

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1842

STATE OF LOUISIANA

VERSUS

DERRICK LOUIS WATTS

Judgment Rendered: May 6, 2011

* * * * *

On Appeal from the
23rd Judicial District Court,
in and for the Parish of Ascension,
State of Louisiana
Trial Court No. 17056

Honorable Thomas J. Kliebert, Judge Presiding

* * * * *

Ricky L. Babin
District Attorney
Donaldsonville, LA
Donald D. Candell
Assistant District Attorney
Gonzales, LA

Attorneys for Appellee,
State of Louisiana

J. Rodney Messina
Baton Rouge, LA

Attorney for Defendant-Appellant,
Derrick Louis Watts

* * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant, Derrick Louis Watts, was charged by bill of information with possession of a schedule I controlled dangerous substance (MDMA), a violation of LSA-R.S. 40:966C. He pled not guilty and, following a trial by jury, was found guilty as charged. Thereafter, the state filed a habitual offender bill of information, seeking to enhance defendant's sentence pursuant to LSA-R.S. 15:529.1. Following a hearing, the trial court adjudicated defendant to be a third-felony habitual offender and sentenced him to fifteen years at hard labor, without benefit of probation or suspension of sentence.¹ Additionally, the trial court noted that defendant's sentence was not subject to diminution for good behavior pursuant to LSA-R.S. 15:571.3C. Defendant filed a motion for postverdict judgment of acquittal or, alternatively, for new trial, which was denied by the trial court.² Defendant has now appealed, alleging in two assignments of error that the trial court erred: (1) in denying his motion to suppress all evidence obtained as a result of his illegal arrest; and (2) in denying his motion to quash based on the violation of his right to a speedy trial. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

Just before noon on November 25, 2003, the Ascension Parish Sheriff's Office (APSO) received a report of a man beating his girlfriend at a residence located on Tony Street in Donaldsonville, Louisiana. As Sheriff's Deputy Michael Brooks approached the residence in response thereto, he observed a black male

¹ The sentencing minutes indicate the sentence also was imposed without the benefit of parole. However, the sentencing transcript reveals this restriction was not actually imposed. When a conflict exists between the minutes and the transcript, the transcript must prevail. See State v. Lynch, 441 So.2d 732, 734 (La. 1983).

² Defendant later filed a second motion for postverdict judgment of acquittal or, alternatively, for new trial. The record contains no ruling on the second motion. However, even if the trial court made no ruling on the motion, the failure to rule on the motion did not "inherently prejudice" the defendant. See State v. Price, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

running away from the residence. Deputy Brooks called in a report for deputies to be on the lookout for the second degree battery suspect, whom he described as a black male wearing blue jeans and a white t-shirt, while carrying a multi-colored shirt. Deputy Brooks then pursued the suspect on foot.

Shortly thereafter, Sergeant Richard Boe of the APSO was driving in his marked patrol car on Anthony Drive, which is located in close proximity to where the suspect was seen by Deputy Brooks. He observed a black male walking on Anthony Drive, who fit the description relayed by Deputy Brooks; the man was wearing blue jeans and a white t-shirt and was carrying another shirt. Sergeant Boe, who was in full uniform, exited his vehicle, identified himself as a sheriff's deputy, and asked the man to come over to the car so that he could determine whether he was the battery suspect the police were looking for. The man seemed nervous and failed to comply with the request. Sergeant Boe twice more requested that the man step over to the patrol car. Instead, the man took off running, while protecting the front waistband of his pants with one hand, which raised the possibility that he might have a weapon. He ignored Sergeant Boe's loud commands to stop. Sergeant Boe chased him on foot for several blocks to a house located at 215 Anthony Drive. The man went one direction around the house, and Sergeant Boe ran around the other side of the house, attempting to cut the man off. However, when he reached the other side, the man had disappeared.

By this time, several other deputies had arrived and they set up a perimeter around the house. It appeared to the deputies that the house had been broken into, since the door under the carport was ajar and there was a window with a screen removed and a broken windowpane. Because they were unable to get a response from anyone inside and were concerned about the safety of any occupants therein, Sergeant Boe and another deputy entered the house loudly identifying themselves and ordering the suspect to come out. They discovered defendant lying in a bed in

the master bedroom. He was wearing boxer shorts and a white shirt with another shirt on top. Defendant was sweating profusely and breathing heavily. As Sergeant Boe was placing defendant in handcuffs, he noticed that defendant's pulse rate was high. Sergeant Boe identified defendant as the same man he had been chasing.

