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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,964

THE HONORABLE JOSEPH P. FARINA,
Judge of the Circuit Court for
the Eleventh Judicial Circuit,
in and for Dade County,,

Petitioner,

vs.

MIGUEL PEREZ, JR.,

Respondent.

* *

BRIEF OF THE PETITION ON THE MERITS

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ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

KATHERINE FERNANDEZ RUNDLE
State Attorney
Eleventh Judicial Circuit
Miami, Florida

LISA BERLOW-LEHNER
Assistant State Attorney
Florida Bar # 382191
1350 N.W. 12 Avenue
Miami, Florida 33136-2111
(305) 547-0666

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INTRODUCTION

This appeal involves the application of this Court's opinion in State v. Agee, 622 So.2d 473 (Fla. 1993), to cases which have been "no actioned." This case comes before this Court from the Third District Court of Appeal as a certified question of great public importance. The defendant, Miguel Perez, was the defendant in the trial court, the Petitioner before the Third District and shall be referred to herein as the defendant. The Honorable Joseph Farina was the Respondent below and shall be referred to as the trial court. The State of Florida shall be referred to as the State. The Record on Appeal shall be denoted by the letter "R" followed by page number. The letters "SR" refer to the Supplemental Record filed by the State, which contains the transcript of the proceedings on September 13, 1993, that was inadvertently omitted from the Supplemental Appendix below.[1]

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[1] A motion to supplement the record with this missing transcript shall be filed contemporaneously with this brief.

STATEMENT OF FACTS AND PROCEDURE BELOW

The defendant was originally arrested in January of 1990. (R. 13.) Both his 1990 arrest and the charges involved in the instant information arise from the defendant's participation in the theft of a U.S. Marshal's plane from Tamiami Airport. (R. 21-32, 64.) The State seeks to prosecute the defendant for a number of offenses, including burglary with an assault or battery, armed kidnapping, and armed robbery, all of which emanated from the theft of the plane that occurred in 1990. (Id.) Because the State was unable to proceed in 1990, it chose to "no action" the case on the 42nd day after arrest. (R. 13, 66.) In August of 1990, after the "no action," the defendant filed a Motion for Discharge, his first of two such motions. (R. 13.)

Approximately three years after the case was "no actioned," the State reopened its investigation. A determination was made that the defendant should be arrested and charges filed. The defendant filed a second motion for discharge on August 31, 1993. (R. 33-34.) At a hearing on the defendant's motion, the trial court entertained lengthy oral argument from the parties. (R. 62-129.) On September 13, 1993, the court ruled that the Supreme Court opinion in State v. Agee,[2] did not apply to a case that was "no actioned." (SR. 1-4.) The trial court denied the defendant's motion for

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[2] 622 So.2d 473 (Fla. 1993).

discharge, ruling that the State had the fifteen day window period within which to try the defendant. (Id.)[3]

The defendant pursued a writ of Prohibition to the Third District Court of Appeal. (R. 1-9.) Oral Argument was held and in an opinion dated November 30, 1993, the Third District granted prohibition on the authority of State v. Agee, certifying to this Court the issue of whether State v. Agee applies to cases which were "no actioned" rather than nol prossed.[4]

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[3] Because the defense had previously raised the issue of the defendant's constitutional right to complete discovery and its interplay with his speedy trial right, the trial court also convened a hearing on that issue. (SR. 14-53.) The trial court ruled that as of August 31, 1993, the date upon which the defendant surrendered, he had been represented by Roy Kahn and that counsel should have begun preparation for trial. (SR. 49-53.) The court denied the defendant's motion, concluding that his state of unpreparedness was due to his own acts. (SR. 52.)

[4] The question certified is:

> Whether the Holding of State v. Agee Applies When the Prosecution Is Terminated by a Voluntary Dismissal Before an Indictment or Information Rather Than a "Nolle Prosse" Filed After an Information or Indictment?

