

Motions to Discharge:
A Game of Cat-n-Mouse

John Hascall and April O'Loughlin

Constitutional Speedy Trial

- Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. State v. Feldhacker, 267 Neb. 145, 672 N.W.2d 627 (2004).
- But the constitutional right to a speedy trial is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities had knowledge of the offense. State v. Meese, 257 Neb. 486, 599 N.W.2d 192 (1999);
- In State v. Huebner, 245 Neb. 341, 513 N.W.2d 284 (1994), we noted that the Due Process Clause requires dismissal of an indictment only if the defendant shows that the prosecuting authority's delay in charging him caused substantial prejudice to his right to a fair trial. See, also, United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)

29-1207 Trial within six months

- (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
- (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed, unless the offense is a misdemeanor offense involving intimate partners, as that term is defined in section 28-323, in which case the six-month period shall commence from the date the defendant is arrested on a complaint filed as part of a warrant for arrest.
- (3) If a defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.

29-1208 Discharge from offense charged

- If a defendant is not brought to trial before the running of the time for trial as provided for in section 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.

When does the clock start?

- Misdemeanors- Once the complaint is filed. Unless it is a Domestic Violence case, then
- Domestic Violence Misdemeanor- Once the Defendant is arrested.
- Felonies- Once the indictment is returned or the information is filed.

Excludable periods of time

- (4) The following periods shall be excluded in computing the time for trial:
 - (a) The period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement, and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
 - (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he or she has been advised by the court of his or her right to a speedy trial and the effect of his or her consent. A defendant who has sought and obtained a continuance which is indefinite has an affirmative duty to end the continuance by giving notice of request for trial or the court can end the continuance by setting a trial date. When the court ends an indefinite continuance by setting a trial date, the excludable period resulting from the indefinite continuance ends on the date for which trial commences. A defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period;

Excludable periods of delay at request of prosecutor

- (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
 - (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or
 - (ii) The continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case;
- (d) The period of delay resulting from the absence or unavailability of the defendant;
- (e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases, the defendant shall be granted a severance so that he or she may be tried within the time limits applicable to him or her; and
- (f) Other periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause.

Burden on the Defendant

- Burden is on Defendant to show the he has not been tried within 6 months.
- How do you do that?
- Ask the court to take judicial notice of the court file. Then offer your exhibit of your calculation.
- Get certified copy of the court file and offer it as an exhibit. Then offer your exhibit of your calculation.
- If it has been more than 180 days since the filing of the complaint, or information, then the burden shifts to the state.

Burden on the State

- When a defendant is not tried within six months, it is the State's burden to prove one or more of the statutorily excludable time periods apply. To overcome a motion for discharge on statutory speedy trial grounds, the State must prove existence of excludable period by a preponderance of the evidence. § 29-1207(4); *State v. Stubbs*, 5 Neb. App. 38, 45, 555 N.W.2d 55, 60 (1996) aff'd, 252 Neb. 420, 562 N.W.2d 547 (1997).
- State has the burden to show that the delay falls under 29-1207(4)(a or b)
- State has the burden to show that their delay was under 29-1207(4) (c-e)
- State has the burden to show that their delay was based on good cause 29-1207 (4)(f)

Burden of Proof

- It is the responsibility of the State to provide an accused with a speedy trial, and it is the State's responsibility to prove that a given time period is not applicable to the speedy trial calculation. *State v. Dailey*, 639 N.W. 2d 141 (Neb. 2002).
- The primary burden of bringing an accused person to trial within the time provided by law is upon the State.. *State v. Beitel*, 296 Neb. 781, 895 N.W. 2d 710 (2017).
- The burden of proof is on the State to show, by a preponderance of the evidence, that one or more of the excluded periods under § 29-1207(4) are applicable. *State v. Beitel*, 296 Neb. 781, 895 N.W.2d 710 (2017).
- Preponderance of the evidence requires proof that would lead a jury to find that the existence of the contested fact is more probable than its nonexistence. *State v. Taylor*, 840 N.W. 2d 526 (Neb. 2013).