A pair of blue jeans was lying on the floor a few feet from the bed. One of the deputies picked the jeans up and brought them out of the room to show Deputy Brooks, who had arrived at the Anthony Drive residence. Deputy Brooks indicated the jeans were similar to the ones worn by the battery suspect. The jeans then were brought back to the bedroom, and defendant was placed under arrest for resisting arrest and was advised of his **Miranda** rights. At this point in time, the deputies still believed defendant was the battery suspect being sought in connection with the domestic disturbance incident.

In preparation for transporting defendant to jail, Detective Sergeant Teddy Gonzales searched the blue jeans for weapons and contraband before giving the jeans to defendant to put on. During the search, Detective Gonzales located a small, brown pill in the front, right coin pocket of the jeans. Defendant began yelling that the police had planted the pill. While en route to jail, Sergeant Boe asked defendant what the pill was, and defendant responded that it was a painkiller. Subsequent scientific analysis established that the pill contained methylenedioxymethamphetamine (MDMA), commonly known as Ecstasy.

Before defendant was transported to jail, several residents of the house arrived home and were upset to find the police inside. Although defendant, who had a White Castle address, did not live at the house, it was later learned that the house was owned by Joan Wilson Nicholas, defendant's aunt by marriage. Ms. Nicholas testified that defendant was entitled to come to her house whenever he wished, and even to rest in bed there, and that he had done so on prior occasions.

Further, at a hearing on defendant's motion to suppress, two of defendant's cousins, Gloria and Dewann Wilson, who lived at the house on the date of defendant's arrest, stated that defendant occasionally came by the house to visit, although he did not have a house key. They further testified that defendant was in bed sleeping when they left the house on the morning in question. Gloria Wilson testified she returned approximately fifteen minutes later, and found the police inside the house. It was later established that the battery suspect in the domestic disturbance incident was Travis Wilson, defendant's first cousin and Ms. Wilson's nephew.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant contends the trial court erred in denying his motion to suppress the pill seized by the police as a result of the search of the blue jeans. Specifically, defendant argues the search was not a permissible search incident to arrest because, at the time of the search, he was handcuffed and the jeans had been removed from his area of immediate control. As such, he argues he had no opportunity to gain possession of a weapon or destructible evidence from the jeans, which is the general justification for permitting searches incident to arrest. Additionally, defendant argues the trial court also erred in denying his motion to suppress the oral statement he made en route to jail that the seized pill was a painkiller. He maintains the state failed to carry its burden of proving he was informed of his **Miranda** rights before Sergeant Boe questioned him about the pill.

A hearing was held on defendant's motion to suppress on September 9, 2004. However, the trial judge who heard the matter never ruled thereon. Subsequently, this matter was transferred to a different division of the district court and defendant obtained new counsel. When this case came up for trial on April 28, 2009, defense counsel re-urged the motion to suppress. Accordingly, the trial court

conducted a new hearing on April 28 and 30, 2009, after which it denied the motion to suppress.

Motion To Suppress Physical Evidence

When the constitutionality of a warrantless search and seizure is placed at issue by a motion to suppress, the state bears the burden of proving the admissibility of evidence seized without a warrant. LSA-C.Cr.P. art. 703D; **State v. Warren**, 05-2248 (La. 2/22/07), 949 So.2d 1215, 1226. Absent one of the well-delineated exceptions, a warrantless search or seizure is per se unreasonable under the Fourth Amendment of the United States Constitution and Article 1, § 5 of the Louisiana Constitution. **Coolidge v. New Hampshire**, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); **Warren**, 949 So.2d at 1226. When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751. Further, the entire record, not merely the evidence adduced at the motion to suppress, is reviewable by the appellate court in considering the correctness of a ruling on a pretrial motion to suppress. See **State v. Francise**, 597 So.2d 28, 30 n.2 (La. App. 1st Cir.), writ denied, 604 So.2d 970 (La. 1992).

For the following reasons, we conclude the pill was properly seized pursuant to a search conducted incident to defendant's lawful arrest. The trial court did not err or abuse its discretion in denying the motion to suppress on this basis.

