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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,060

TODD RICHARD DORIAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF THE RESPONDENT ON THE MERITS

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INTRODUCTION

The defendant appeals from the en banc decision in State v. Dorian, 619 So.2d 311 (Fla. 3d DCA 1993), which reversed the trial court's order discharging the defendant for violation of the speedy trial rule. In this brief the parties will be referred to as they appeared in the trial court, "the defendant" and "the State." References to the record on appeal will be denoted by the letter "R"; the transcript of proceedings will be denoted by the letters "TR"; the transcripts of the supplemental record will be designated "SRTR".

STATEMENT OF THE CASE AND FACTS

The State supplements the Statement of the Case and Facts as provided by the defendant with the following.

On May 20, 1981, the defendant, Todd Richard Dorian, was arrested for the first degree murder of George Litwin. (R. 72.) On June 10, 1981, the grand jury charged the defendant with one count of first degree murder for the death by strangulation of George Litwin and one count of first degree arson. (R. 1.) On November 7, 1981, one hundred and seventy-one days after the defendant's arrest, the State of Florida nol prossed the charges due to its inability to locate its witnesses. (SRTR. 100.)[1]

Six years later, in October of 1987, the defendant was arrested on unrelated robbery charges. (SRTR. 129-130, 269.) Subsequent to his arrest, the defendant, harboring the belief that he could not be prosecuted for the homicide, confessed to detectives the details of the 1981 murder that he had committed. (SRTR. 137, 165-167, 280, 297; R. 63-65.) Based upon the defendant's confession, the State reopened the homicide investigation into the murder of George Litwin. (SRTR. 502.) Following the subsequent investigation, the State of Florida presented its case to the grand jury, which reindicted the defendant for murder, arson and armed burglary. (R. 3-4.) The

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[1] The trial court found that the State's decision to nol pros the 1981 charges was not made to gain a tactical advantage. (TR. 39.)

defendant was rearrested on these charges on December 5, 1990. (R. 39.)

On April 29, 1991, the defendant moved to dismiss the indictment, claiming the violation of his constitutional right to a speedy trial. (R. 34.) The trial court conducted a full hearing upon the defendant's motion to dismiss. At this hearing, the defendant was unable to establish the requisite prejudice to his defense, sufficient to claim pre-indictment delay. (SRTR. 78-115.) In fact, according to the defendant's attorney, any claim he had of prejudice was purely "speculative." (SRTR. 109, 113.) The court subsequently ruled that neither the defendant's Sixth Amendment right to speedy trial, nor his Fourteenth Amendment right to due process, had been violated. (SRTR. 115; R. 40.)

On May 17, 1991, the defendant moved for discharge claiming that the former 180-day speedy trial rule applied to his case and that the State was not entitled to the window period. (TR. 53-77.) The trial court, recognizing that the 1981 nol pros had not been entered to gain a "tactical advantage," nonetheless granted the motion. (TR. 76.)

SUMMARY OF ARGUMENT

Subsection (o) of the Speedy Trial Rule, which prohibits the State from nol prossing charges to avoid the intent and effect of the rule, should not be applied to the instant case and bar its prosecution. In this case, which the State nol prossed in 1981, the motives of the State in nol prossing are beyond peradventure. Since the State nol prossed on the 171st day, four years prior to the advent of the window period, it did so to terminate the case, not to avoid the Speedy Trial Rule. The concerns of this Court, as set forth in its Agee opinion,[2] are not implicated by a pre-1985 nol pros, which, by occurring prior to the existence of the window period, presumptively evidences the State's lack of bad faith. Nor is the ex post facto clause of either the state or federal constitution violated by the application of a 1985 procedural change in the rule to a 1981 offense. Since neither the Speedy Trial Rule, nor this Court's Agee opinion apply to a pre-1985 nol pros, the interests of justice will not be served by the application of Agee to the case at bar, a case in which the defendant had no constitutional speedy trial claim, was fully prepared for trial and there was no statute of limitations. Such an extension of Agee and application of Subsection (o) is unwarranted and will result in precluding prosecution of a case which merits prosecution.