State v. Richter 240 Neb 223 (1992)

- State has burden to show diligent efforts to secure defendant's appearance at hearing on charges.
- Excludable period does not begin if defendant fails to appear at hearing of which he has no notice.
- Diligent efforts-
 - No Actual service of the court notice
 - No Certified mail with return receipt
 - Police knocked on last known residence 6 times
 - Did not contact post office to see if he moved
 - No effort to contact any of his relatives who live in the area

Richter continued

- When does this situation occur? All the time
- Probable cause affidavits for arrest warrants
 - Bad checks, forgery charges, thefts, assaults. (Any time when the person is not arrested or cited on the spot.)
- Juvenile court cases in which officer leaves the date TBD
- Indictments, Direct Information

State v. Sumstine 478 N.W.2d 240 (1991)

- Doctrine of “tacking,” for Speedy Trial Act purposes, allows joining or combining periods which have a nexus for continuity of time involved in separated events or actions.
- When State dismisses information against defendant and subsequently files information against defendant which alleges same offense charged in dismissed information, offense committed simultaneously with lesser included offense charged in dismissed information, or commission of crime that is lesser included offense of crime charged in dismissed information, time which elapses during pendency of both informations shall be charged against State for Speedy Trial Act purposes, subject to statutory provision for excludable time.

State v. Retzlaff

- Client was a former police officer who was an alcoholic and stole money from the safe at the convenient store in which he worked. \$6000.00
- Approved for diversion. Signed a “waiver” at the diversion office.
- Arraigned- paid some restitution. Case was dismissed.
- Case was then refiled when he failed out of diversion.

State v. Retzlaff

- An accused has the right to waive speedy trial and consent to a continuance as long as he is properly advised either by counsel or the court of his right to speedy trial. *State v. Williams*, 211 Neb. 650, 654, 319 N.W.2d 748, 751 (1982).
- Once the Court has accepted a waiver of speedy trial rights on the record, then the waiver existed and was presumed valid. *State v. Andersen*, 232 Neb. 187, 194, 440 N.W.2d 203, 210 (1989).

State v. Williams 277 Neb 133 (2009)

- Trial court is required to make specific findings in record regarding calculation and description of excludable periods;
- Practice Pointer-Do your own calculation and mark it and offer it as an exhibit.

Calculation for State v. Retzlaff CR14-326 (Sarpy County Case)

Speedy trial Calculation

CR14-91

- 3/17/14 Information Filed
- 5/23/14 Case dismissed without prejudice 67 days

CR14-326

- 8/20/14 Information Filed
- 10/24/14 PTC/Defendant's Motion to Continue 65 days
- 12/5/14 PTC/Set case for Trial 0 days
- 2/15/15 Motion to Discharge 71 days

203 days

IN THE COUNTY COURT OF SARPY COUNTY, NEBRASKA

FILED BY THE CLERK
SARPY COUNTY COURT
2014 JAN 24 PM 11:27

THE STATE OF NEBRASKA,

Plaintiff

vs

MICHAEL C. RETZLAFF

WAIVER OF SPEEDY TRIAL

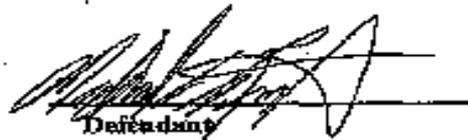
Case No CR 13-0683

Defendant

COMES NOW Michael C. Retzlaff, knowing and understanding my right to trial within six (6) months from the time the criminal complaint is filed and hereby waive my rights to a speedy trial of any and all charges in the above-captioned matter.

I acknowledge and affirm that this waiver of my personal right to a speedy trial is a free and voluntary act on my part, and that said act has not been induced by any threats, promises, duress, or undue coercion.

Dated this 21 day of January 2014.


Defendant

Attorney for same

Valid Waiver?