SUMMARY OF ARGUMENT

Extending the rule of law as set forth in State v. Agee, 622 So.2d 473 (Fla. 1993), to preclude the State from filing charges after a case is "no actioned," is an unwarranted and unfair application of the Agee decision. Unwarranted because neither the language or intent of the speedy trial rule nor this Court's concerns as expressed in Agee are implicated in a case in which a defendant is arrested, charges are never filed and the State announces a "no action." Unfair because unlike a case which is nol prossed, a "no actioned" case follows an arrest by police, usually without any input from the prosecuting office and without formal charges ever being filed. Under these circumstances, in the case of a "no action," the State Attorney should not be penalized because the police made a premature arrest or there is not sufficient, competent evidence to file charges and the State should not be disallowed, as in Agee, from ever filing charges once the 175-day period has expired.

Neither of the solutions offered in Agee, delaying arrest until there is an "adequate case" or extending the speedy trial period, are applicable to a "no action" situation. Police officers on the street should be authorized to arrest after a determination of probable cause is made. They are however, neither qualified nor responsible for making the legal determination of whether charges should be filed, a determination quite different from whether probable cause

exists to arrest. Only the prosecutors can make the decision of whether charges should be filed and they cannot possibly get involved in each and every case beginning with the point of arrest. A motion to extend the speedy trial period is not a viable solution because it forces a tremendous and often unnecessary expenditure of resources, on the part of the trial court, the State and the defendant, to keep abreast of a case that in all likelihood will never be filed. No significant result will be achieved by an extension of Agee to cases that are never even filed. However, a chilling effect upon law enforcement or a serious drain of the already burdened resources of the criminal justice system will result from an application of the Agee decision to "no actioned" cases.

ARGUMENT

THE COURT'S OPINION IN STATE V. AGEE, AND THE PROSCRIPTIVE EFFECT OF RULE 3.191(o), FLA.R.CRIM.P., DO NOT APPLY TO CASES WHICH ARE "NO ACTIONED" PRIOR TO THE FILING OF FORMAL CHARGES RATHER THAN CHARGES THAT ARE FILED AND THEN NOL PROSSED. THUS, A "NO ACTION" AND THE ELAPSEMENT OF THE 175-DAY SPEEDY TRIAL PERIOD SHOULD NOT BAR THE SUBSEQUENT FILING OF CHARGES.

At issue is whether Rule 3.191(o), Fla.R.Crim.P., precludes prosecution or allows the State to prosecute within the "window of recapture" after a "no action" is entered by the State and then charges are later filed beyond the 175-day speedy trial period. The only provision of the speedy trial rule that arguably would bar such a prosecution is Subsection (o), which provides:

> (o) **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.

(Emphasis added.) Analysis of the text of the rule and its intent reveals that it does not apply to "no actioned" cases.

Subsection (o) is clearly entitled "Nolle Prosequi; Effect." Moreover, the language of this section equally

clearly applies only to cases in which charges have been filed and then the State enters a nol pros. Thus, it is beyond dispute that the drafters of this subsection, by entitling it "nolle prosequi" and referring to "charged crimes," meant for the proscriptive effect of (o) to apply only to cases in which the State has actually filed charges.[5] This subsection was not intended to apply to cases that were dismissed at the arrest stage, prior to the filing of formal charges.

The focus of Subsection (o) is also clear. This subsection, (formerly (h)(2)), antedated the advent of the window period rule, which came into effect in 1985. Thus, Subsection (o) was drafted during the pendency of the 180-day automatic discharge rule. The concern of the drafters at that time was that a prosecutor would use a nol pros to avoid the time constraints of the speedy trial rule by entering a nol pros and later refiling charges. What the drafters of Subsection (o) sought to proscribe was a prosecutor, who, fearing that the 180-day time period was elapsing, nol prossing the charges to stop the speedy trial clock. As this Court stated in Stewart v. State, 491 So.2d 271, 272 (Fla. 1986), the purpose of Subsection (o) is "to prevent the state from circumventing the speedy trial rule and extending the applicable time period by nol prossing a charge and refiling a

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[5] The word "charge" for purposes of the speedy trial rule clearly refers to a filed charge. Rule 3.191(a) begins with "... every person charged with a crime by indictment or information shall be brought to trial..." This evinces the drafters' intent to equate the word charge with filed charges, not mere arrest.

new information when the time limit approaches." This is clearly the ambit of the rule and its proscriptive purpose. It does not take within its reach a "no action" of unfiled charges that is entered by the State without any intent to avoid the speedy trial rule.