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[2] State v. Agee, 622 So.2d 478 (Fla. 1993).

ARGUMENT

A VALID AND WORTHY EXCEPTION TO THIS COURT'S OPINION IN STATE V. AGEE, 622 So.2d 473 (Fla. 1993), SHOULD BE CARVED OUT FOR CRIMES WHICH WERE NOL PROSSED PRIOR TO 1985, CASES WHICH WERE PRESUMPTIVELY NOL PROSSED IN GOOD FAITH AND THUS NEITHER SUBJECT TO THIS COURT'S CONCERNS IN AGEE NOR THE PRECLUSIVE EFFECT OF RULE 3.191(o).

The State nol prossed the charges in the instant case in 1981, four years prior to the advent of the window period. The issue before this Court is whether its opinion in State v. Agee, 622 So.2d 473 (Fla. 1993), applies to this case.

The State recognizes that this Court's Agee decision represents a desire by this Court to establish a bright line rule: if the State enters a nol pros and the speedy trial period elapses, the State can never refile charges. This approach effectively eschews any good-bad faith analysis, rendering unnecessary any inquiry into the State's motives for nol prossing the charges. Recognizing and accepting this as the law, the State nonetheless believes that a valid exception can be carved out for cases in which the State nol prossed the charges prior to January 1, 1985, the effective date of the window period. Such an exception would be permitted under any reasonable interpretation of Rule 3.191(o), Fla.R.Crim.P., would be totally consistent with this Court's concerns as expressed in the Agee decision, and would allow the State to prosecute a small number of capital and life felonies under certain very

narrow circumstances.[3] In sum, the interests of justice will be well-served by the creation of such a limited but significant exception.

A nol pros entered prior to January 1, 1985 must be seen presumptively as done in good faith, and therefore, the constraints of Subsection (o) of the speedy trial rule do not apply. Subsection (o)[4] addresses only the use of a nol pros by the State to deliberately avoid the intent and effect of the rule. The clear import and thrust of this section is to prohibit the State from nol prossing charges when the intent of the prosecutor is to circumvent the speedy trial rule. When the prosecutor has no such intent, as is ultimately exemplified in the situation of a pre-1985 nol pros, Subection (o) is not violated. Where, as in the case at bar, the nol pros could not have been entered to circumvent the rule or deny the defendant

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[3] The State primarily would only be able to prosecute capital and life felonies because the statutes of limitations will have run on all other pre-1985 felonies.

[4] This section is currently lettered (o); however, at the time of the nol pros and at the time of the motion for discharge, it was denoted with the letter (h)(2). The text of the rule has remained unchanged and reads:

> Nolle Prosequi: Effect. The intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode or otherwise by prosecuting new and different charges based on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.

any remedy thereunder, but rather was entered solely to end the case and permanently remove the threat of prosecution, Subsection (o) was never intended to apply. Since the strictures of (o) do not apply to a pre-1985 nol pros, and since the concerns of this Court as expressed in Agee concerning potential abuse of a nol pros are not implicated in pre-1985 cases, disapproval of the district court's decision is neither mandated by the speedy trial rule nor justified.

In Agee, this Court expressed the concern that "[t]o allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule...." 622 So.2d at 475. The Court's opinion then raised the spectre of a prosecutor with a weak case entering a nol pros, continuing to develop his or her case, and then later refiling charges months or years later, "thus effectively denying an accused the right to a speedy trial while the State strengthens its case." Id. The Court's concern, as expressed in Agee, and hence the rationale for the Court's opinion, do not apply to cases that were nol prossed prior to January 1, 1985, the effective date of the "window period" rule.

