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The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part I

by Patrick Furman

This column is sponsored by the CBA Criminal Law Section. It features articles written by prosecutors, defense lawyers, and judges to provide information about case law, legislation, and advocacy affecting the prosecution, defense, and administration of criminal cases in Colorado state and federal courts.

This two-part article discusses the constitutional right to a speedy trial and the basics of the speedy trial statute.

The right to a speedy trial is one of the cornerstones of the American criminal justice system. The underlying goals of the speedy trial requirement are justice and fairness. Both the public and accused are more likely to get justice if a dispute is resolved in a timely fashion, with the innocent exonerated and the guilty punished. Delay can hamper the pursuit of justice because memories may fade and evidence may disappear. The requirement of a speedy trial also acts as a check on government power. People cannot be held in custody indefinitely; the government must provide the accused with his or her day in court in a timely fashion.

The right to a speedy trial is a personal and fundamental right. The Sixth Amendment to the U.S. Constitution; § 16, Article II, of the Colorado Constitution; Colorado Revised Statutes ("CRS") § 18-5-401; and Colorado Rules of Criminal Procedure ("C.R.Crim.P.") 48 all guarantee criminal defendants a speedy trial. The Colorado statute and rule are premised on constitutional guarantees and are intended to render them more effective. Failure to comply with speedy trial requirements results in the dismissal of charges.

The purpose of this two-part article is to review the constitutional and statutory right to a speedy trial, and to discuss the case law interpreting that right. Prosecutors, defense counsel, and judges all have roles to play in ensuring that the right to a speedy trial is enforced.

This Part I discusses the constitutional right to a speedy trial and begins the discussion of the statutory right, cover-

ing the topics of the rule itself and the extension, waiver, and tolling of the statutory right. Part II, to be published in the August 2002 issue, will address other issues that arise under the speedy trial statute, including delays caused by appellate proceedings, the interaction between the right to a speedy trial and the right to the effective assistance of counsel, and delays that are attributable to actions by the prosecution or the court.

The Constitutional Right To a Speedy Trial

The U.S. and Colorado Constitutions contain virtually identical speedy trial provisions. The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." Section 16, Article II, of the Colorado Constitution provides in relevant part: "In criminal prosecutions the accused shall have the right to . . . a speedy public trial. . . ." Thus, the analysis of speedy trial issues under the U.S. and Colorado Constitutions is the same.¹

A defendant who believes his or her constitutional right to a speedy trial has been violated must raise the issue prior to the commencement of trial.² Failure to raise an objection prior to the commencement of trial constitutes a waiver of the constitutional right to speedy trial.³ It is the defendant's burden to establish that the constitutional right to a speedy trial has been violated.⁴

The defendant's constitutional speedy trial right starts to run from the date the defendant falls into the status of "an ac-

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cused.²⁵ A defendant has been "accused," and the constitutional right to a speedy trial attaches, once the defendant is formally accused by a charging document, such as a criminal complaint.⁶ (As discussed below, the statutory right to a speedy trial starts to run at the time of arraignment.) The constitutional right to a speedy trial has no set time period within which a trial must occur. Accordingly, the determination of whether a defendant's constitutional speedy trial right has been violated must be made on a case-by-case basis.⁷

The Four Factors in the Constitutional Analysis

There are four factors, none of which is dispositive,⁸ that a trial court should consider in resolving the defendant's motion to dismiss based on the constitutional right to a speedy trial: (1) the length of the delay; (2) the reasons for the delay; (3) if, and when, the defendant asserted a demand for a speedy trial; and (4) whether the delay has caused prejudice to the defendant.⁹

The Length of the Delay: The U.S. and Colorado Constitutions do not guarantee a trial immediately on apprehension.¹⁰ Instead, the Constitutions guarantee a trial that is both speedy and consistent with the court's business.¹¹ No specific time period resolves the speedy trial question; whether a specific delay violates a defendant's constitutional rights depends on the facts of each case.¹²

The Reasons for the Delay: Where the delay is attributable, either in whole or in part, to the defendant, appellate courts are more likely to find that the constitutional right to a speedy trial has not been denied.¹³ Conversely, when the delay is not attributable to the defendant, and particularly when the delay is attributable to the prosecution, appellate courts are more likely to find that there has been a violation of the constitutional right to a speedy trial.¹⁴

The Timeliness of Defendant's Demand: A defendant who demands a speedy trial early and often in the course of the proceedings is much more likely to gain a sympathetic appellate ear. When the defendant does not object to a trial date or seek an earlier date and, instead, requests an even later date, such actions have been held to constitute a waiver of the defendant's constitutional right to a speedy trial.¹⁵

Even a delay in the assertion of the constitutional right to a speedy trial may constitute a waiver of that right. The Colora-

do Supreme Court has held that the "defendants' delay in asserting their right to a speedy trial is entitled to strong evidentiary weight in determining whether the defendants were denied their constitutional right to a speedy trial."¹⁶ The Court also has held that a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."¹⁷ In any event, the defendant must raise the issue of speedy trial prior to the commencement of trial or the objection is waived.¹⁸

