

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: 2013-AP-16-A-O  
Lower Case No.: 2013-MM-000117-A-W

STATE OF FLORIDA,

Appellant,

v.

ALAN Y. VIEYRA,

Appellee.

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Appeal from the County Court  
for Orange County, Florida  
James A. Craner, County Court Judge

Jeffrey Ashton, State Attorney,  
and Dugald McMillan, Assistant State Attorney  
for Appellant

No Appearance for Appellee

Before EGAN, SCHREIBER, GRINCEWICZ, J.J.

**PER CURIAM**

**FINAL ORDER REVERSING TRIAL COURT**

Appellant, the State of Florida, appeals the trial court's "Order Dismissing Charges" for Petit Theft rendered on May 6, 2013. We reverse and remand.

On January 26, 2013, Appellee, Alan Vieyra, was issued a Notice to Appear for a Petit Theft charge with a date to appear before the trial court on February 27, 2013, at 8:00 a.m. On February 8, 2013, the Orange County Clerk of the Court issued a Notice of Arraignment to the Appellee for February 27, 2013, at 1:00 p.m.

On February 27, 2013, the Appellee appeared before the trial court, was arraigned, entered a plea of not guilty, and the case was set for a pre-trial conference on March 18, 2013.<sup>1</sup> Subsequently, the case was reset for a pre-trial conference on April 22, 2013, and Appellee again appeared before the trial court on that date and the case was again set for a pre-trial conference on April 29, 2013.<sup>2</sup>

On April 29, 2013, Appellee failed to appear and the trial court found there was a waiver of speedy trial.<sup>3</sup> On April 29, 2013, a status hearing was set for May 6, 2013. On May 6, 2013, the trial court *sua sponte* dismissed the charge against Appellee in an Order titled “Order Dismissing Charges.”

In its Order, the trial court found that “[n]o Information has (ever) been filed against Vieyra; more than ninety (90) days has elapsed since Vieyra was investigated and received said paperwork. The matter was reset several times by the Court prior to the running of ninety (90) days. Vieyra has not waived speedy trial.” The State objected to the trial court’s *sua sponte* dismissal. This appeal followed.

The State contends the Notice to Appear was a sufficient charging document, however, the trial court ruled it could dismiss the charges *sua sponte* because the State failed to comply with Florida Rule of Criminal Procedure 3.125, and based upon Florida Rule of Criminal

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<sup>1</sup> February 27, 2013, Court Minutes reflect “State to make charge decision.”

<sup>2</sup> April 22, 2013, Court Minutes reflect “State has not filed an Information.”

<sup>3</sup> April 29, 2013, Court Minutes reflect a failure to appear and a waiver of speedy trial.

Procedure 3.191, the State cannot file an Information beyond the ninety (90) day speedy trial time constraint for misdemeanor offenses.<sup>4</sup>

The State argues that in the absence of a statute or motion to dismiss, the decision to dismiss or prosecute is to be made solely by the State, and that even if the trial court's analysis of the Notice to Appear was correct, in that it did not comply with rule 3.125, the trial court's *sua sponte* dismissal was an abuse of discretion and must be reversed. Appellee did not file an Answer Brief.

*Sua sponte* orders dismissing charges are reviewed by an abuse of discretion standard. *State v. Brosky*, 79 So. 3d 134 (Fla. 3d DCA 2012); *State v. Leon*, 967 So. 2d 437 (Fla. 4th DCA 2007). As the State argues, the decision to prosecute or dismiss charges is a decision to be determined solely by the State in the absence of a statute or motion to dismiss. *Brosky*, 79 So. 3d at 135; *Leon*, 967 So. 2d at 437. Even if the court believes dismissal would be in the best interest of the public and parties, the decision to prosecute is exclusively within the discretion of the State. *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982); *State v. Wheeler*, 745 So. 2d 1094, 1096 (Fla. 4th DCA 1999); *State v. Franklin*, 901 So. 2d 394, 395 (Fla. 5th DCA 2005).

The provisions of rule 3.191 make it evident that it is not self-executing and requires the accused take affirmative action to trigger its application. *State v. Gibson*, 783 So. 2d 1155, 1158 (Fla. 5th DCA 2001); *State v. Clifton*, 905 So.2d 172, 175 (Fla. 5th DCA 2005). Therefore, the trial court's *sua sponte* dismissal of the charge was an abuse of discretion and the order of dismissal must be reversed.

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<sup>4</sup> The May 6, 2013, Order indicates Vieyra did not waive speedy trial, however, Court Minutes dated April 29, 2013, reflect a waiver of speedy trial for failing to appear.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order dismissing the charge of Petit Theft is **REVERSED** and this matter is **REMANDED** for reinstatement of the charge.

**REVERSED** and **REMANDED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 15th day of April, 2014.

/S/ \_\_\_\_\_  
**ROBERT J. EGAN**  
**Presiding Circuit Judge**

SCHREIBER and GRINCEWICZ, J.J., concur.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing order was furnished by U.S. mail or hand delivery to **Dugald McMillan, Assistant State Attorney**, Office of the State Attorney, 415 North Orange Avenue, Post Office Box 1673, Orlando, Florida 32801; and to **Alan Y. Vieyra**, 11136 Crystal Glen Blvd., Orlando, Florida 32837, on this 15th day of April, 2014.

/S/ \_\_\_\_\_  
Judicial Assistant