In the instant case, as in all such cases in which the nol pros was entered prior to the advent of the "window period," there was never any intent or even any hope of later refiling charges. When the State nol prossed the charges in 1981, with eight days remaining in the speedy trial period, it did so to terminate the prosecution once and for all. There can be no

question as to the motives of a prosecutor who entered a nol pros prior to January 1, 1985. There can be no dispute that when a prosecutor, such as the one at bar, nol prossed the charges, he or she did so to end the prosecution, not to toll the time period while the case developed and possibly strengthened. Because, when charges were dismissed prior to 1985, by entry of a nol pros, there was no vehicle to ever refile after 180 days had elapsed. Therefore, by definition, a pre-1985 nol pros was entered solely to dispose of the case, not to avoid the effect of the rule or gain any advantage over a defendant. In fact, the trial court below specifically found that the State's actions in this regard were not in bad faith. (TR. 76.) See State v. Dorian, 619 So.2d 311 (Fla. 3d DCA 1993).

The State cannot lay claim to such amazing prescience that when it nol prossed the instant case in 1981, the prosecutor foretold that the rule would change in 1985, thereby allowing an additional fifteen days if charges were refiled. Furthermore, in the case at bar, the State ultimately refiled charges in 1990, only after the defendant, in the belief that he could not be prosecuted, boasted to the police about the murder he committed. See Dorian, 619 So.2d at 312. Thus, in the instant case, the State would have had to have been doubly clairvoyant when it nol prossed in 1980: 1) to predict the rule change in 1985, and 2) to predict that Dorian would someday confess and supply the necessary additional information needed

to bring charges against him for murder. It is clear therefore, that the Court's fear that a prosecutor can utilize the nol pros to manipulate the speedy trial period and thereby deny a defendant his/her remedy under the rule is unsubstantiated in cases such as this, in which the State nol prossed prior to January 1, 1985.

The defendant maintains that the good faith claim in Agee was more substantial than that at bar. Whereas the situation in Agee, a nol pros because a witness is comatose, presented a compelling argument for a good faith exception to Subsection (o), it was not nearly as compelling as the facts at bar. The nol pros in Agee, though undoubtedly entered with little intent to refile later, could nonetheless have been entered with some hope, albeit faint, that the witness would miraculously recover. In the instant case, on the contrary, absent a window period, there was no hope, intent or even a glimmer of ever refiling charges.

It cannot be overemphasized just what the State is asking for here. Since this was a first degree murder prosecution, there is no statute of limitations. Additionally, the defendant had ample opportunity to establish a constitutional speedy trial violation, but he was completely unable to show any prejudice. (SRTR. 78-115.) Further, trial counsel was ready and able to proceed within the window period, since the case was substantially the same as it had been when the State nol prossed in 1981, with the crucial addition of the

defendant's confession, which apparently did not necessitate further discovery. For these reasons, trial counsel never claimed that due process concerns precluded forcing him to choose between his right to conduct discovery and his right to a speedy trial. Compare State v. Hutley, 474 So.2d 233 (Fla. 4th DCA 1985); Mulryan v. Judge, Division "C" Circuit Court of Okaloosa County, 350 So.2d 784 (Fla. 1st DCA 1977); State ex rel. Wright v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975) (defendant cannot be forced to choose between opportunity to prepare defense and speedy trial). Thus, what the Court is presented with in the case at bar is a prosecutor who acted in good faith, a defendant who is totally unprejudiced and a rule that does not expressly prohibit this prosecution. To expand the rule of Agee to apply to this case is unwarranted and achieves an unjust result with no appreciable gain.

The defendant posits two arguments as to why the State should not be allowed the benefit of the fifteen-day window period. First, he cites to the committee note to Rule 3.191, 1984 Amendment, to support his position. The note undisputably states that a purpose of the window period is to aid the negligent prosecutor, i.e., one who through oversight or mistake allows the speedy trial period to elapse. But it would be an absurd interpretation of the rule to afford the negligent prosecutor the window of recapture but deny the same to a diligent prosecutor. Consider for example two prosecutors in 1981. One, like that in Dorian, realizes that he cannot proceed

in good faith with the prosecution and so he nol prosses the charges. The second prosecutor, through negligence, lets the speedy trial period run. If both cases were refiled during the pendency of the window period, i.e., post-1985, under the defendant's view of subsection (o), only the negligent prosecutor's case could be refiled. Such a strained interpretation and unjust result would be uncalled for.