- Not advised by Judge
- Not advised by attorney
- Not acknowledged by his attorney
- Waiver was under county court case number under county court caption.

Can you waive a right in county court for a district court case?

Can the state use a waiver on the first case that was dismissed and wasn't the corresponding county court file on this felony file?

State v. Karch 639 N.W.2d 118 (2002)

- An amended complaint or information which charges a different crime, without charging the original crime, constitutes an abandonment of the original complaint or information and acts as a dismissal of the same.

State v. French 633 N.w.2d 908 (2001)

- If the amendment to the complaint or information does not change the nature of the charge, then the time continues to run against the State for purposes of the Speedy Trial Act, but if the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information, and the original charges have been abandoned or dismissed.

State v. Gibilsco 778 N.W.2d 106 (2010)

- Filing of amended information which added four new charges of first degree sexual assault based on four additional incidents of sexual assault against the same victim during the same time period as had been alleged with respect to the charge found in the original information restarted the speedy trial clock on the new charges, and thus defendant was not denied his statutory right to a speedy trial on the new charges; each of the new charges required State to present separate, additional evidence in order to prove each additionally alleged crime beyond a reasonable doubt.

Potential Defenses

- Ambiguous Continuances
- 29-1207 (f) Good Cause-State's requirements
 - Shippler
 - Round Tree
 - Vela-Monte
- Objections to Good Cause
 - State v. Baird
 - Retroactivity
 - Sua Sponte

State v. Hettle 848 N.W.2d 582 (2014)

- For purposes of waiving the statutory six-month speedy trial period, a defendant's motion for indefinite continuance in an ongoing prosecution under the same case number applies not only to those charges that were pending at the time the motion was made, but also to any charges later added by amendment;
- State's addition of misdemeanor charge to information following defendant's motion for indefinite continuance did not change defendant's obligation to give notice of request for trial in order to end excludable period of time from statutory six-month speedy trial period;

State v. Baird 609 N.W.2d 349(2000).

- To find good cause under 20-1207 (f), court must make specific findings as to good cause which resulted in the extension of time;
- State v. Baird: the trial court, *sua sponte*, issued an order continuing a criminal trial based upon congestion in its court docket. As the reason case couldn't be tried in 6-month speedy trial time period. *State v. Baird*, 609 Neb. 350 (2000). Additionally, the trial court attempted to establish good cause on its' own by simply taking judicial notice of its' crowded scheduling docket. *Baird*, 609 Neb. at 350.
- The Nebraska Supreme Court reversed the trial court's finding of good cause noting that "it was the burden of the State in the instant case to establish facts showing that good cause existed for the district court to delay the appellants' trials beyond the 6-month time period,"
- The introduction of evidence necessary to establish good cause rests *solely* with the State and absent a showing by the State, facts presented by the trial court alone are not enough.
- A trial court cannot shoulder the burden of producing sufficient evidence to establish good cause, the burden of creating a record must rest independently with the State. Since the State failed to offer evidence substantiating the heaviness of the court's docket, the State failed to meet its' burden mandated under § 29-1207.

State v Bruckner CR20-56 (On Appeal)

- Judge Smith, sua sponte makes record continuing the trial for good cause based on Covid-19. No evidence was put on by the State, no exhibits offered or admitted, nor did Judge take Judicial notice of any prior Covid Proclamation.
- Retroactive attempts by the State to establish good cause based on State v. Baird.

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

STATE OF NEBRASKA,)	DOC.
)	
Plaintiff,)	
)	
vs.)	DEFENDANT'S SPEEDY TRIAL
)	CALCULATION
BYRON BRUCKNER ,)	
)	
Defendant,)	

Comes Now the Defendant, by and through his attorney of record, April O'Loughlin, and who hereby offers the following exhibit in support of his Motion to Discharge:

1/30/20 Information Filed

7/31/20 Speedy Trial runs

Excludable Time under §29-1207:

