

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2010 KA 2253**

**STATE OF LOUISIANA**

**VERSUS**

**CAROL MORGAN, CHERYL FOSTER,  
ERNEST GOLDSTON, AND JEANETTE MCKENNEY**

*Judgment Rendered: June 10, 2011*

\*\*\*\*\*

**Appealed from the  
19th Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Case No. 11-07-0548**

**The Honorable Donald R. Johnson, Judge Presiding**

\*\*\*\*\*

**James D. "Buddy" Caldwell  
Attorney General  
Robert James King  
Assistant Attorney General  
Nicholas J. Diez  
Assistant Attorney General  
Baton Rouge, Louisiana**

**Counsel for Plaintiff/Appellant  
State of Louisiana**

**Glen R. Peterson  
Baton Rouge, Louisiana**

**Counsel for Defendants/Appellees  
Carol Morgan and Cheryl Foster**

**Marci L. Blaize  
Baton Rouge, Louisiana**

**Counsel for Defendants/Appellees  
Ernest Goldston and  
Jeanette McKenney**

\*\*\*\*\*

**BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.**



**GAIDRY, J.**

The defendants, Carol Morgan, Janette McKenney, Ernest Goldston, and Cheryl Foster, were originally charged by grand jury indictment with a total of fourteen counts, including conspiracy to commit Medicaid fraud, Medicaid fraud, conspiracy to commit theft by fraud, theft by fraud, conspiracy to commit money laundering, money laundering, forgery, and filing false public records.<sup>1</sup> They pled not guilty on all counts. Thereafter, they were charged by amended bill of information with one count of conspiracy to commit Medicaid fraud (count I), a violation of La. R.S. 14:26 and La. R.S. 14:70.1(A)(1) and (A)(2); and six counts of Medicaid fraud (counts XXXII, XXXIX, LXXIV, LXXV, LXXVIII, LXXIX), violations of La. R.S. 14:70.1(A)(1) and (A)(2). Their subsequent motion to quash was granted. The State now appeals, contending the trial court erred in granting the motion to quash. For the following reasons, we reverse the granting of the motion to quash as to all defendants and remand for further proceedings.

**FACTS**

Due to the granting of the motion to quash, no trial testimony was presented concerning the facts of the offenses. The amended bill of information charged: between September 30, 2004 and June 15, 2005, the defendants, doing business as Community Care of Bossier, Inc. (CCB), entered into an agreement or combination for the specific purpose of committing Medicaid fraud, with the intent to defraud the State through a medical assistance program created under the Federal Social Security Act and administered by the Louisiana Department of Health and Hospitals, and that agreement or combination was furthered by one or more of the defendants

---

<sup>1</sup> Goldston was charged with six counts and the remaining defendants were each charged with 14 counts.

doing an act in furtherance of the conspiracy, to-wit: agreeing and/or combining together to present and/or cause to be presented for payment false and/or fraudulent claims for services; and/or knowingly submitting false information for the purpose of obtaining greater compensation than that to which CCB and the defendants were legally entitled for furnishing services (count I); and between September 30, 2004 and June 15, 2005, the defendants, with the intent to defraud the State through the Medicaid program, a medical assistance program created under the Federal Social Security Act and administered by the Louisiana Department of Health and Hospitals, committed Medicaid fraud by causing multiple fraudulent and/or false Medicaid claims to be filed on behalf of Medicaid recipient #6004071181901, by knowingly and willfully presenting for allowance and/or payment and/or causing to be presented for allowance and/or payment and false and/or fraudulent claim for furnishing services on behalf of CCB and/or by knowingly and willfully submitting and/or causing to be submitted false information for the purpose of obtaining greater compensation than to which the defendants were legally entitled for furnishing services (counts 32, 33, 74, 75, 78, and 79).

#### **MOTION TO ADOPT MOTION TO QUASH**

In assignment of error number 2, the State argues the trial court erred in allowing McKenney and Goldston to adopt the motion to quash filed by Morgan and Foster because the motion to adopt failed to include a memorandum in support of the motion to adopt and failed to include any argument in regard to the motion to quash.

The record indicates the State failed to object to the motion to adopt in the trial court, and presents its arguments concerning this assignment of error for the first time on appeal. Accordingly, error, if any, in the trial court's granting of the motion was not preserved for appeal. See La. Code Crim. P.

art. 841(A) (“An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.”).<sup>2</sup>

This assignment of error is without merit.

### **UNTIMELY COMMENCEMENT OF TRIAL**

In assignment of error number 1, the State argues the trial court erred in granting the motion to quash because on December 9, 2009, the defendants entered a preliminary plea, which was granted, and thus, under La. Code Crim. P. art. 580, the State had no less than one year to bring the matter to trial. The defense argues December 9, 2009 was only a resetting of a status conference and thus, the State was not entitled to an additional year in which to bring the defendants to trial.