A police officer may briefly stop and interrogate a person on less than probable cause, if the officer has a reasonable suspicion, supported by specific, articulable facts that the person is, or is about to be, engaged in criminal conduct. LSA-C.Cr.P. art. 215.1A; **State v. Lowery**, 04-0802 (La. App. 1st Cir. 12/17/04),

890 So.2d 711, 718, writ denied, 05-0447 (La. 5/13/05), 902 So.2d 1018. Moreover, knowledge that an offense has been committed is often a critical element in establishing reasonable cause for a stop. When the officer making the stop knows a crime has been committed, he has only to determine whether or not additional trustworthy information justifies a man of ordinary caution to suspect the detained person of the offense. **State v. Bickham**, 404 So.2d 929, 932 (La. 1981); **State v. Washington**, 540 So.2d 502, 505 (La. App. 1st Cir. 1989).

Thus, when Sergeant Boe, who was assisting in the search for a suspect who was known to have committed a battery only minutes earlier, saw defendant, who fit the suspect's description, walking within a few blocks of where the offense occurred, he certainly had a basis for reasonable suspicion. Under the circumstances, that suspicion was sufficient to justify stopping and questioning defendant briefly to determine if he was the battery suspect being sought. See LSA-C.Cr.P. art. 215.1A. Moreover, once Sergeant Boe asked defendant three times to come over to the patrol car, defendant's nervousness and refusal to comply heightened the level of suspicion. Finally, when defendant broke out into headlong flight from Sergeant Boe, ignoring commands to stop and clutching his front waistband with one hand, that suspicion ripened into probable cause to believe defendant was the person involved in the recent battery. See State v. Dunbar, 356 So.2d 956, 960 (La. 1978).

Louisiana Code of Criminal Procedure article 213(3) authorizes a warrantless arrest whenever a police officer has reasonable cause to believe the person to be arrested has committed an offense.³ Probable cause to arrest exists when the facts and circumstances within an officer's knowledge, and of which he has reasonable and trustworthy information, are sufficient to justify a person of

³ The "reasonable cause" standard of Article 213 is equivalent to "probable cause" under the general federal constitutional standard. See State v. Fisher, 97-1133 (La. 9/9/98), 720 So.2d 1179, 1183 n. 4.

average caution in the belief that the accused has committed an offense. Probable cause to arrest must be judged by probability and practical considerations of everyday life on which average persons, and particularly average police officers, can be expected to act. **State v. Wells**, 08-2262 (La. 7/6/10), 45 So.3d 577, 582-83.

Flight from a police officer does not alone indicate guilt. **Dunbar**, 356 So.2d at 960. However, in **Illinois v. Wardlow**, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000), the Supreme Court explained that, “[h]eadlong flight-wherever it occurs-is the consummate act of evasion: [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” In the instant case, defendant’s flight while clutching his waistband, coupled with the description of the battery suspect, as well as defendant’s close geographical and temporal proximity to the scene of the offense, would indicate to a reasonable man that he had some involvement with the crime. Given these facts, probable cause to arrest defendant on a second degree battery charge existed from the time he broke into headlong flight. Under Article 213(3), Sergeant Boe therefore was authorized to arrest defendant on that charge.

Moreover, in continuing to flee as Sergeant Boe, who had identified himself as a sheriff’s deputy, pursued him and commanded him to stop, defendant committed the offense of resisting an officer “acting in his official capacity and authorized by law to make a lawful arrest... .” See LSA-R.S. 14:108A. Pursuant to Article 213(1), a police officer is authorized to arrest a person who has committed an offense in his presence.

Therefore, the entry into the house for the purpose of arresting defendant was permissible in the instant case, even without a warrant, since the deputies had

probable cause to arrest and were in hot pursuit of defendant.⁴ See **United States v. Santana**, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-10, 49 L.Ed.2d 300 (1976); **State v. Franklin**, 353 So.2d 1315, 1320-21 (La. 1977); **Dunbar**, 356 So.2d at 960. Since Sergeant Boe had probable cause to arrest defendant before defendant entered the house, defendant could not thwart that lawful arrest by fleeing into the house. See **Santana**, 427 U.S. at 42, 96 S.Ct. at 2409; **State v. Davis**, 00-278 (La. App. 5th Cir. 8/29/00), 768 So.2d 201, 213, writ denied, 00-2730 (La. 8/31/01), 795 So.2d 1205.

