

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0789

STATE OF LOUISIANA

VERSUS

LIONEL ROMAR

Judgment Rendered: OCT - 3 2007

Appealed from the  
Twenty-Second Judicial District Court  
in and for the Parish of St. Tammany, State of Louisiana  
Trial Court Number 279801

Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

*Whipple, J. dissents, for reasons assigned.  
Hughes, J. concurs with reasons.*

**GUIDRY, J.**

The defendant, Lionel Romar, was charged by bill of information # 279801, filed December 16, 1997, with one count of third offense operating a vehicle while intoxicated, a violation of La. R.S. 14:98. On January 18, 2007, he moved to quash, arguing the delay for commencement of trial had expired. Following a hearing, the trial court granted the motion to quash. The State now appeals, designating one assignment of error. We affirm the granting of the motion to quash.

**ASSIGNMENT OF ERROR**

The trial court erred in granting the motion to quash, dismissing the charge against the defendant.

**FACTS**

Due to the granting of the motion to quash, there was no trial testimony concerning the facts in this matter. The bill of information charged the defendant committed the instant offense on October 19, 1997.

**MOTION TO QUASH**

In its sole assignment of error, the State argues that the trial court erred in granting the motion to quash because the time limitation for commencement of trial was interrupted by the defendant's failure to appear for trial on April 20, 1998 after receiving actual notice of the trial date on March 5, 1998. In support of its argument, the State relies upon La. C.Cr. P. art. 579(A)(3).

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. C.Cr. P. art. 578(A)(2). Third offense operating a vehicle while intoxicated is a non-capital felony offense. La. R.S. 14:98(D).

The period of limitation established by Article 578 shall be interrupted if the defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record. La. C.Cr. P. art. 579(A)(3). The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists. La. C.Cr. P. art. 579(B).

Once the accused shows that the State has failed to bring him to trial within the time periods specified by Article 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, p. 1 (La. 2/18/00), 755 So.2d 205 (per curiam).

In the instant case, prosecution was instituted by the filing of the bill of information on December 16, 1997. The minutes<sup>1</sup> contained in the record reflect the following occurred thereafter:

January 21, 1998 - the defendant, present in open court and attended by counsel, waived reading of the bill of information and entered a plea of not guilty;

March 5, 1998 - the defendant, present in open court and attended by counsel, the matter being on assignment for hearing of motions and felony pre-trial, on motion of the defense, court ordered the felony jury trial be continued to April 20, 1998;

April 20, 1998 - the defendant, not present in open court, but represented by counsel, the matter being on assignment for felony jury trial, on motion of the defense, court ordered the matter continued to June 15, 1998;

June 15, 1998 - the defendant, not present in open court, the matter being on assignment for felony jury trial, on motion of the Assistant District Attorney, court

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<sup>1</sup> In an effort to better review the assignment of error, this Court attempted to obtain transcripts of the proceedings of April 20, 1998 and June 15, 1998. See La. C.Cr. P. art. 914.1(D). The court reporters for the dates in question, however, advised this Court that transcripts were unavailable for those dates.

ordered the surety bond forfeited, the personal surety bond revoked, and an attachment issued for the arrest of the accused;

October 6, 2006 - the defendant, present in open court, the matter came before the court for seventy-two hour hearing to determine bond and counsel [in regard to another charge]. Further, the defendant being held on attachment in docket number 279801, court held the bond to be adequate as previously set in the amount of \$50,000.00 cash, property or surety plus \$331 cash only on attachment;

October 9, 2006 - the defendant, present in open court and attended by counsel, the matter being on assignment for attachment, the defendant entered a plea of guilty to the attachment, whereupon the court sentenced him to serve a period of ten days in the parish jail, with credit for time served.

The trial court correctly granted the motion to quash. The State failed to bear its heavy burden of demonstrating that prescription under La. C.Cr. P. art. 578(A)(2) was either interrupted or suspended in this case. At the hearing on the motion to quash, the State focused on whether the defendant had notified the Clerk of Court when he changed addresses. See La. C.Cr. P. arts. 579(A)(1) & 579(A)(2). (R. 32-33). La. C.Cr. P. art. 579(A)(3) does not require proof that the State searched for a defendant who failed to appear. See State v. Buckley, 2002-1288, pp. 6-8 (La. App. 3d Cir. 3/5/03), 839 So.2d 1193, 1198-99. Indeed, the State made no argument under La. C.Cr. P. art. 579(A)(3) in the trial court. The State's failure to raise its argument under Article 579(A)(3) in the trial court precluded the defendant from defending against that claim at the hearing on the motion to quash. We also note that when the defendant failed to appear in court on April 20, 1998, defense counsel requested and received a continuance, apparently without objection by the State since no objection is noted in the minute entry. The State did not move for an attachment to issue for the arrest of the

defendant until he failed to appear on June 15, 1998. See State v. Ward, 36,545, p. 3 (La. App. 2d Cir. 11/23/02), 830 So.2d 1135, 1137. There is no indication, however, that the defendant received actual notice of the June 15, 1998 trial date.

This assignment of error is without merit.

**GRANTING OF MOTION TO QUASH AFFIRMED.**

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 WHIPPLE, J., DISSENTING

I respectfully disagree with the majority's opinion herein. The minute entry dated March 5, 1998 reads as follows:

March 5, 1998 - the defendant, present in open court and attended by counsel, the matter being on assignment for hearing of motions and felony pre-trial, on motion of the defense, court ordered the felony jury trial be continued to April 20, 1998;

The minute entry and transcript of the proceedings of March 5, 1998 clearly indicate the defendant was present and received notice in open court of the April 20, 1998 trial date. He failed to appear at that trial date. Therefore, the time limitation of Article 578(A)(2) was interrupted. LSA-C.Cr.P. art. 579(A)(3). The cause of interruption no longer existed and the time limitation of Article 578(A)(2) began to run anew when the defendant appeared in court on October 6, 2006 (after the court ordered an attachment). See LSA-C.Cr.P. art. 579(B). Thus, in my view, the trial court erred in granting the motion to quash.

Accordingly, I would reverse the trial court's ruling of January 18, 2007, granting the motion to quash, and remand the matter for further proceedings.

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HUGHES, J., concurring

I respectfully concur.

The record contains a transcript of the proceedings of March 5, 1998. It appears that a motion date was set for 4/15/98 and a trial date was set for 4/20/98. It is not clear for which date the defendant received notice. It would further appear that the state failed to carry its burden of proof at the hearing of the motion to quash held on 1/18/07. I would therefore affirm the ruling of the trial court in this matter.