Except as otherwise provided in Louisiana Code of Criminal Procedure, Title XVII, Chapter 2, no trial shall be commenced in non-capital felony cases after two years from the date of institution of the prosecution. La. Code Crim. P. art. 578(A)(2). Conspiracy to commit Medicaid fraud and Medicaid fraud are non-capital felony offenses. La. R.S. 14:70.1(B); La. R.S. 14:26(C).

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. La. Code Crim. P. art. 580. For the purposes of Article 580, a preliminary plea is any pleading or motion filed by the defense which has the effect of delaying trial. These pleadings include properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and bills of

---

<sup>2</sup>The exception to this rule set forth in La. Code Crim. P. art. 841(B) (“[t]he requirement of an objection shall not apply to the court’s ruling on any written motion”) does not apply unless the court and the other party are put on notice of the objection by the very filing of the motion. *See State v. Hopkins*, 351 So.2d 474, 480 (La. 1977).

particulars. *State v. Brooks*, 2002-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (*per curiam*).

Once the accused shows that the State has failed to bring him to trial within the time periods specified by La. Code Crim. P. art. 578, the State bears a heavy burden of demonstrating that either an interruption or a suspension of the time limit tolled prescription. *State v. Morris*, 99-3235 (La. 2/18/00), 755 So.2d 205 (*per curiam*).

Prosecution in this matter was instituted by an amended bill of information filed November 28, 2007. Thus, absent interruption or suspension, the State had to bring the matter to trial no later than November 28, 2009.

This matter was originally scheduled for trial on November 16, 2009. On November 13, 2009, the trial court held a hearing on the State's motion to continue the case. Counsel for McKenney and Goldston indicated that four days earlier she had given the State information which, if corroborated, could result in "a possible dismissal." She stated she would not agree to setting another trial date, but then stated she agreed with continuing the matter "to give [the State] time to verify the information" and "[t]hat's why I won't agree to setting it for trial in ten days." Counsel for Morgan and Foster objected to the continuance. The court stated, unless the State wished to sever prosecution of the defendants, it would grant the motion to continue over the objection of Morgan and Foster. The State declined to sever prosecution of the defendants, and the court granted the motion to continue the trial date and set the matter for status conference on December 9, 2009.

On December 9, 2009, the State indicated it had contacted the witnesses referenced by McKenney and Goldston, but had not completed formal interviews. The State indicated it would like to set a trial date, and possibly a

status date prior to the trial date. Counsel for McKenney and Goldston indicated she had “a problem” with setting a trial date when “the word dismissal keeps getting thrown around.” Counsel for Morgan and Foster indicated he was “flabbergasted” that after so long, further investigation was still being discussed. He suggested a February 1, 2010 status hearing, and that at that time, the State should be forced to “do or die.” The parties agreed on a January 28, 2010 status conference and an August 16, 2010 trial date, but counsel for Morgan and Foster objected to “putting it off till nine months.”

On August 16, 2010, counsel for Morgan and Foster moved to quash, arguing the State had failed to bring the matter to trial within two years of institution of prosecution. Counsel for McKenney and Goldston moved to adopt the motion. Following a hearing, the court granted both motions.

McKenney and Goldston’s motions to quash should have been denied. The State moved to continue the trial date from November 16, 2009 in response to the request for additional investigation by counsel for McKenney and Goldston (but over the objection of counsel for Morgan and Foster). Thereafter, counsel for McKenney and Goldston joined in the State’s motion to continue the trial date. By joining in the motion to continue, McKenney and Goldston entered a preliminary plea, and thus, the State was entitled, with regard to those defendants, to “no less than one year after the ruling to commence the trial,” *i.e.*, until November 13, 2010. See La. Code Crim. P. art. 580. Indeed, the mutual agreement between the State and McKenney and Goldston for a trial date beyond the point of prescription would have extended the date of prescription in the same manner as if counsel had joined in a continuance for that avowed purpose even without McKenney and Goldston formally joining in the motion to continue. See *State v. Fish*, 2005-1929, p. 3 (La. 4/17/06), 926 So.2d 493, 495 (*per curiam*). The State’s ability to

prosecute McKenney and Goldston was actually affected by the additional investigation requested by their counsel. See Brooks, 838 So.2d at 783.

The running of prescription was sufficiently suspended against Morgan and Foster so that the motion to quash, filed two hundred and sixty-one days after November 28, 2009, should have been denied. Morgan and Foster moved for discovery and for a bill of particulars on March 26, 2008, and the trial court ruled on these motions on June 5, 2008, suspending prescription for seventy-one days. Thereafter, Morgan and Foster objected to the State's notice of intent to offer evidence of other crimes (and requested a hearing), on October 10, 2008, and the court ruled on this motion on June 4, 2009, suspending prescription for another two hundred and thirty-seven days.

This assignment of error has merit.

#### **DECREE**

The judgment granting the defendants' motion to quash is reversed as to all defendants, and this matter is remanded for further proceedings.

**GRANTING OF MOTION TO QUASH AS TO ALL DEFENDANTS REVERSED; REMANDED.**