Moreover, we believe there were additional exigent circumstances that justified the warrantless entry into the house.⁵ Sergeant Boe had observed defendant, who was believed to be a suspect in a violent crime, protecting the front waistband of his pants with one hand, raising the possibility that he had a weapon. Because the police found a broken windowpane and a door to the house ajar, they reasonably believed the house might have been broken into. Accordingly, when the police entered the house in hot pursuit of defendant, they had a legitimate concern in avoiding a possible violent confrontation and protecting the safety of any occupants who might be inside. At the time, the police did not know who was inside, nor did they know of the connection defendant had to the occupants of the house. Given these circumstances, the deputies' warrantless entry into the house to effectuate defendant's arrest was justified under the exigent circumstances exception to the warrant requirement. See **State v. Hathaway**, 411 So.2d 1074, 1079-80 (La. 1982).

⁴ Even though defendant did not reside at the house, he had standing as a person "adversely affected" to contest the legality of the entry of the officers into the house and the subsequent seizure of the evidence. See LSA-Const. art. I, § 5; **State v. Brown**, 09-2456 (La. 5/11/10), 35 So.3d 1069, 1072-73; **State v. Talbert**, 449 So.2d 446, 448 n.1 (La. 1984).

⁵ Exigent circumstances are exceptional circumstances that, when coupled with probable cause, justify an entry into a "protected" area that, without those exceptional circumstances, would be unlawful. Examples of exigent circumstances include the escape of the defendant, avoidance of a possible violent confrontation that could cause injury to others, and the destruction of evidence. **State v. Hathaway**, 411 So.2d 1074, 1079 (La. 1982).

Once inside the house, defendant was arrested on a charge of resisting an officer, rather than on a battery charge. However, it is immaterial to the validity of the search conducted incident to defendant's arrest whether he was arrested for resisting an officer, second degree battery, or both, as long as probable cause existed to arrest him for a criminal offense. In **Devenpeck v. Alford**, 543 U.S. 146, 153, 125 S.Ct. 588, 594, 160 L.Ed.2d 537 (2004), the Supreme Court explained that a police officer's subjective reason for making an arrest need not be the criminal offense as to which the known facts provide probable cause, as long as the circumstances justify that action. See also State v. Sewell, 40,768 (La. App. 2d Cir. 10/20/05), 912 So.2d 719, 721-22, writ denied, 06-0090 (La. 4/17/06), 926 So.2d 522. As we have already concluded in this case, probable cause existed to arrest defendant for the second degree battery the police were investigating. The deputies at the scene of defendant's arrest did not learn the name of the battery suspect and eliminate defendant as that suspect until after defendant had been arrested, searched, and removed from the house. As discussed, probable cause also existed to arrest defendant for resisting arrest. Therefore, defendant's arrest was proper. Moreover, once defendant was arrested, the search of his person incident to that arrest was justified as a well-established exception to the warrant requirement. **Chimel v. California**, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); **Warren**, 949 So.2d at 1226-27.

Defendant contends the search exceeded the permissible scope of a search incident to arrest, since he was handcuffed and the jeans were removed from his area of immediate control when they were taken out of the room. This argument lacks merit. Although the possibility of defendant freeing himself and reaching a weapon was remote, the deputies could not take the chance that the jeans contained a weapon, particularly since Sergeant Boe saw defendant protecting the front waistband of the jeans as he was fleeing. See Warren, 949 So.2d at 1230. Based

on common experience, this observation raised the possibility that defendant might have a weapon. Further, although the jeans were taken out of the room at one point for identification by Deputy Brooks, they were brought back into the room so that defendant could put them on. One of the deputies then searched the jeans before giving them to defendant to put on so that he would be fully clothed when he was taken outside in public view and transported to jail. Under these circumstances, the search of the jeans was within the permissible scope of the search conducted incident to defendant's arrest.

Motion To Suppress Statement

Additionally, defendant argues the oral statement he made en route to jail that the seized pill was a painkiller should be suppressed because the state failed to prove he had been advised of his **Miranda** rights prior to Sergeant Boe questioning him about the pill. Defendant notes in particular that, although Sergeant Boe testified at trial that he advised defendant of his **Miranda** rights at the time of arrest, this fact is not included in the police report prepared by Sergeant Boe. He further argues that the police report is the most reliable evidence on this issue since Sergeant Boe admitted several times during his testimony that he could not recall certain details of the incident, which occurred over five years prior to trial.