The fundamental difference between the intent and effect of a "no action" and a nol pros reveals just why the drafters of the rule would be concerned with the State manipulating the speedy trial rule with a nol pros, but would not have even considered a "no action." This fundamental difference explains the drafters' limited and specific choice of words when drafting Subsection (o), a choice that includes only "nolle prosequi" and "charged crime" and not "no action" or "no information."

The State "no actions" a case because it has been determined that there is not sufficient evidence to file charges at that time. Often this occurs shortly before the 21st day after arrest, the arraignment date, to avoid the operation of Rule 3.133(b)(1) and the necessity of holding an adversary preliminary hearing.[6] The State might also "no action" a case on the 30th, 33rd or 40th day after arrest, if

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[6] Rule 3.133(b)(1), Fla.R.Crim.P., provides that a defendant who is not charged in an information or indictment within twenty-one days from arrest shall have the right to an adversary preliminary hearing.

the case was reset at arraignment to those days and the State has not yet been able to file charges.[7]

The reasons why the State "no actions" cases most often involve the unavailability of witnesses. For example, in Dade County, many cases were "no actioned" in the wake of Hurricane Andrew because an arrest was made prior to the storm and the State Attorney's Office subsequently encountered difficulties locating witnesses who had moved after the storm. A homicide case might be "no actioned" because a witness at the last minute feared retaliation from the defendant, and refused to testify before the grand jury. Sexual battery cases are frequently "no actioned" because family members of the accused are uncooperative when the victim and defendant are related. Apart from witness difficulties, a case may also be "no actioned" because although there may have been probable cause for arrest, members of the State Attorney's Office, after reviewing the evidence, decide that they cannot proceed and file charges in accordance with the governing standards of their office or because evidence that may have justified the arrest is subsequently deemed inadmissible by the attorneys who conduct the initial review.

It is apparent from this discussion, that whatever the reason for the "no action," the motivation of the State is not to avoid or defeat the intent or effect of the speedy trial

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[7] Rule 3.134, Fla.R.Crim.P., provides that the State must file formal charges within 30 days from arrest or the defendant is to be released on his/her own recognizance on the 33rd day or on the 40th day if good cause is shown.

rule. The State is not even mindful or concerned with the speedy trial rule at this very early juncture; instead, the focus of the State Attorney's Office at this point is whether charges can be filed in good faith. While it may well be that a "no action" on the 21st or 33rd day is done to avoid the effect of Rule 3.133 or 3.134, that was not the focus of those who drafted Subsection (o). Rule 3.191 (o) merely states that "the intent and effect of this rule shall not be avoided ... by a nolle prosequi." (Emphasis added.) When the State "no actions" a case, it is not doing so with the speedy trial rule in mind. Thus, the only impediment to the State's dismissing charges, Subsection (o) of Rule 3.191, does not apply to a "no action," either facially or in its intent or effect.

There are additional significant distinctions between a "no action" and a nol pros that may have led the drafters of Subsection (o) to omit reference to the "no action." A "no action" follows an arrest made by the police, often without input or supervision from the State Attorney's Office. On the other hand, a nol pros follows formal charges, which were filed by the State Attorney's Office and in which a prosecutor has signed his or her name and taken an oath as to his or her good faith in instituting charges. See Rule 3.140(g). Further, the filing of formal charges, as opposed to a mere arrest, carries with it the greater threat of prosecution and concomitantly a greater disruption upon a suspect's life and infringement upon his or her liberty. For these reasons, it may be logical to

hold the State responsible where charges are filed and later nol prossed. However, in the case of an arrest, that is not instituted by the State Attorney's Office and does not carry with it the same degree of infringement, the State Attorney's Office should not be bound.[8]

Moreover, the concern and holding of this Court in Agee are likewise limited to the nol pros. The holding of Agee is: "that when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." 622 So.2d 475 (emphasis added). The Court's ruling stemmed from its concern as expressed thusly:

> To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule - a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case. Id.

