NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 1323

STATE OF LOUISIANA

VERSUS

LEONARD MOORE

Judgment Rendered: December 23, 2008

Appealed from the
Twentieth Judicial District Court
in and for the Parish of East Feliciana, State of Louisiana
Trial Court Number 06-CR-587

Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.

Downing, J. dissents and assigns reasons.

WHIPPLE, J.

The defendant, Leonard Moore, was charged by grand jury indictment with second-degree murder, a violation of LSA-R.S. 14:30.1, and pled not guilty. He moved to quash the indictment as violative of his constitutional speedy trial rights. Following a hearing, the motion was granted. The State now appeals, contending in its sole assignment of error that the trial court erred in granting the motion to quash because of the passage of time between the defendant's original arrest for second-degree murder and the return of the indictment by the East Feliciana Parish Grand Jury. We reverse the granting of the motion to quash 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 offense. The indictment charged that, on or about June 26, 1996,[1] the defendant committed the second-degree murder of Henry Perry in East Feliciana Parish with the specific intent to kill or inflict great bodily harm.

CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

In its sole assignment of error, the State argues that the trial court erred in finding that the defendant's constitutional right to speedy trial was violated by the delay between the defendant's August 24, 1998, initial arrest for the murder of the victim and the August 22, 2006, grand jury indictment of the defendant for the murder.

A defendant's 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. See also La. Const. art. 1, § 16; State v. Love, 2000-3347, p. 14 (La. 5/23/03), 847 So. 2d 1198, 1209. The underlying purpose of this constitutional right is to protect a defendant's interests in preventing oppressive pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. Id. (citing Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972)). The right to a speedy trial is a vaguer concept than other procedural rights. Love, 2000-3347 at p. 15, 847 So. 2d at 1209. It is, for example, impossible to determine with precision when the right has been denied. Id. The amorphous quality of the right leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. Id. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Love, 2000-3347 at p. 15, 847 So. 2d at 1209-10.

In determining whether a defendant's right to 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. Love, 2000-3347 at p. 15, 847 So. 2d at 1210 (citing Barker, 407 U.S. at 530, 92 S. Ct. at 2192). Under the rules established in Barker, none of the four factors listed above is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker at 533, 92 S. Ct. at 2193. Instead, they are "related factors and must be considered together ... in a difficult and sensitive balancing process." Id. Unless

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[1]The indictment was amended to change the year listed thereon from 1995 to 1996.

the delay in a given case is "presumptively prejudicial," further inquiry into the other Barker factors is unnecessary. Love, 2000-3347 at p. 16, 847 So. 2d at 1210.

Applying these precepts to the instant case, the record reflects that on April 27, 2007, the defendant moved to quash the indictment for violation of his constitutional speedy trial rights. However, he did not allege any specific prejudice from the delay.

At the hearing on the motion to quash, defense counsel argued the State had waited in excess of ten years to prosecute the case. The defense set forth that the murder at issue had taken place in 1996, and the defendant had originally been arrested in 1998, but had been released after the discovery that one of the potential witnesses had lied. The defense indicated it had subpoenaed the attorney who had represented the defendant in 1998, and who had been given names (presumably by the defendant) of young women whom the defendant may have been consorting with at the time of the offense, but the attorney no longer had his file.

The State responded that the defendant was required to show prejudice sufficient to remove his ability to put on a defense, and the names of the people who allegedly knew the whereabouts of the defendant on the night of the offense were still available from the defendant. The court asked the defense if it was claiming that in 1998, the defendant had not had the chance to reflect on the witnesses at issue. Defense counsel claimed that the defendant did not concern himself with witnesses once he was released in 1998. The State argued that the prejudice claimed was speculative at best.

The court asked the State, from the prosecution's standpoint, what was different about the case at the time of the hearing as opposed to 1998. The State

responded that a grand jury had listened to evidence and found probable cause to go forward with the charge of second degree murder against the defendant. The court responded that the grand jury proceedings could have occurred in 1998; it wanted to know what was different as far as the State's evidence was concerned. The State indicated there was no significant difference in its evidence between 1998 and the time of the hearing. Thereafter, the court granted the motion to quash.