On the trial of a motion to suppress, the burden is on the state to prove the admissibility of a purported confession or statement by the defendant. LSA-Cr.P. art. 703D. Before a purported confession or inculpatory statement can be introduced into evidence, LSA-R.S. 15:451 provides it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. Further, the state must show that an accused who makes a statement or confession during custodial

interrogation was first advised of his **Miranda**⁶ rights. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 342. See also LSA-Const. art. I, §13; LSA-C.Cr.P. art. 218.1.

In the instant case, Sergeant Boe testified at the September 9, 2004 suppression hearing that he verbally advised defendant of his **Miranda** rights at the time he was apprehended and that defendant understood those rights. Similarly, he again testified at the second suppression hearing, as well as at trial, that he advised defendant of his **Miranda** rights at the scene of his arrest before transporting him to jail. It was while defendant thereafter was being transported to jail that the statement in question was made.

In denying the motion to suppress on this basis, the trial court obviously accepted Sergeant Boe's testimony that he verbally advised defendant of his **Miranda** rights before questioning him. Although defendant argues the police report constitutes more reliable evidence on this issue considering the amount of time that has passed since defendant's arrest, that is a matter that goes to the weight of the evidence. As previously noted, when a motion to suppress is denied, the trial court's factual and credibility determinations will not be reversed on appeal in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See Green, 655 So.2d at 281. Based on our review of the record, we find no error or abuse of discretion in the trial court's ruling.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, defendant contends the trial court erred in denying his motion to quash based on the denial of his right to a speedy trial. Specifically, he argues that the delay of over five years between his arrest on

⁶ **Miranda v. Arizona**, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

November 25, 2003, and the commencement of trial on April 28, 2009, without any justifiable reasons, was so prejudicial to his defense that his constitutional right to a speedy trial was violated. Defendant also contends the two-year statutory time limit provided by LSA-C.Cr.P. art. 578A(2) for commencement of trial was violated by the delay.

Statutory Time Limitations

Prosecution of this matter was instituted by the filing of a bill of information on March 2, 2004. Since defendant was charged with a non-capital felony, Article 578A(2) required commencement of defendant's trial within two years of that date. After trial was scheduled for April 28, 2009, defendant filed a motion to quash based on the state's failure to commence trial within two years of the institution of prosecution. At the beginning of trial, the trial court denied the motion to quash on the grounds that the statutory time limit was suspended by a pending motion to suppress filed by the defense.

Upon expiration of the time limitations provided in Article 578A for commencement of trial, 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. See LSA-C.Cr.P. art. 581. Moreover, when the defendant has brought an apparently meritorious motion to quash based on a violation of the statutory time limits, 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. **State v. Lathers**, 05-0786 (La. App. 1st Cir. 2/10/06), 924 So.2d 1038, 1043, writ denied, 06-1036 (La. 11/3/06), 940 So.2d 659.

Pursuant to LSA-C.Cr.P. art. 580A, the statutory time limits are suspended when a defendant files a motion to quash or other preliminary plea. When the prescriptive period is suspended, the relevant period is not counted, and the running of the time limit resumes when the court rules on the pending motion,

although in no case shall the state have less than one year after the ruling to commence trial. LSA-C.Cr.P. art. 580A; **Lathers**, 924 So.2d at 1043. 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. **Lathers**, 924 So.2d at 1043.

When a trial court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See **State v. Odom**, 02-2698 (La. App. 1st Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 03-2142 (La. 10/17/03), 855 So.2d 765. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Smith**, 99-0606 (La. 7/6/00), 766 So.2d 501, 504.

As noted, prosecution was instituted in this case by the filing of a bill of information on March 2, 2004. See LSA-C.Cr.P. art. 934(7). Thus, absent a suspension or interruption of the statutory time limit, the state had until March 2, 2006, to commence defendant's trial. The record reflects that on July 9, 2004, defendant filed a motion to suppress evidence. A hearing was held on that motion on September 9, 2004, in Division "C" of the 23rd Judicial District Court. At the conclusion of the hearing, defendant was given thirty days to file a memorandum, with the state to have an additional fifteen days thereafter. Defendant never filed a memorandum on the motion to suppress or sought a ruling thereon from the Division "C" judge. On December 9, 2004, defendant was placed in the "D.A. Diversion Program," with that matter to be reviewed on May 5, 2005. Months later, defendant's attorney withdrew from the case. Shortly thereafter, this matter was transferred to Division "B" upon motion of the state, due to the fact that defendant was being prosecuted in Division "B" on several other charges.