Secondly, the defendant engages in a lengthy exposition characterizing the State's position herein as unconstitutional, without citing to that portion of which constitution, state or federal, is allegedly offended. (Brief of the Respondent, p. 12-14.) The State can only presume from the language used in the defendant's argument ("retrospective") and from the authority relied upon, that the defendant is claiming that the application of the 1985 rule amendment to his case violates the ex post facto clauses of the two constitutions.

The former speedy trial rule, that provided for the remedy of automatic discharge after 180 days was procedural; it did not confer any substantive rights. Automatic discharge after 180 days was merely a procedural remedy available to one who still had pending charges after 180 days and had not been brought to trial. There is no vested right in a procedural remedy, particularly not for someone such as this defendant, whose case was nol prossed on the 171st day and was not even entitled to the remedy.

Moreover, if the retrospective application of the window period has ex post facto implications, then this Court's decisions in Bloom v. McKnight[5] and Zabrani v. Cowart[6] were both violative of the ex post facto clause. For by ruling that the operative event for determining which rule to apply was the motion for discharge, this Court in McKnight and Zabrani applied the 1985 rule amendment to offenses which predated the amendment. Such an application would of necessity be an ex post facto violation if there were ex post facto concerns with the retrospective application of the window period.[7]

Additionally, it is abundantly clear that there is no ex post facto violation in applying the window period rule to pre-1985 cases. The federal ex post facto clause is concerned solely with whether a statute assigns a more disadvantageous criminal or penal consequence to an act than the law that existed at the time of the offense. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 965, n. 13 (1981). "No ex post facto violation occurs if a change is merely procedural and does not alter 'substantial personal rights.'" Miller v. Florida, 482

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[5] 502 So.2d 422 (Fla. 1987).

[6] 506 So.2d 1035 (Fla. 1987).

[7] This Court in Agee receded from Zabrani and McKnight to the extent that they suggest the availability of the window period to cases such as Agee, wherein the State nol prosses charges and the speedy trial period elapses. The defendant characterized this Court's Agee opinion as overruling McKnight and Zabrani. (Brief of the Respondent, p. 10.) The State would suggest that these cases are still good law and whatever recession this Court intended from the principles set forth in Zabrani and McKnight, it did not mean to overrule these cases on ex post facto grounds.

U.S. 423, 107 S.Ct. 2446, 2451 (1987). A change in "modes of procedure which do not affect matters of substance" does not constitute an ex post facto violation. Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298 (1977). As recognized by the defendant, under Florida law, a law or its equivalent violates the ex post facto clause if: 1) it is retrospective and 2) it diminishes a substantial substantive right that the party would have enjoyed under the law existing at the time of the offense. Dugger v. Williams, 593 So.2d 180, 181 (Fla. 1991). Not only has the speedy trial rule been held to be procedural, see State ex rel. Maines v. Baker, 254 So.2d 207 (Fla. 1971), but discharge, a procedural remedy available after expiration of the applicable time periods, is not a "substantial substantive right."

CONCLUSION

In sum, a valid and noteworthy exception to this Court's Agee opinion can and should be created to exempt from Agee's reach a pre-1985 nol pros. Such a nol pros was, by definition, entered in good faith and thus not within the purview of Subsection (o) of Rule 3.191. Since neither Subsection (o), nor any other rule or constitutional provision, preclude prosecuting the instant case, the trial court erred in granting the defendant discharge. Wherefore, the State respectfully requests that this Court affirm the district court's opinion in State v. Dorian and allow the prosecution of the defendant to go forward.

Respectfully submitted,

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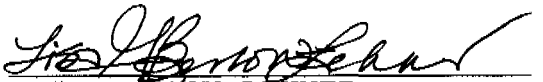
State Attorney

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing was hand-delivered to Bruce A. Rosenthal, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this the 29th day of November, 1993.

LISA BERLOW-LEHNER
Assistant State Attorney