On the issue of the length of the delay, the State concedes that the almost eight-year delay between the August 24, 1998, initial arrest of the defendant and the August 22, 2006, grand jury indictment is presumptively prejudicial.

In regard to the reason for the delay, the State further concedes that the delay between arrest and indictment was not attributable to the defendant. The State argues, however, that one reason for the delay was the failure of the former District Attorney to further the prosecution of homicides in the district. The State further argues that the fact that no evidentiary change occurred during the delay demonstrates that the delay was not a strategic maneuver by the State to fortify its case against the defendant or to prejudice the defendant's ability to present a meaningful defense.

Concerning the defendant's assertion of his right to a speedy trial, the State argues that from the time of the defendant's initial arrest in 1998, despite filing various motions since the 2006 grand jury indictment, the defendant has remained completely silent on the issue of his right to a speedy trial. The defendant responds that he was indicted in 2006, turned himself in, hired counsel, and, upon

completion of discovery, filed a motion to quash for violation of his speedy trial rights.

In Love, 2000-3347 at p. 19, 847 So. 2d at 1212, where the defendant first raised his speedy trial rights by filing a motion to quash three months after charges were reinstituted against him, the court found that the objection was more "*pro forma*" than not, and therefore not entitled to significant weight.

Prejudice to the defendant should be analyzed in light of the following three interests that the right to 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, 2000-3347 at pp. 19-20, 847 So. 2d at 1212. As noted by the defendant, he was arrested and released in 1998 for the offense at issue. Thereafter, following the 2006 indictment, he was released on bond eight months after the indictment. Thus, pretrial incarceration was not oppressive.

The key issue in this case is whether or not the defense was impaired. The defense persuaded the trial court that although the defendant faced prosecution for the murder at issue in 1998, once the defendant was released, he simply forgot the names of his alibi witnesses. The defendant's claim of an alleged inability to recall the identity of these alleged critical witnesses was presumably offered to also excuse his failure to identify them by name or to give any details concerning their testimony. This was self-serving testimony. We also note that the defendant's alleged inability to remember the names of his alibi witnesses was his only claim of prejudice, not that the witnesses had died or that testimony from them was otherwise unavailable.

In State v. Dyer, 2006-0619 pp. 5-6 (La. 7/11/06), 933 So. 2d 788, 792 (per curiam), cert. denied sub nom., Thomas v. Louisiana, ___ U.S. ___, 127 S. Ct. 945, 166 L. Ed. 2d 722 (2007), the court found that the defendants' claim that they had lost two important witnesses, one of whom they named and claimed had died, failed to show specific prejudice from the delay absent details as to why those witnesses were material. Further, the court noted that the delay in the case did not necessarily inure solely to the detriment of the defendants, because "time can tilt the case against either side ... [and] one cannot generally be sure which [side] it has prejudiced more severely." Dyer, 2006-0619 at p. 6, 933 So. 2d at 792 (quoting Doggett v. United States, 505 U.S. 647, 655, 112 S. Ct. 2686, 2693, 120 L. Ed. 2d 520 (1992)).

In Love, 2000-3347 at pp. 20-21, 847 So. 2d at 1212-13, the court rejected the defendant's claims that the loss of his two "best" witnesses established sufficient prejudice to prove violation of his right to a speedy trial. The court noted the defendant could not describe the efforts he had made to locate the allegedly missing witnesses.

A thorough consideration of the Barker factors as applied to the facts of this case does not warrant the "unsatisfactorily severe remedy" of dismissal of the indictment. Barring extraordinary circumstances, courts should be reluctant indeed to rule that a defendant has been denied a speedy trial. State v. Alfred, 337 So. 2d 1049, 1057 (La. 1976) (on rehearing). We agree with the State that the prejudice claimed by the defendant was speculative at best. Accordingly, the

judgment of the trial court, granting the motion to quash, is hereby reversed and and this matter is remanded for further proceedings.

This assignment of error has merit.

GRANTING OF MOTION TO QUASH REVERSED; REMANDED FOR FURTHER PROCEEDINGS.

