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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,030

THE HONORABLE MICHAEL A. GENDEN,
Judge of the Circuit Court for
the Eleventh Judicial Circuit,
in and for Dade County,

Petitioner,

vs.

WILLIAM FULLER,

Respondent.

* * * * *

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.

The defendant, most notably in his Summary of Argument, posits that the provisions of the speedy trial rule afford the State 190 days (175 + 15), within which to try a felony case. The defendant implies that the two distinct periods as provided for under the rule, the 175-day period and the 15-day "window of recapture," must be contiguous. This interpretation of Rule 3.191 is clearly incorrect. The window period takes effect whenever the defendant files his notice of expiration of speedy trial, and while this may occur immediately after the expiration of the 175-day speedy trial period, it need not.

Secondly, the defendant's reliance on the Third District opinion in Allied Fidelity Insurance Co. v. State, 408 So.2d 756 (Fla. 3rd DCA 1982), to support his contention that a "no action" has the same effect as a nol pros for purposes of the speedy trial rule is misplaced. The Allied decision did not remotely deal with the speedy trial rule. To be sure, there are contexts in which an equation of a nol pros and "no action" is 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. However, the Third District never presumed to rule that in other contexts, in all cases not before it, there is no distinction between these two forms of termination of prosecution. Instead, the court in Allied merely held that under the circumstances of that case, the discharge of a surety, it did not matter which vehicle the State utilized, a nol pros or a "no action." It would be wrong to extrapolate from this case that for purposes of applying the constraints of Rule 3.191(o), which was not at issue in Allied and which by its clear language differentiates between filed and unfiled charges, that there is no difference between a "no action" and a 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 to nol prosses. Hence, the defendant must argue that nol pros is a generic term referring to any voluntary abandonment of prosecution. The basic flaw with this approach is that it defies the clear language of the speedy trial rule. Rule 3.191(o) expressly deals with the abandonment of prosecution of "charged" crimes, the nol pros. On the face of the governing rule, 3.191(o), the basic distinction between a nol pros and a "no action" is manifest. To blur this distinction is to rewrite the rule so as to make it applicable to uncharged crimes that are "no actioned."

Finally, the defendant has attempted to highlight the fact that the record is unclear as to why the State chose to "no action" this case in December of 1992. The record silence on this issue is due to two reasons. First, this Court made it abundantly clear in its Agee decision that the State's good faith vel non in not pressing charges is irrelevant. Hence, for the State to put forth its reasons for "no actioning" a case would be a futile gesture if Agee were to apply to "no actions." Second, the State has always maintained that the proscriptive effect of Subsection (o), the only portion of Rule 3.191 that could remotely apply to a "no action," does not apply. Therefore, since Subsection (o) does not even apply, there is no need for the State to have set forth the reasons why its actions should be exempted from Subsection (o)'s reach because of good faith. Simply stated, if Subsection (o) does not apply, the trial court need not be apprised of the State's motive.¹

¹ Clearly, if a defendant were to claim that the State had denied him due process, as distinguished from violating his rule speedy trial rights, by deliberately "no actioning" a case to delay trial, such a claim could be entertained and the State's motives and intent would indeed be at issue. No such claim has ever been made in the instant case.

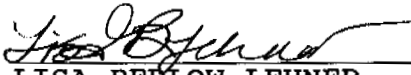
CONCLUSION

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,

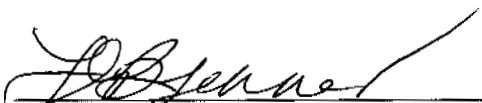
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Assistant Public Defender Bruce Rosenthal, and Judge Michael Genden, on this the 6th day of April, 1994.


LISA BERLOW-LEHNER
Assistant State Attorney