NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0806

STATE OF LOUISIANA

VERSUS

MICHAEL GRANT BISHOP

Judgment Rendered: September 14, 2007

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 381,798

Honorable David W. Arceneaux, Judge

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Joseph L. Waitz, Jr., District Attorney
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State – Appellee

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Attorney for
Defendant – Appellant
Michael Grant Bishop

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

WELCH, J.

The defendant, Michael Grant Bishop, was originally charged by bill of information with oral sexual battery, a violation of La. R.S. 14:43.3 (Count 1); aggravated incest, a violation of La. R.S. 14:78.1 (Count 2); molestation of a juvenile, a violation of La. R.S. 14:81.2(A) (Count 3); and felony carnal knowledge of a juvenile, a violation of La. R.S. 14:80 (Count 4). The defendant entered a plea of not guilty to all charges.

The State subsequently filed an amended bill of information. The amended bill provided for the same charges on Counts 1-3 against defendant, but Count 4 was changed to charge defendant with forcible rape, a violation of La. R.S. 14:42.1. Defendant again pled not guilty to all counts.

After disposing of the pre-trial motions filed by the defendant, the case proceeded to trial by jury. The jury determined the defendant was guilty as charged of Counts 1-3, and returned the responsive verdict of guilty of sexual battery for Count 4, a violation of La. R.S. 14:43.1.

The trial court sentenced the defendant to serve five years at hard labor without benefit of probation, parole or suspension of sentence for his conviction of oral sexual battery (Count 1); twelve years at hard labor for his conviction of aggravated incest (Count 2); five years at hard labor for his conviction of molestation of a juvenile (Count 3); and five years at hard labor without benefit of probation, parole or suspension of sentence for his conviction of sexual battery (Count 4). The trial court ordered all sentences to be served concurrently.

FACTS

The facts giving rise to this appeal involve complaints of sexual abuse occurring from 2000-2001 against A.B., who was born on June 22, 1988, committed by her adoptive father, the defendant. Although the defendant initially denied the charges, he subsequently provided a statement admitting that he had

engaged in sexual activity with A.B. on four different occasions in 2001.

The original bill of information in this case was filed on February 22, 2002. The defendant entered a plea of not guilty on March 4, 2002. Trial was originally scheduled for June 24, 2002; however, the defendant's trial did not commence until September 27, 2004.

ASSIGNMENT OF ERROR

In his only assignment of error, the defendant argues the trial court erred in denying his motion to quash because the State had delayed commencement of the trial beyond the period allowed by law.

Louisiana Code of Criminal Procedure article 578(A)(2) provides that trial of non-capital felonies must be held within two years from the date of the institution of prosecution. "Institution of prosecution" includes the finding of an indictment, or the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. C.Cr.P. art. 934(7). 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. C.Cr.P. art. 581; **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.

In the instant case, the defendant was charged with four non-capital felonies, thus requiring commencement of trial on the charges within two years from the date the prosecution was instituted. Prosecution of this matter was instituted by the filing of the original bill of information on February 22, 2002. Therefore, under La. C.Cr.P. art. 578(A)(2), the State had until February 22, 2004, to commence the defendant's trial. As of August 24, 2004, the date the defendant moved to quash the bill of information, a trial had not been commenced. Clearly, the two-year prescriptive period for the commencement of trial was exceeded; thus, on its face,

the defendant's motion to quash had merit.

Once an accused shows that the State has failed to bring him to trial within the time periods specified by La. C.Cr.P. art. 578, the State bears a heavy burden of showing that an interruption or suspension of the time limit tolled the running of the two-year period. **Cotton**, 2001-1781 at pp. 4-5, 818 So.2d at 971.

The interruption of the time limit for commencing trial is set forth in La. C.Cr.P. art. 579, which provides:

> A. The period of limitation established by Article 578 shall be interrupted if:
>
> (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.

In addition, La. C.Cr.P. art. 580 allows for the suspension of the time limitations, and it provides as follows:

> 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.

Based on our review of this record, we find no error in the trial court's ruling that the State satisfied its burden of proving that there was a suspension of the time limitations sufficient to justify the delay in bringing defendant to trial.

The record reflects on December 1, 2003, the defendant filed a written motion to continue the trial to February 25, 2004. The trial court granted the defendant's motion to continue on December 1, 2003.

A motion for continuance suspends, but does not interrupt, the running of prescription pending the ruling of the court thereon. **State v. Morris**, 99-3235, p. 1 (La. 2/18/00), 755 So.2d 205 (per curiam). Thus, under the plain language of La. C.Cr.P. art. 580, the continuance obtained by the defendant suspended the running of prescription and provided one year from the ruling or until December 1, 2004 to commence the trial. Accordingly, the commencement of defendant's trial on September 27, 2004, was timely.

The defendant argues that La. C.Cr.P. art. 580 does not apply to this case because the minute entry of the court indicates there was no objection by the State to the December 1, 2003 continuance. In support of this contention, the defendant cites **State v. Rome**, 93-1221 (La. 1/14/94), 630 So.2d 1284, as authority for the proposition that unless the district attorney objects to a motion to continue, the motion does not interrupt the running of the time limitation.

The defendant's argument ignores the differences between interruption of prescription under La. C.Cr.P. art. 579 and suspension of prescription under Article 580. The supreme court held in **Rome**, 630 So.2d at 1288, that a "joint motion for a continuance is **insufficient to interrupt prescription."** (Emphasis added). The exact wording used by the court was that, "[I]t is well settled that when the state has consented to a preliminary plea, such as the joint motion for a continuance filed in the present case, it cannot thereafter point to that delay as 'a cause beyond [its] control' under article 579, which would interrupt prescription and would excuse a failure to commence trial within the time limits." **Rome**, 630 So.2d at 1287-88. Thus, we do not find **Rome** stands for the proposition that the State must object to a defendant's motion for continuance in order for prescription to be suspended, nor does it provide the State with less than one year after ruling on such a motion to commence trial. The plain language of La. C.Cr.P. art. 580 specifies that prescription is suspended by certain acts of the defendant, not the State.

We note that **State v. Hudson**, 263 La. 72, 74-75, 267 So.2d 198, 199 (1972) (per curiam), which was cited by the court in **Rome**, also held that because the State agreed to a continuance, its inability to try the defendant could not be considered a result beyond its control that would have interrupted prescription. Again, the court in **Hudson** was addressing interruption under La. C.Cr.P. art. 579, not suspension under La. C.Cr.P. art. 580.

Moreover, the case **State v. Benson**, 254 La. 867, 869-872, 227 So.2d 913, 914-915 (1969), was also cited in **Rome**. A close reading of **Benson** reveals that no motions for continuance were filed on behalf of Benson; however, his defense counsel was aware that the State sought to try Benson following the trial of a codefendant, thus defense counsel filed numerous continuances on behalf of the codefendant, which effectively delayed the commencement of Benson's trial until the time limit for prosecution had prescribed. The supreme court held that such a scenario would not interrupt the time limits for prosecuting Benson.

Accordingly, we find that the continuance obtained by the defendant on December 1, 2003, enabled the time limits for commencing the defendant's trial to be extended until December 1, 2004. The defendant's trial commencing on September 27, 2004 was timely.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.