STATE OF LOUISIANA
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DOWNING, J., dissents and assigns reasons

"Because the complementary role of trial courts and appellate courts demands that deference be given to a trial court's discretionary decision, an appellate court is allowed to reverse a trial court judgment on a motion to quash only if that finding represents an abuse of the trial court's discretion." **State v. Love**, 00-3347, pp. 9-10 (La. 5/23/03), 847 So.2d 1198, 1206. This is our standard of review. The majority opinion does not mention, nor apply, this standard of review. I respect the majority's competent analysis; however, the majority errs in giving no deference to the trial court's discretion, which it did not abuse in quashing Moore's indictment on grounds of violation of his constitutional right to a speedy trial.[1] Accordingly, I respectfully dissent.

As the majority notes, the State concedes that the delay between the arrest in 1998 and the indictment in 2006 is **presumptively prejudicial** to Moore. Accordingly, Moore is entitled to a rebuttable presumption that his right to a speedy trial has been violated. *See* **State v. Dyer**, 06-0619, p. 3 (La. 7/11/06), 933 So.2d 788, 791, *certiorari denied sub nom.* **Thomas v. Louisiana**, ___ U.S. ___, 127 S.Ct. 945, 166 L.Ed.2d 722, 75 USLW 3351 (2007). Yet the State offered no evidence into the record, only argument, to rebut the presumption.

[1] *See* **Love**, 00-3347, p. 14, 847 So. 2d at 1209 regarding the source of this constitutional right.

As the majority observes, claims for violation of speedy trial rights should be evaluated using the factors outlined in **Barker v. Wingo**, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972). *See* **Love,** 00-3347 at p. 15, 847 So. 2d at 1210. The **Love** court also instructed that none of the four factors listed above is a necessary or sufficient condition for finding a deprivation of the right to speedy trial. **Id.** It explained that the factors are related and must be considered together in a difficult and sensitive balancing process. **Id.** From the record, it is clear that the trial court was aware of the **Barker** factors in making its decision.

The majority concludes that "[t]he key issue in this case is whether or not the defense was impaired," acknowledging that Moore's claim of prejudice was his inability to remember the names of alibi witnesses. It then cites two cases[2] in which the Louisiana Supreme Court reversed decisions of the appellate courts, to which it owes no deference, and affirmed the judgments of the trial court. In **Love**, the supreme court observed that the issue before it involved reversing the decision of an appellate court, not a trial court. **Love,** 00-3347 at p. 9, 847 So. 2d at 1206. It explained the deference due a trial court's decision:

> When a trial judge exercises his discretion to deny [or grant] a motion to quash, he presumably acts appropriately, based on his appreciation of the statutory and procedural rules giving him the right to run his court. When, as in this case, a trial judge denies a motion to quash, that decision should not be reversed in the absence of a clear abuse of the trial court's discretion. (Bracketed information added.)

Love, 00-3347 at p. 12, 847 So. 2d at 1208.

Regarding a defendant's claim that he is prejudiced by the inability to remember the names of alibi witnesses some ten years after the alleged incident,

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[2] The majority cites **Dyer and Love**, cited within.

the court in **State v. Alfred**, 337 So.2d 1049, 1058 (La.1976) (on rehearing), observed that "the most persuasive argument to support a claim of prejudice is the fact that the defense has been impaired." After expressing its hesitancy to grant the motion to quash due to the nature of the indictment against Moore, the trial court here explained that it would be "hard pressed to tell you what I was doing ten years ago and who my alibi witnesses were if I was accused of a murder I didn't do." In saying this, the trial court stated that it was giving Moore the presumption of innocence.

Here, given the long delay in prosecution that creates presumptive prejudice against Moore, the State's failure to rebut the presumption with **any** evidence, the lack of change in the status of the case in ten years, and the trial court's reasonable explanation for its decision, the trial court validly exercised its discretion in granting Moore's motion to quash the indictment against him. We are obligated to defer to the trial court's valid exercise of discretion.[3] Accordingly, I respectfully dissent.

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[3] St. Thomas More was a lawyer. The story is told that his son-in-law, Roper, wanted him to break the civil law to stop the traitor, Richard Rich, from harming him, per the following exchange:

SIR THOMAS MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

SIR THOMAS MORE: ... Oh? ... And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? ... This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down ... d'you really think you could stand upright in the winds that would blow then? ... Yes, I'd give the Devil benefit of law, for my own safety's sake.