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SOL vs. Nolle? What is the difference? The Ferguson Formula

By Sean D. Brady

Ferguson v. City of Chicago, 213 Ill. 2d 94, 820 N.E.2d 455 (2004)

What is the difference between a criminal case that is stricken with leave to reinstate (SOL'd) and a criminal case that is *nolle prosequi*? For some attorneys, especially those outside of Cook County, the differences between the two may not be well known. However, there are significant differences between the two outcomes. Those differences are explained in the case of *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 820 N.E.2d 455 (2004).

Mr. Ferguson was arrested by the Chicago police and charged with several misdemeanor offenses. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 97 (2004). The prosecutor determined that the arresting officer had lied and then asked that the charges be "stricken with leave to reinstate" (SOL'd). *Id.* On August 25, 2000, the trial court granted the prosecutor's SOL request. *Id.* Mr. Ferguson's attorney immediately filed a written speedy trial demand. *Id.* at 97-98. The 160 day speedy trial period ran out on February 1, 2001

without any further action in the criminal case. *Id.* at 98.

Mr. Ferguson filed a complaint for malicious prosecution on January 29, 2002. *Id.* In response, the City of Chicago filed a motion to dismiss the malicious prosecution complaint arguing that pursuant to 735 ILCS 5/2-619(a)(5), the one year (1) year statute of limitations under the Tort Immunity Act expired in August of 2001. *Id.* The trial court granted the City's motion to dismiss and the appellate court affirmed. *Id.* However, the Illinois Supreme Court reversed. *Id.* at 105.

The court stated, "A cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been terminated in the plaintiff's favor." *Id.* at 99. Thus, Mr. Ferguson's claim hinged on when the one (1) year statute of limitations period began. The City of Chicago argued that the criminal proceeding was terminated and the statute of limitations began to run on August 25, 2000 - the day the case was SOL'd. *Id.* At 99-100. Mr. Ferguson argued that the criminal proceedings were terminated and the statute of limitations began to run on February 1, 2001 - the day his 160 day speedy trial period expired. *Id.* at 100. Thus, the Illinois Supreme Court looked at when Mr. Ferguson's criminal proceeding terminated and for that it discussed the differences between a case that is SOL'd and a case that is a Nolle Prosequi.

SOL

The court pointed out that striking a case with leave to reinstate is not provided for by any statute or rule. The

court recognized that striking with leave to reinstate is a common practice in Cook County criminal cases. "Where a case is stricken with leave to reinstate, the matter remains undisposed of. The same charges continue to lie against the accused, albeit in a dormant state." *Id.* at 100, 459. The Court pointed out that the case can be put back on the docket by a motion to reinstate. Illinois courts "have consistently recognized that the striking of charges with leave to reinstate does not terminate the proceedings against the accused." *Id.* In Illinois, "charges stricken with leave remain pending." *Id.* at 102, 461. Furthermore, when a case is SOL'd the statute of limitations is tolled but the speedy trial period continues to run if the defendant demanded trial.

Nolle Prosequi

A *nolle prosequi* order is "a formal entry of record whereby the prosecuting attorney declares that he is unwilling to prosecute a case." A *nolle prosequi* order ends the case. When a case is *nolle prosequi*, the statute of limitations continues to run but the speed trial period is tolled. When a case is *nolle prosequi*, new proceedings are required if the prosecutor wishes to pursue the defendant in the future.

The court stated, "Because an SOL order does not finally dispose of criminal proceedings, the circuit court's order of August 25, 2000, striking the criminal charges against Ferguson with leave to reinstate did not result in a termination, favorable or otherwise, of the criminal case against him. The criminal charges remained pending." *Id.* at 100-101, 459-460. Accordingly, the court determined

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that the statute of limitations did not begin to run on the day of the SOL order on August 25, 2000. The court held that the criminal proceedings against Mr. Ferguson terminated when the speedy trial period had expired and the State was prohibited from reinstating the charges against him. Thus, the one-year statute of limitations began to run on February 1, 2001 and as a result, the malicious prosecution complaint was filed within the one-year statute of limitations.

Recently, prominent Will County DUI defense Attorney Ted P. Hammel of

Brumund, Jacobs, Hammel, Davidson & Andreano, LLC, attempted to obtain two dismissals for speedy trial violations citing *People vs. Ferguson*. Both cases involved the filing of a speedy trial demand and the eventual entry of a *nolle prosequi*. The prosecution re-filed both cases. Citing what Atty. Hammel now calls the "Ferguson Formula," the Will County Courts were reluctant to concur with Atty. Hammel. The trial courts interpreted the *Ferguson* language as dicta, as opposed to a direct holding. No appeal was taken, as the cases were dismissed/nolled on unrelat-

ed grounds. However, with the dramatic increase in the number of nolled/re-filed criminal cases, Atty Hammel encourages attorneys to file speedy trial demands in order to eventually resolve this issue.

What can a defense attorney take away from *Ferguson*? If a case is SOL'd, follow the example of Mr. Ferguson's attorney and file a written speedy trial demand. If a case is SOL'd and no speedy trial demand is filed, then the case remains pending and theoretically could be reinstated at any time because the statute of limitations has been tolled.