When this matter came up for trial on April 28, 2009, defense counsel pointed out that the motion to suppress filed in 2004 by prior defense counsel had

never been ruled on. Defense counsel then re-urged the motion to suppress, which was heard and denied by the trial court. The trial court further concluded that the pending motion to suppress suspended the statutory time limit for commencement of trial and denied defendant's motion to quash on that basis.

On appeal, defendant argues the trial court erred in finding that the statutory time limits were suspended by the pending motion to suppress, because the motion was rendered moot, and no ruling was necessary once he was placed in the district attorney's pretrial diversion program. He contends both that it was the state's duty to obtain a ruling on the motion in order to move the case forward and that the state prevented the original trial judge from ruling on the motion by transferring this case to a different division of district court.

Defendant's arguments are meritless. The fact that a defendant is placed in a pretrial diversion program is not a guarantee that he will not be prosecuted on the charge, since there are numerous conditions and requirements that must be met in order for a defendant to successfully complete the program. In the instant case, defendant obviously did not meet these conditions and requirements. In any event, the contention that the motion to suppress was moot is contradicted by defense counsel's own actions in re-urging the motion to suppress at the beginning of trial, and in continuing to argue the merits of the motion on appeal.

Moreover, it was not the state's duty to obtain a ruling on defendant's motion to suppress. As the proponent of the motion, it was incumbent on the defendant to move for a hearing and to obtain a ruling on his motion. See State v. Wagster, 361 So.2d 849, 856 (La. 1978); State v. Harper, 07-0299 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 604, writ denied, 07-1921 (La. 2/15/08), 976 So.2d 173. As of the time this matter was transferred to Division "B" in May 2005, defendant still had not filed the post-trial memorandum ordered by the original judge that heard the motion. The mere fact that this matter was transferred to

another division did not prevent defendant from requesting a new hearing and obtaining a ruling on his motion, which is what defendant eventually did, albeit not until the beginning of trial.

Accordingly, the trial court correctly concluded the two-year limitation provided by Article 578A(2) was suspended and had not tolled. Prosecution was instituted in this matter on March 2, 2004. Defendant's motion to suppress, which was filed on July 9, 2004, was not ruled on until April 30, 2009, after trial of this matter had already commenced. During the period the motion to suppress was pending, the statutory time limits for commencement of trial were suspended. See LSA-Cr.P. art. 580A. Therefore, no violation of the statutory time limitation occurred in this case.

Constitutional Right to Speedy Trial

A defendant's Sixth Amendment right to a speedy trial is a fundamental right imposed on the states by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. **Klopfer v. North Carolina**, 386 U.S. 213, 222-23, 87 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967). See also LSA-Const. art. I, § 16. The underlying purpose of the constitutional right to speedy trial is to protect a defendant's interests in preventing oppressive pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972).

In determining whether a defendant's right to a speedy trial has been violated, courts are required to assess the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. **Barker**, 407 U.S. at 530, 92 S.Ct. at 2192; **State v. Love**, 00-3347 (La. 5/23/03), 847 So.2d 1198, 1210. Under the rules established in **Barker**, none of these four factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."

Barker, 407 U.S. at 533, 92 S.Ct. at 2193. Instead, they are related factors that must be considered together “in a difficult and sensitive balancing process.”

Barker, 407 U.S. at 533, 92 S.Ct. at 2193.

Length of the delay

The first of the **Barker** factors, the length of the delay, is a threshold requirement for courts reviewing speedy trial claims. This factor serves as a triggering mechanism. Unless the delay in a given case is presumptively prejudicial, further inquiry into the other **Barker** factors is unnecessary. However, when a court finds that the delay was presumptively prejudicial, the court must then consider the other three **Barker** factors. **Love**, 847 So.2d at 1210.

In the present case, defendant's trial commenced approximately five years and two months after the filing of the bill of information. For purposes of this analysis, we will presume this delay, which was over two and one-half times as long as the two-year statutory delay, was presumptively prejudicial. Accordingly, we will consider the remaining **Barker** factors.