(Emphasis added.) It is apparent that the concern of the Agee Court, like that of the drafters of the speedy trial rule, was

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[8] While it is clear that under Rule 3.191(d), Fla.R.Crim.P., the speedy trial time is computed from the time of arrest and thus, in that sense, the State is bound by the actions of the police, to extend this analysis to preclude ever filing charges and proceeding to trial within the window, goes too far.

with the nol pros and subsequent refiling of charges, not with a "no action" in a case that was never even filed.

Admittedly, the Court in Agee, in offering options to the State in lieu of nol prossing, went further and opined: "The State may either postpone arresting a suspect until it has an adequate case or, if charges have already been filed, seek an extension for good cause." Id. Neither of these options is truly viable as applied to a "no action."

As discussed supra, often cases are "no actioned" because the police officer on the street makes a judgment call to arrest on probable cause that is not later supportable when viewed by lawyers in terms of prosecution. This may occur for many reasons. Sometimes, the initial probable cause determination was faulty or evidence relied upon in making a probable cause determination is later deemed inadmissible or perhaps other reasons militate against prosecution. It is important to recall that the standard for a prosecutor's office to go forward with charges is a great deal higher than that used for arrest.[9] Therefore, to submit that the prosecutor's office is bound by the actions of the police to the extent that a prosecution is later barred because of a premature arrest by

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[9] As this Court has noted: "Before filing an Information every State Attorney should not only seek probable cause in his investigation, but also determine the possibility of proving the case beyond and to the exclusion of every reasonable doubt." See In Re: Rule 3.131(b) Florida Rules of Criminal Procedure, 289 So.2d 3 (Fla. 1974). Not only is the standard for filing charges higher than that for arrest, the other considerations that bear upon a charging decision, such as admissibility of evidence, can only be made by the attorneys responsible for filing charges.

the police is an unwarranted and unfair extension of the speedy trial rule.

The Agee opinion's solution, that "the State" may postpone arresting someone until it has an "adequate case" does not adequately consider the practical realities of the situation. In the vast majority of cases, it is not "the State," in the form of the State Attorney's Office, that makes an arrest, it is the police. In most cases arrests are brought to the State Attorney's Office without any input from a prosecutor. Police officers are not attorneys. Whereas their training and expertise equip them to make an arrest on probable cause, they are neither competent nor authorized to determine what is an "adequate case" to prosecute. That is the function of the prosecutor's office. And yet, for the State Attorney's Office to get involved pre-arrest in every case within its jurisdiction and supervise whether there will be an "adequate case" for trial is simply not feasible.

On the other hand, police officers in the street are entitled, and indeed often encouraged, to make arrests after probable cause has been found. In such a manner, those for whom probable cause to arrest exists are incarcerated. To change the standard from probable cause to whether there is an adequate case could have a potentially chilling effect upon law enforcement.

Moreover, the focus of Agee was "the State," as represented by prosecutors, and their ability to manipulate the

speedy trial rule to disadvantage criminal defendants. Likewise, the Court in Agee focused on the prosecutors' options to nol prossing cases. However, unlike the ability to move to extend speedy trial, which is the prosecutor's prerogative, the decision of when to arrest is often totally out of a prosecutor's hands or unsupervised by the State Attorney's Office. The State is not monolithic for purposes of applying the Agee alternatives. Delaying arrest until there is a determination that charges can be filed is not really a viable option for a case that is ultimately "no actioned."

