IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,097

DCA No. 97-588

THE STATE OF FLORIDA,

Petitioner,

vs.

Jorge Olivo,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

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REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF AUTHORITIES

OTHER AUTHORITY

INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the appellant in the Third District Court of Appeal and the prosecution in the trial court. Respondent, JORGE OLIVO, was the appellee in the court of appeal and the defendant in the trial court. The parties will be referred to as they stood before the trial court, i.e., the Petitioner will be referred to as "the State," and the Respondent will be referred to as he stood in the trial court, or "the defendant."

The symbol "R" will be used to refer to the Record on Appeal. The symbol "T" will be used to refer to the transcript of the hearing. The symbol "SR" will be used to refer to the appendix filed with the State's motion to supplement the record on appeal, which consists of Exhibits A through G, as appended to the State's Initial Brief on direct appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

Apellant certifies that the size and style of type used in this brief is 12 point Courier New.

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts contained in its Petitioner's Brief on the Merits, and submits that the Respondent's Statement of the Case and facts is argumentative and should be stricken.

SUMMARY OF THE ARGUMENT

The defendant's reliance in his Answer Brief on the *State v. Agee*, 622 So. 2d 473 (Fla. 1993) line of cases, is misplaced. In *Agee*, the State had filed charges against the defendant but later entered a nol pros, only to re-file the charges after the speedy trial period expired. That did not occur here. Moreover, the defendant's statement to the Court that *Zabrani v. Cowart*, 506 So. 2d 1035 (Fla. 1987) and *Bloom v. McKnight*, 502 So. 2d 422 (Fla. 1987) have been overruled on the point at issue herein, is inaccurate and misleading.

This Court's opinion in *Agee* made clear that it receded from Zabrani and Bloom to the extent that the opinions in those cases suggested that the window of recapture would apply even in cases where the State had nol prossed existing charges and then refiled them, based on the same conduct, after the speedy trial period had expired. Sub judice, the State did not enter a nol pros or a "no action," or even suggest that it would. On the contrary, it filed an information within the speedy trial period of Florida Rule of Criminal Procedure 3.191(a).

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DISMISSED THE INFORMATION PURSUANT TO THE JUVENILE SPEEDY TRIAL RULE, SINCE THE STATE HAD NEVER FILED A PETITION IN JUVENILE COURT AND HAD INITIATED THE CASE AS A DIRECT FILE IN THE ADULT DIVISION OF THE CIRCUIT COURT WITHIN THE TIME ALLOWED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(a).

The district court of appeal's decision to affirm the trial court's dismissal of the timely filed information against the defendant, should be quashed. The trial court's dismissal of the information constituted an abuse of discretion.

The defendant misplaces his reliance on *State v. Agee*, 622 So. 2d 473 (Fla. 1993). In *Agee*, this Honorable Court agreed with the district court's holding that "where the speedy trial period has run and the defendant could have secured a discharge but for entry of a nol pros, the defendant is entitled to automatic dismissal if charges are refiled." *Id.* at 474. This Court then held: "[W]hen 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." *Id.* at 475. *Sub judice*, since there was no petition filed within the juvenile speedy trial period, there were no charges for the State to nol pros and no justifiable reason for the defendant to think himself released from

the jurisdiction of the court. Therefore, *Agee* does not apply.

The State in the present case also did not announce that it had terminated the prosecution at any time during the juvenile speedy trial period. Thus, this case is also not controlled by *Genden v. Fuller*, 648 So. 2d 1183 (Fla. 1994), where this Court held that the *Agee* reasoning applied in cases where the State had voluntarily terminated the prosecution by announcing that it would bring "no action" in the case. The State never declined to prosecute this defendant.

In the present case, the State did not file a petition for delinquency at all. Therefore, the trial court's outright dismissal of the duly filed information based upon a perceived violation of the juvenile speedy trial rules, was error. See Fla.R.Juv.P. 8.090. The rule is very clear that it applies, "If a **petition** has been filed..." Fla.R.Juv.P. 8.090(a). Since there was no petition filed here, there was no triggering event under the juvenile speedy trial rule. The State was not bound by the ninety (90) day time limitation. *See Bell v. State*, 479 So. 2d 308 (Fla. 2d DCA 1985); *Parr v. State*, 415 So. 2d 1353 (Fla. 4th DCA), pet. for rev. denied, 424 So. 2d 763 (Fla. 1982).

The defendant makes the presumptuous statement that the State, in its Initial Brief, "failed to recognize or acknowledge" that the Court in *Agee* "specifically overruled" *Zabrani v. Cowart*, 506 So. 2d 1035 (Fla. 1987), and *Bloom v. McKnight*, 502 So. 2d 422 (Fla. 1987), on the point of the availability of the recapture window (Respondent's Brief, page 14) which was added to the Rules of Procedure after *State v. Perez*, 400 So. 2d 91 (Fla. 3d DCA 1981), *rev. denied*, 412 So. 2d 470 (Fla. 1982). However, it appears that it is the defendant who failed to recognize or acknowledge what the *Agee* Court actually wrote.