Reason for the delay

Defendant's assertion in brief that none of the delay was attributable to him is not supported by the record. It appears there were various reasons for the delay, some of which were attributable to defendant. First, we note that both defendant and the state filed motions for discovery. Additionally, although defendant filed a motion to suppress, he failed to seek a ruling thereon until after trial commenced. Nevertheless, defendant seeks to blame both the state and the original trial judge for any delay attributable to this pending motion, since the state had this matter transferred to a different division of district court after it was originally heard. While the transfer likely did cause some delay in the proceedings, it was still incumbent on defendant, as the proponent of the motion, to obtain a hearing and ruling thereon. See **Wagster**, 361 So.2d at 856; **Harper**, 970 So.2d at 604.

Defendant was free at any time to seek a hearing and ruling on this motion in the new division, but failed to do so.

Moreover, the record reflects that the state sought the transfer to Division "B" because there were several more serious charges against defendant pending in that division. According to the state's motion, defense counsel raised no objection to the transfer. Thus, the transfer was made for a legitimate reason other than causing delay.

Further, part of the delay in bringing this matter to trial undoubtedly was due to the fact that defendant was permitted to enter the district attorney's pretrial diversion program, although he obviously failed to complete that program. That portion of the delay cannot be attributed solely to the state. The record further reflects that defendant also filed numerous motions for continuance, and joined with the state in at least one joint motion for continuance. The minutes reflect there were also several other continuances, but it is unclear on whose motion they were made.

In sum, the record reflects that, although the delay was presumptively prejudicial, the entire delay was not attributable to the state and there were legitimate reasons for portions of the delay.

Defendant's assertion of his right to a speedy trial

The third factor in analyzing a speedy trial claim is whether the defendant asserted his right to a speedy trial. The **Barker** balancing test allows a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection. The failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. **Love**, 847 So.2d at 1211-12.

In the present case, defendant did not assert his right to a speedy trial during the delay of over five years between the filing of the bill of information on March

2, 2004, and the state's motion to set this matter for trial on April 14, 2009. Only after the state moved to set a trial date did defendant file a motion to quash. Moreover, during the period of delay, defendant filed multiple motions for continuances and failed to raise any objection to several other continuances reflected in the court minutes. Given his failure to assert his speedy trial claim until shortly before trial, together with the numerous continuances he obtained, we find that the objection in this case was more *pro forma* than not and, therefore, is not entitled to significant weight. See Love, 847 So.2d at 1212.

Prejudice to the defendant

The final factor to be considered when analyzing a defendant's speedy trial claim under **Barker** is the prejudice to the defendant resulting from the delay. Prejudice to the defendant should be analyzed in light of the following interests that the right to a speedy trial was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. **Love**, 847 So.2d at 1212.

In the instant case, it appears defendant was out on bail for most of the delay preceding trial. Moreover, although he asserts he has labored under a cloud of anxiety for years due to uncertainty over this criminal charge, there are at least three minute entries reflecting that he did not appear for a hearing date. Such instances raise serious questions regarding the level of anxiety and concern suffered by defendant.

Defendant additionally asserts his defense was impaired by the delay because the viability of the evidence and the ability of the witnesses to recall details were affected by the lapse of time. He notes that several deputies had difficulty recalling details not included in the police reports. In fact, a review of the record indicates that several of the deputies who testified at the second suppression hearing and at trial did have difficulty recalling some details.

However, they were allowed to refresh their memories with the police reports. Further, when they were unable to recall details, they so indicated. These were factors that went to the weight of their testimony, which is a matter for the trier-of-fact.

Defendant also contends he was substantially prejudiced because he presented two witnesses at the original motion to suppress hearing who were unavailable at trial. He does not name these witnesses, but presumably they are his cousins, Gloria and Dewann Wilson. Regardless, defendant neither explains why they were unavailable nor describes what efforts he made to obtain their presence at trial. Thus, defendant failed to establish that they were truly unavailable. We note that defendant might have requested a continuance in order to secure their presence, but failed to do so. See Love, 847 So.2d at 1212-13.

Accordingly, we do not believe that defendant has shown sufficient prejudice to establish that his right to speedy trial was violated. Considering this factor together with the other three factors of the **Barker** balancing test, especially the fact that some part of the delay was attributable to defendant, as well as defendant's failure to assert his speedy trial claim until almost the end of the delay, we find there has been no showing that defendant's constitutional right to a speedy trial was violated.

This assignment of error lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.