It is evident that the second option offered in Agee, an extension of the speedy trial rule under Subsections (i) and (l) of Rule 3.191, Fla.R.Crim.P., is inapplicable to cases in which charges have never been filed. Id. Using the previous examples at page 9, supra, it is clear that many of the reasons cases are "no actioned" will not be grounds to extend the speedy trial period. For example, a case that the State "no actioned" because a witness refused to testify before the grand jury or because of a recalcitrant family member in a sexual battery case would not constitute an exceptional circumstance justifying an extension under (l), either because the State could not assert that the "witness will become available at a later time," see Rule 3.191(e)(3), or because the absence of the witness was not "unforeseeable" or the witness's testimony is not "uniquely necessary." See Rule 3.191(l)(1), Fla.R.Crim.P. In fact, most of the witness availability

problems that cause the State to enter a "no action" would not qualify as an exceptional circumstance. It is evident from reasons (1) - (6) of Subsection (1) that the enumerated exceptional circumstances necessary to extend the speedy trial period were intended to deal with those situations in which the State had filed charges after amassing its evidence and then encountered difficulties meeting its trial date. Subsection (1) of the speedy trial rule was not intended to be used by the State to extend the speedy trial period prior to the filing of a charging document.

Additionally, an extension of speedy trial in the context of cases like the instant case is an impractical solution. The vast majority of cases that are "no actioned" by the State never result in filed charges. Thus, to suggest that rather than announcing a "no action" and setting a defendant free, that the State should instead move to extend speedy trial, perhaps indefinitely, has consequences that are not judicially sound nor desirable. Such a course would result in having a trial court indefinitely carry on its docket a case that the State may in all likelihood never pursue. This would require an unnecessary expenditure of resources by the system, because the trial courts would of necessity require a report date from the State detailing its progress, perhaps at 60 or 90-day intervals. Thus, a defendant would be required to continue to retain counsel, or the Public Defender would be forced to continue its representation, returning to court every

60 or 90 days to follow the State's progress in filing charges. Surely everyone involved in the system, defendants included, would prefer not to undertake these efforts, efforts likely to prove unnecessary, since the State may inevitably choose not to file charges.

The Third District below felt constrained to follow what it believed to be the underlying logic of Agee. As has been discussed thoroughly in this brief, the State does not believe Agee to be so far-reaching. Further, in ruling that this Court's Agee decision applied to "no actions," the Third District's opinion relied in part on Diaz v. State, ___ So.2d ___, 18 Fla. L. Weekly D2080 (Fla. 5th DCA Sept. 24, 1993). However, at the time of its opinion in the instant case, the Third District did not have the benefit of the substituted opinion in Diaz on rehearing. Diaz v. State, ___ So.2d ___, 18 Fla. L. Weekly D2542 (Fla. 5th DCA Dec. 3, 1993). On rehearing, the Court opined "[e]ven if we equate the filing of a no information with the filing of a nol pros," that because the State had refiled charges within the 175-day period, the defendant was not entitled to automatic discharge. Id. Hence, since the State had filed charges within the speedy trial period, Agee did not apply and the issue of equating a "no action" with a nol pros need never have been addressed. Thus, Diaz no longer stands for the proposition cited by the Third District in the case at bar.

In sum, there is no appreciable gain to the administration of justice from an extension of Agee to "no actions." And yet application of Agee to "no actions" could have a chilling effect upon law enforcement officers, who may become fearful that an arrest that triggers the speedy trial rule could some day bar prosecution if the case were "no actioned" and the State found itself unable to file charges within 175 days. At present, prosecutors who announce a "no action," often at the earliest possible juncture, are doing so in good faith to end the threat of prosecution and release a suspect to freedom. These are laudable actions. However, if the situation should change and the State later becomes able to proceed, it should not find itself hampered by its former conduct, conduct that was totally appropriate, indeed necessary at the time. Instead, the State should be entitled to bring a defendant to trial within the fifteen day window period, as the trial court held below.

CONCLUSION

WHEREFORE, the State respectfully requests that the certified question be answered in the negative and this cause be remanded to the trial court for trial.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

KATHERINE FERNANDEZ RUNDLE
State Attorney

By: 

LISA BERLOW-LEHNER
Assistant State Attorney
Florida Bar # 382191
1350 N.W. 12 Avenue
Miami, Florida 33136-2111
(305) 547-0666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Roy Kahn, Esquire, and Judge Joseph Farina, on this the 31st day of January, 1994.

LISA BERLOW-LEHNER
Assistant State Attorney