The *Agee* Court made abundantly clear that it receded from *Zabrani* and *Cowart* to the extent that they suggest the fifteen-day window of recapture applies in cases where the State has filed a nol pros. 622 So. 2d at 476. Thus, the State did not fail to recognize or acknowledge anything. The State simply disagrees with the defendant's representation of *Agee* as an opinion which overruled those cases as they would apply to the instant facts. As noted earlier, the State did not enter a nol pros, nor did it file a "no action" in this case.

Announcement of a "no action" or a nol pros serves to release the accused from his obligations to the court and simulaneously

discharges the surety. Thus, when the State later files an information against the released accused, his presence before the trial court must be acquired, not through a letter, but through the process or order of the court, e.g., by summons or, if necessary, an arrest warrant. *See e.g., Allied Fidelity Insurance Co. v. State*, 408 So. 2d 756, 757 (Fla. 3d DCA 1982). Since the present defendant was never released, he was never outside the jurisdiction of the trial court. Thus, an "arrest" was not legally necessary to bring him back into court after his initial arrest as a juvenile, unless he failed to appear and the trial court found itself in the position where it had to issue an alias capias.

The defendant, relying on *Genden v. Fuller*, 648 So. 2d 1183 (Fla. 1994), argues that since the defendant was not brought back into court until April 9, 1996 on an alias capias, and the 175-day speedy trial period ran on Friday April 5, 1996 (which, incidentally, was Good Friday and an official circuit court holiday), the defendant is entitled to discharge even independently of the issue of whether the State could file an information beyond the ninety (90) days. The State submits that the defendant, by failing to make this particular argument before the Third District Court of Appeal, deprived the State of the

opportunity to respond to this point before the district court of appeal, where the State would have had the opportunity to supplement the record before the district court of appeal with documents from the court file, such as the Notice to Appear, which the defendant likely ignored and which necessitated the issuance of an *alias capias* to secure his appearance in court after the information was filed. The State submits that what occurred on April 9, 1996, was not an "arrest," as the defense paints it, under *Genden* at all, but simply a manner in which to get the defendant back into court after a failure to appear.

Florida Rule of Criminal Procedure 3.191(j), which addresses delay and continuances, provides that a defendant's failure to appear is a delay or continuance chargeable to the defense, which is sufficient to withstand a motion for discharge for failure to commence trial within the time period established by the rule:

> **(j) Delay and Continuances; Effect on Motion.**
>
> If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that:
> ...
>
> (3) the accused was unavailable for trial under subdivision (k); or..
> ...

> If the court finds that discharge is not appropriate for reasons under (2), (3), or (4), the pending motion for discharge shall be denied, provided, however, that trial shall be scheduled and commence within 90 days of a written or recorded order of denial.

Subdivision (k) then provides, in pertinent part,

> **(k) Availability for Trial.** A person is unavailable for trial if the person or the person's counsel fails to attend a proceeding where either's presence is required by these rules, ...

However, since the defendant did not make the argument in the Third District Court of Appeal that the State failed to comply with Rule 3.191(a), to which the State could have responded with record support, the State is now precluded from providing a complete record to this Court.

Also because of the defendant's failure to make such an argument to the district court of appeal, there is no way of ascertaining whether the district court would have even certified conflict with the other district courts of appeal based on *Perez*, had it considered the argument now being made based upon a factually developed record on appeal.

Very significantly, the State was never given the opportunity to respond below to any claim of noncompliance with Florida Rule of Criminal Procedure 3.191(a), since the trial court made it

abundantly clear that it would proceed no further than its consideration of the fact that the information was filed beyond the ninety (90) day speedy trial period in light of *Perez*. Thus, the State was foreclosed from developing a factual basis in this regard. That being the case, and given that this is not the proper forum for the development of a factual basis, the State respectfully submits that the argument should not be considered and that the Court limit its consideration to the conflict question.

The State is mindful of the concerns expressed in the *Agee* and *Genden* line of cases, but submits that those concerns should not be implicated here. The State did not fail to act for several months after it filed its information or otherwise fail to notify the defendant of said charges filed March 19, 1996, for an unreasonable amount of time.

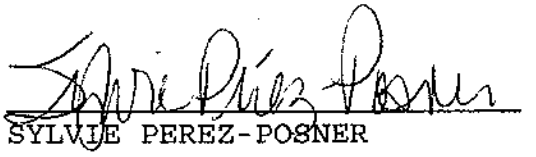
Accordingly, the State prays this Honorable Court will limit its consideration of this case to the conflict question, quash the district court's decision, approve *Bell*, and remand the cause for further proceedings.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Third District Court of Appeal should be quashed and the cause remanded for reinstatement of the charges against the defendant in the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by mail to Bruce Rosenthal, Esquire, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on this 3rd day of June, 1999.

SYLVIE PEREZ-POSNER
Assistant Attorney General