3/18/20 Defendant's Motion to Continue
Granted...set for Status Hearing on 4/7

3/19/20 Defendant's Motion for Deposition

3/31/20 Deposition Granted – Status Hearing Cancelled

4/13/20 Defendant's Mot to Reconsider

4/21/20 Jury Trial set for July 22

4/23/20 Order on Def Mot to Reconsider Filed

36 DAYS TOTAL EXCLUDABLE FROM 3/18 TO 4/23

5/13/20 Defendant's Motion to Produce

6/9/20 Order of Defendant's Motion to Produce

28 DAYS TOTAL EXCLUDABLE FROM 5/13 TO 6/9

7/7/20 Order entered setting new Jury Trial date of 9/15 – No Defendant's Mot to Cont –
Def Oral Motion to Produce Witness for Deposition

7/14/20 Order entered allowing Production of Witness for Deposition

8 DAYS TOTAL EXCLUDABLE FROM 7/7 TO 7/14

9/11/20 Defendant's Motion to Compel Med Records
State Oral Mot to Continue Jury Trial – Court find Good Cause due to Prosecutor
quarantining.....Jury trial continued "to a date to be set."- open ended cont.?
11/24/20 Court enters Order setting Jury trial on 1/20/21
12/10/20 Order on Defendant's Motion to Compel entered- sustained
90 DAYS TOTAL EXCLUDABLE FROM 9/11 TO 12/10
12/30/20 *Sua Sponte*-Court continues cancels 1/20/21 Jury and resets for 3/16/21
2/22/21 Motion to Discharge filed

**TOTAL 162 DAYS EXCLUDABLE...ADD THAT TO 7/30/20 – NEW TRIAL DATE
1/09/21**

1/30/20 Information Filed

7/31/20 Speedy Trial runs

Excludable Time under §29-1207:

3/18/20 Defendant's Motion to Continue
Granted...set for Status Hearing on 4/7

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12/10/20 Order on Defendant's Motion to Compel entered- sustained

Def. Req. Speedy Trial Waiver Under §29-1919

12/30/20 *Sua Sponte*-Court continues cancels 1/20/21 Jury and resets for 3/16/21

2/22/21 Motion to Discharge filed

**TOTAL 72 DAYS EXCLUDABLE....ADD THAT TO 7/30/20 -- NEW TRIAL DATE
10/09/20**

State v Shipler 758 N.W.2d 41 (2008)

State v Roundtree 658 N.W.2d 308 (2003)

- State doesn't comply with 25-1148.
- Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked. After the filing of such application and the affidavits in support thereof, the adverse party shall have the right to file counter affidavits in the matter. Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application. The court may, upon the hearing, in its discretion, grant or refuse such application, and no reversal of such cause or proceeding shall be had on account of the action of the court in granting or refusing such application except when there has been an abuse of a sound legal discretion by the court.

Shipler/Roundtree continued

- It is not error for a trial court to grant a prosecutor an oral motion for a continuance under speedy trial statute, even though the only showing is by the oral statements of the prosecutor when the defendant and his or her counsel are present and do not object on the record to the oral motion and showing, and where the facts as stated by the prosecutor would be sufficient if they had been contained in an affidavit or otherwise made under oath. (Roundtree)
- State's failure to include affidavits with its written motion to continue or formally seek leave to present oral testimony was not itself sufficient basis for finding error in granting of continuance and exclusion of resulting period of delay from speedy trial period, where defendant did not specifically object to State's showing at hearing and State was impliedly given leave to present oral testimony when court itself elicited prosecutor's testimony. (Shipler)

State Vela-Montes 807 N.W.2d 544 (2011)

- State doesn't comply with 25-1148.
- Defendant Objects all over the place to State's continuance requests.
- Judge grants State's continuance
- Defendant files his timely Motion to Discharge

Should be discharged? Right?

Vela-Montes Continued

- NOPE
- Although Vela–Montes had a technical right to have the State comply with the statutory requirement of § 25–1148 that the motion to continue be supported by an affidavit, the State's failure did not affect a substantial right of Vela–Montes, particularly when the oral representations by the State at the hearing on the motion to continue did not materially vary from the evidence adduced at the hearing on the motion for discharge.
- WTF?
- At least Judge Irwin's dissent was correct.

