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.

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REPLY BRIEF OF THE PETITIONER

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ARGUMENT

THE COURT'S OPINION IN STATE V. AGEE, 622 So.2d 473 (Fla. 1993), 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 FILING OF CHARGES.

1. The Defendant's Ability to Prepare His Case.

The defendant maintains that the State's position herein, i.e., that the window period remains within which to try the defendant, will deprive him of the opportunity to fully prepare for trial. (Brief of Respondent at p. 5.) The defendant further posits that should the State's position prevail, he will be placed in the "unenviable position of having to waive his right to speedy trial, in order to preserve his Fourteenth Amendment right to due process." Id. at p. 7. Given the procedural history of this case, these assertions ring hollow.

On September 13, 1993, the trial court ruled that this Court's Agee decision did not apply to the instant case, which involved a "no action." Concomitantly, the court ruled that the State had the remaining days of the "window period" to try the defendant. (SR. 2-6.) At that point, the defendant renewed his objection to going to trial because he claimed he had not been allowed sufficient time to complete discovery.

(SR. 5-6.)[1] The trial court convened a hearing on this issue. (SR. 14-59.)

At the hearing, counsel for the defendant took the position that he could not be ready for trial in two or thirty days. (SR. 22.) The State proffered to the court that it had anticipated this as an issue and had attempted to take measures to ensure the defendant's preparedness. To this end, the Assistant State Attorney in charge of the case had tried to make available to Mr. Kahn all of the discovery as early as the defendant's arrest. (SR. 30-31.) On three separate occasions, the State offered Mr. Kahn discovery (SR. 31, 33-34); each time it was turned down. On one occasion, Mr. Kahn acknowledged that he was aware of what the State was trying to do in offering discovery and he denied representing the defendant.[2] (SR. 31.)

On August 31, Mr. Kahn surrendered his client and picked up the discovery that the State had prepared and had tried for nearly 19 days to turn over to Mr. Kahn. (SR. 22.) Kahn reviewed the discovery, organized it but did nothing further to prepare his case, other than to file and litigate the motion for discharge. (SR. 22, 35-36.)

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[1] The defendant had previously raised this issue on September 9, 1993). (R. 86.)

[2] Despite this disclaimer, Kahn always referred to the defendant as his client and continued to negotiate with the State concerning the defendant's surrender. (SR. 31.)

The State proffered that the case was not a complex one. Rather, the charges involved a simple armed robbery in which the State intended to call six or eight witnesses. (SR. 35-36.)

Based upon these facts, the trial court ruled that as of the date of the defendant's surrender, August 31, he was represented by Mr. Kahn who should have commenced discovery at that time. (SR. 50.) The court found that the State had been ready as of August 12 and that Mr. Kahn had done nothing to prepare other than review the discovery and litigate the motion for discharge. (SR. 52.) The trial court found that the defendant's state of unpreparedness was solely a result of his own actions and not any "Hobson's choice" that had been engineered by the State. (SR. 52-53.)

Clearly, in light of this record, the defendant cannot be heard to complain that his due process rights were implicated by affording the State the "window period." The State is mindful that there may well be a case in which a defendant is forced to choose between his procedural right to speedy trial and his right to complete discovery and prepare his defense. The State recognizes that it would not be fair to place a defendant in such a position and to do so might deny due process under certain circumstances. However, as is abundantly clear in the record before this Court, as was clear to the trial judge below, this is not such a case.

2. "No Action" v. Nol pros.

The State's position before this Court is that there are fundamental differences between a "no action" and a nol pros, differences that support treating the two actions differently. The defendant's tack is to blur these distinctions, in order for Agee's reach to extend to "no actions" as well as nol prosses. Hence, the defendant must argue that nol pros is a generic term referring to any voluntary abandonment of prosecution. (Brief of Respondent at p. 6.) The basic flaw with this approach is that it defies the clear language of the speedy trial rule. Rule 3.191(o) clearly deals with the abandonment of prosecution of charged crimes, the nol pros. The rule itself was only intended to apply to situations in which there are charges filed and the State abandons prosecution, not to cases in which charges were never filed. On the face of the governing rule, 3.191(o), the basic distinction between a nol pros and a "no action" is made. To blur this distinction is to rewrite the rule so as to make it applicable to uncharged crimes that are "no actioned."

The defendant reliance upon Allied Fidelity Insurance Co. v. State, 408 So.2d 756 (Fla. 3rd DCA 1982), and Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3rd DCA 1980), are unavailing since neither of these decisions deal with the speedy trial rule. To be sure, there are contexts in which an equation of the nol pros and "no action" are valid. Thus, for example, in Allied, the Third District ruled that a surety is

discharged by a "no action" as well as a nol pros. In Gatto, the court ruled that for purposes of pleading malicious prosecution, a cause of action that requires a termination of prosecution as an essential element, there is no distinction between a "no informationed" case and a nol prossed one. In neither of these cases did the Third District presume to rule that in all contexts, in all cases not before it, there is no distinction between these two forms of termination of prosecution. Instead, the courts in Allied and Gatto merely held that in the contexts before the courts, discharge of surety and malicious prosecution, it did not matter which vehicle was utilized, a nol pros or a "no action." It would be wrong to extrapolate from these cases that for purposes of applying the constraints of Rule 3.191(o), which clearly differentiates between filed and unfiled charges, that there is no difference. Such an extrapolation would fly in the face of the clear words used in the rule, as they evince the obvious intent of its drafters, that subsection (o) was meant to apply only to charged crimes.

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,

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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 14 day of March, 1994.

LISA BERLOW-LEHNER
Assistant State Attorney