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

APPELLATE CASE NO: 2013-AP-17-A-O
Lower Case No.: 2013-MM-000137-A-A

STATE OF FLORIDA,

Appellant,
v.

VICTOR GONZALEZ ROLDAN,

Appellee.
_____/

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 MYERS, S. KEST, LEBLANC, J.J.

PER CURIAM

FINAL ORDER REVERSING TRIAL COURT

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

On February 3, 2013, Appellee, Victor Roldan, was issued a Notice to Appear for a Petit Theft with a date to appear before the trial court on February 28, 2013, at 8:00 a.m.

On February 28, 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.

On March 18, 2013, Appellee appeared before the trial court and the case was again set for a pre-trial conference on May 6, 2013.[1]

On May 6, 2013, the trial court sua sponte dismissed the charge against Appellee in an Order titled "Order of Disposition." In its Order, the trial court found that the State did not file an Information within ninety (90) days. 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 placed on the record that 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 Procedure 3.191, the State cannot file an Information beyond the ninety (90) day speedy trial time constraint for misdemeanor offenses.

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). 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.*

[1] March 18, 2013, Court Minutes reflect "State has not filed an Information."

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.

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 7th day of April, 2014.

/S/
DONALD A. MYERS, JR.
Presiding Circuit Judge

S. KEST and LEBLANC, 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 **Victor Roldan**, 1213 Osprey Way, Apopka, Florida 32712, on this 8th day of April, 2014.

/S/
Judicial Assistant