Brickwall of Speedy Trial

- Mortensen
- Defendant's brickwall to motions to discharge
- Any motion by Defense is in favor of the State and against the defendant
 - Lovvorn

State v. Mortensen 841 N.W.2d 393 (2014)

- Defendant charged with assault while incarcerated and being habitual offender abused speedy trial statutes requiring that trial take place within six months of information by filing motion to discharge on speedy trial grounds on day before trial that was scheduled within six-month period, which caused postponement of trial pending hearing and appeal from denial of motion, and then filing second motion for discharge on day before rescheduled trial on remand that was within statutory six-month speedy trial period, resulting in trial delay of over three years.

Mortensen Continued

- If a defendant requests a continuance that moves a trial date which has been set within the statutory six-month speedy trial period to a date that is outside the six-month period, that request constitutes a permanent waiver of the statutory speedy trial right. [Neb. Rev. Stat. § 29-1207\(4\)\(b\)](#)
- So try to make sure your Judges are not setting trial dates from the jump

State v. Lovvorn 932 N.W.2d 64 (2019)

- Delay caused by defendant's request for continuance of pretrial hearing was excludable time under speedy trial statute, regardless of whether trial date was postponed or remained unchanged;

Neb Rev Stat 29-2267. Probation; revocation; procedure

- Whenever a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court. The court shall not revoke probation or increase the requirements imposed thereby on the probationer, except after a hearing upon proper notice where the violation of probation is established by clear and convincing evidence. The probationer shall have the right to receive, prior to the hearing, a copy of the information or written notice of the grounds on which the information is based. The probationer shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

How do you do it?

- File Motion to discharge/ and or motion to quash.
- Motion to discharge when looking at due process and/or speedy disposition.
- Motion to quash when you think the court has no jurisdiction. State v. Rosenthal 1994 WL 387925 (1994). Not filed within reasonable time after probation period ends.

Motions to Revoke

- When does this happen? All the time,
- Client not in custody
- Client in custody at another facility within state.
 - Remember state has the burden to show diligent efforts.
 - Did they go to the last known residence?
 - Did they speak to family member?
 - Did they search his name and find out he was in custody somewhere?

State v. Windels 503 N.W.2d 834 (1993)

- Motion or information to revoke probation may be filed during term of probation or within reasonable time thereafter.
- Statute governing probation revocation procedure and due process of law require that probationer have notice concerning grounds of alleged probation violation.
- Prosecuting authority is required to demonstrate diligent effort in serving warrant for violation of probation whenever there is significant lapse of time between end of probationary term and due process hearing afforded on violation of probation

What do you do?

- Don't ask for continuances
- Object to continuances, say it will prejudice your clients right to speedy trial
- Don't let Judge's take any menial requests or motions under advisements
- Make oral Motions for Deposition and Discovery when you can. Make the Judge's rule on things in a timely manner

Appealing Motion to Discharge

- Speedy trial on regular case
 - Immediately! This is an interlocutory appeal issue. Motion to discharge on regular case is a final appealable order. If you don't appeal within 30 days, you waive it forever and you will get post convicted.
- Speedy trial on Motion to revoke.
 - Only after disposition of the motion to revoke. This is not an interlocutory appeal issue. Within 30 days after disposition. (Re-Sentencing) State v. Skelnar 690 N.W.2d 631 (2005).

Pending Appellate Challenges to Speedy Trial- *Sua Sponte* Orders

- State v Robertson -CR19-521;
- State v. Abernathy-CR19-791;
- **State v. Bruckner-CR20-56;

-Neb. Rev. Stat. §§29-1912; 29-1919 (4) v. Mortensen

29-1919(4)- A court may enter such other order as it deems just under the circumstances”:

-Baird;

-Sua Sponte COVID Orders;