendant argues that the proposed demonstration did not consist of a scientific test, but was simply an attempt to show that the evidence was not capable of floating. The defendant concludes that he was deprived of presenting a defense.

A courtroom demonstration by a sworn witness is subject to the requisite foundation of similarity of circumstances. *State v. Ballard*, 351 So.2d 484, 488 (La. 1977) (*per curiam*). The trial court has great discretion in permitting or refusing in-court experiments. Usually, however, simple demonstrations by a witness are permissible. The criteria for withholding permission include considerations arising from the possible disruption of orderly and expeditious proceedings or from a lack of similarity between conditions in the courtroom and the actual conditions sought to be retested. *State v. Hampton*, 326 So.2d 364, 366 (La. 1976); *State v. Thornton*, 94-1470, p. 7 (La. App. 1 Cir. 10/6/95), 671 So.2d 481, 486.

During direct examination, Officer McDaniel presented the following description of the defendant's actions (as he crossed the creek in an attempt to flee):

> And he looked up at me and pushed himself off the ground, and I saw him clinch his right hand and I saw a piece of what I suspected was cocaine fall out of his hand. And then he jabbed it, he was right on the edge of the bank, and he jabbed it like he was trying to hide it in the mud. And he climbed up the other bank, and by this time Officer Tervalon found a shallow place because I told him he jumped into the creek and was going across, and he found a shallow place and walked across the creek.
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> * * *
>
> I walked directly back to where we were standing, where I was standing, and his handprints were still in the sand right there and I could see the cocaine floating right there where he had jabbed it into the ground. Was in water about this deep (indicating).
>
> There was two chunks about this big around floating, and I reached in the sand where he stuck his hand and I pulled out the rest of it.

According to his testimony on cross-examination, Officer McDaniel observed the defendant's handprint and scuffmarks in a sandy area on the bank of the creek where he attempted to hide pieces of rock-like cocaine. Officer McDaniel retrieved a piece of the cocaine from the sand and the rest was floating nearby when he retrieved it. Officer McDaniel testified that the rock-like cocaine

had been floating in the water for approximately one minute before he recovered it. Regarding the evidence, the defense attorney asked Officer McDaniel to "show me what piece of this would be floating, would have the ability to float." Officer McDaniel could not identify which piece or pieces of evidence floated in the creek. Officer McDaniel confirmed that the water was not muddy but was "[p]retty clear." He further described the area as follows: "The creek bottom goes up and down. When [the defendant] crossed, he was up over his waist when he jumped in and went to his neck swimming across." He stated that he could not see the bottom of the creek as the defendant crossed it. The defense attorney asked Officer McDaniel to "take a representative sample of that and put it in that glass." The State objected and the trial court ultimately sustained the objection, stating in part that any testing of the evidence should have been performed prior to the trial and that the judge was not allowed to comment on the evidence during the trial.

We find no abuse of discretion in the trial court's denial of the defendant's request to use a glass of water to demonstrate that the evidence in question was incapable of floating in the creek. Not only was the witness unsure as to which piece or pieces of the evidence actually floated in the creek, there was an obvious lack of similarity between the conditions in the courtroom and the actual conditions sought to be retested. Thus, this assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his final assignment of error, the defendant argues that the trial court did not have the authority to impose a portion of the sentence herein without the benefit of parole. We agree.

Herein, the trial court sentenced the defendant to three years imprisonment at hard labor, with two years of said sentence to be served without the benefit of probation, parole, or suspension of sentence.[3] In accordance with La. R.S.

[3] We further note that the trial court imposed sentence immediately after denying the defendant's motion for post-verdict judgment of acquittal and motion for new trial. La. Code Crim. P. art. 873 mandates a twenty-four hour delay between the denial of such motions and the imposition of sentence. However, the defense counsel responded "That is correct[,]" when the trial court stated, "So I think at this time we are ready for the sentencing." Arguably,

40:967(C)(2), the defendant was subject to imprisonment with or without hard labor for not more than five years. In addition, a fine of not more than five thousand dollars may have been imposed. Although discretion was involved, we amend the defendant's sentence to strike that portion of the sentence requiring defendant's sentence to be served without benefit of probation, parole, or suspension of sentence. *See State v.Templet*, 05-2623 (La. App. 1 Cir. 8/16/06), 943 So.2d 412. As amended, we affirm the sentence. Additionally, we remand to the trial court with instructions to correct the minutes to reflect the amendment to the sentence.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AFFIRMED AS AMENDED; AND REMANDED WITH INSTRUCTIONS.

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the defendant implicitly waived the sentencing delay. *State v. Steward*, 95-1693, p. 23 (La. App. 1 Cir. 9/27/96), 681 So.2d 1007, 1019; *State v. Lindsey*, 583 So.2d 1200, 1206 (La. App. 1 Cir.1991), *writ denied*, 590 So.2d 588 (La. 1992). Nonetheless, the trial court imposed an illegal sentence. Thus, as noted above, the sentence is being vacated, and we are remanding for resentencing.

STATE OF LOUISIANA **NUMBER 2006 KA 1334**

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

BERNARD TERRELL FORREST **STATE OF LOUISIANA**

WELCH, J., CONCURRING.

JCW I respectfully concur with the majority opinion in this case. I agree that the defendant's conviction and amended sentence should be affirmed; however, I believe that the trial court erred in refusing to allow the simple demonstration of whether the rock cocaine would float in a glass of water.

As the majority correctly notes, the trial court has great discretion in permitting or refusing in court experiments. Usually, however, simple demonstrations by a witness are permissible. **State v. Thornton**, 94-1470, p. 7 (La. App. 1st Cir. 10/6/95), 671 So.2d 481, 486. The criteria for *withholding* permission for a simple demonstration include considerations arising from the possible disruption of orderly and expeditious proceedings or from a lack of similarity between the conditions in the courtroom and the actual conditions sought to be retested. *Id.*

In this case, Officer McDaniel testified that the rocks of cocaine the defendant dropped in the creek floated for approximately one minute before he retrieved them from the water. During Officer McDaniel's cross-examination, the counsel for the defendant requested that Officer McDaniel place a sample of the rock cocaine into a glass of water to see if it would float. This proposed demonstration is easily characterized as a "simple demonstration," and is certainly not disruptive of the courtroom proceedings. Admittedly, while there may be a "lack of similarity" between the conditions in the courtroom and the actual conditions sought to be retested, whether a rock of cocaine is dropped in water in a

creek or water in a glass in the courtroom, it will either float or sink. Such a simple demonstration would have either confirmed or rebutted Officer McDaniel's testimony, and therefore, I believe the trial court abused its discretion in refusing to allow the demonstration.

Nevertheless, because the evidence presented by the State was sufficient to support the defendant's conviction, I respectfully concur.