Prejudice to the Defendant: Prejudice will not be presumed when the delay has not been shown to be arbitrary or oppressive¹⁹ nor will prejudice be presumed solely from the length of the delay. Actual prejudice must be shown by the defendant.²⁰ What constitutes prejudice depends on the facts of the particular case. Usually, prejudice arises in the form of something that hampers the defendant's ability to present his or her case; for example, the disappearance of witnesses and evidence and the fading of memories.²¹ Prejudice also may arise from the deprivation of liberty, loss of employment and financial resources, personal and family anxiety, social obloquy, and the public opprobrium that often accompanies the existence of charges pending against a person.²²

The Statutory Right To a Speedy Trial

A defendant also may move to dismiss charges based on a violation of the statutory right to a speedy trial found in CRS § 18-1-405 and C.R.Crim.P. 48. The Colorado appellate courts have consistently considered the statute and rule interchangeably.²³ While the statute and rule are designed to implement the constitutional guarantees, compliance with the statutory requirements does not automatically satisfy constitutional demands.²⁴

The statute puts the burden on the court and prosecution to bring the defendant to trial within six months of the date the defendant enters a plea of not guilty. The statute places on the defendant the burden of objecting to a setting that is outside the statutory speedy trial limit. A dismissal due to a violation of the statute bars any further prosecution based on acts arising out of the same criminal episode. The statutory time period may be extended by operation of law and may be tolled by various actions of the defendant.

As previously stated, the statutory right to a speedy trial requires the court and

prosecution to bring a defendant to trial within six months of the date the defendant enters a plea of not guilty. The initial application of this rule is fairly simple and straightforward. The beginning date is the date a defendant enters a plea of not guilty. The ending date is the date the case is brought to trial. A defendant is "brought to trial" when the court calls the case, counsel indicate they are ready to proceed with trial, and trial commences. For purposes of the statutory speedy trial right, trial commences when jury selection begins, not when the jury is sworn in.²⁵

Assertion of the Statutory Right

Historically, it was occasionally quite difficult to determine whether a defendant had waived the statutory right to a speedy trial or whether the time limit had been extended by operation of law or actions of the parties. Sometimes, it still is. However, to reduce the confusion surrounding this determination, CRS § 18-1-405(5.1) requires defense counsel to expressly object to a trial setting that counsel believes is outside of the statutory speedy trial time frame. If counsel fails to object to the setting at the time it is offered, the statutory speedy trial right is automatically extended to the date set for trial. This provision does not apply to defendants who appear *pro se*.²⁶ Additionally, a defendant must move for dismissal based on a violation of the statutory right to speedy trial either prior to the commencement of the trial or prior to the entry of a plea of guilty. Failure to so move waives the defendant's right to claim a violation of the statutory right to a speedy trial.²⁷

Although the statute clearly places the burden on the defendant and defense attorney to object to a date beyond speedy trial, the burden presumably still remains on the court and prosecution to make sure there is a record an appellate court can review to determine whether the defendant or defense counsel objected to the proposed trial date.²⁸ In *Fisher v. County Court*,²⁹ the trial date was set with a clerk in the clerk's office, and not on the record. The defendant and defendant's counsel claimed they voiced an objection to the clerk, but did not go back into the court to place the objection on the record. The Colorado Court of Appeals held that the burden was on the trial court and the prosecution to make an appropriate record, and that the defendant's motion to dismiss should have been granted.

Extension of the Statutory Right to a Speedy Trial

The speedy trial statute provides that a number of events trigger an extension of the six-month time period within which a defendant must be brought to trial. Those events include a request for a continuance by the defendant,³⁰ a failure to appear by the defendant at trial,³¹ and the defendant's consent to a request for a continuance.³² The first two of these extensions are for six months. This means that a defendant's request for a continuance extends the statutory speedy trial time by six months from the date of the request; a failure to appear for trial extends the period for six months from the date on which the defendant does appear. The length of the third extension is the length of time between the granting of the prosecution's request for continuance or the waiver by the defendant and the new date to which the trial is continued.

CRS § 18-1-405 further provides that certain periods of time are excluded altogether from the calculation of the statutory right to a speedy trial, with the obvious net effect of extending the statutory speedy trial time period. These periods include certain specified periods of time related to mental health evaluations and competency; interlocutory appeals, mistrials, and changes of venue; voluntary absences and other delays by the defendant; efforts by the prosecution to secure evidence; and the time needed for re-setting of trial after these sorts of delays.

Properly considered, these subsections of the speedy trial statute "toll" the statute. In some appellate decisions, the terms "toll" and "waive" are used interchangeably, but the Colorado Supreme Court has noted³³ that the term "waive" should apply only to those events that cause a new six-month period to begin (for example, a defendant's request for a continuance),³⁴ while "toll" applies to those situations that suspend the running of the speedy trial clock for some specified period of time (for example, the period of time that a defendant is incompetent).³⁵

The Colorado appellate courts have addressed issues relating to the tolling or waiving of the speedy trial statute. The next two sections address these cases.

Waiver of the Statutory Right to a Speedy Trial

It is well settled that a defendant can waive the statutory right to a speedy trial and that such a waiver may be either ex-

press or implied. A failure to demand dismissal on speedy trial grounds,³⁶ proceeding to trial without a speedy trial objection,³⁷ and a failure to raise a speedy trial claim until appeal³⁸ have all been deemed to amount to a waiver of the statutory right to a speedy trial.

The statute now contains an explicit provision, mentioned above, that a defendant must object to a trial setting that is outside the statutory speedy trial time or the defendant will be deemed to have waived any statutory speedy trial objection.³⁹ That provision requires not only that defendant's objection must precede the commencement of trial, but also that the objection must precede the commencement of any pretrial motions set for hearing immediately before trial or the entry of a plea of guilty.

Certain other actions of the defendant are deemed, by statute or case law, to constitute a waiver of the statutory right to a speedy trial (thus, starting a new six-month period within which to bring the defendant to trial). One recurring issue is a failure of the defendant to appear for trial. Historically, if a defendant failed to appear for trial, the speedy trial period was extended by the length of time the defendant remained at large, plus a reasonable length of time to get the defendant re-scheduled on the court's calendar.⁴⁰ The speedy trial statute now specifically provides that if a defendant fails to appear for trial, the speedy trial period begins to run anew when the defendant reappears in court.⁴¹

Similarly, the statute explicitly provides that, once a trial date has been set, a defendant who requests a continuance waives speedy trial. On the granting of such a request, a new six-month period begins to run from the date on which the continuance was granted.⁴² If a trial date has not been set and the defendant requests a continuance, the analysis is different; this situation is analyzed in the section below on tolling of the statute.

If the defendant fails to appear for some hearing other than trial, the statute excludes from speedy trial calculations "the period of delay resulting from the voluntary absence or unavailability of defendant."⁴³ The statute goes on to provide that "a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial."⁴⁴ In interpreting this provision, the courts have applied it when the defendant simply failed to appear,⁴⁵ as well

as when the defendant's whereabouts are known but his or her presence cannot be obtained for trial.⁴⁶

The fact that a defendant is incarcerated in another jurisdiction outside the state does not make him or her unavailable for purposes of speedy trial calculations, unless the prosecution can show that it is unable to obtain the defendant's presence despite diligent efforts.⁴⁷ A defendant in custody in a foreign jurisdiction does not forfeit the right to a speedy trial, and the prosecution still has a duty to make a diligent good-faith effort to bring the defendant to trial.⁴⁸ This is particularly true when the defendant is in the custody of that foreign jurisdiction and because a Colorado Governor's warrant can authorize the extradition of the defendant from that jurisdiction.⁴⁹

The amount of time excluded from the statutory speedy trial calculation due to defendant's absence or unavailability is not limited to the actual time of such absence or unavailability. The exclusion applies to all delay "resulting from" such absence.⁵⁰ Accordingly, once the defendant is located or becomes available, the court and prosecution are also permitted an additional reasonable time to get the trial set on the court's docket and to prepare the case for trial.⁵¹ What constitutes a "reasonable time" must be determined on a case-by-case basis, considering such factors as the difficulty in locating witnesses, problems with overcrowded dockets, and the goal of discouraging defendants who run time off the speedy trial period and then abscond from the state.⁵²

Tolling of the Statutory Right to a Speedy Trial

If the prosecution requests a continuance of the trial and the defendant or defense counsel waive speedy trial in open court, or if a written waiver of speedy trial is signed by the defendant and filed with the court, the period of speedy trial is tolled for the length of time between the granting of the continuance and the new trial date. The statutory right is thus extended by that period of time.⁵³

If a trial date has not been set, and the defendant requests a continuance, the resulting period of delay is attributed to the defendant and generally operates to extend the speedy trial period.⁵⁴ However, the Colorado Court of Appeals has held that this time period should not be excluded from the speedy trial calculation unless the continuance actually affects the trial

date.⁵⁵ Thus, in this case, the defendant's motion to continue the pretrial conference, before a trial date had even been set, did not extend the speedy trial limit.

Conclusion

Part I of this two-part article has provided an overview of the constitutional right to a speedy trial and an introduction to the statutory right to a speedy trial. The constitutional right—as is frequently the case with constitutional law—is bounded by broad statements of principles, while the statutory right is much more specifically tailored to the everyday needs of criminal prosecutors, defenders, and judges. All parties must consider both the statute and the constitution when evaluating speedy trial questions. The second part of this article will address a number of issues that frequently arise in the interpretation of the statutory right.

NOTES

1. *Lucero v. People*, 476 P.2d 257 (Colo. 1970); *Falgout v. People*, 459 P.2d 572 (Colo. 1969).
2. *Keller v. People*, 387 P.2d 421 (Colo. 1963).
3. *Id.*; *Valdez v. People*, 483 P.2d 1333 (Colo. 1971).
4. *Falgout*, *supra*, note 1; *Gelfand v. People*, 586 P.2d 1331 (Colo. 1978); *Casias v. People*, 415 P.2d 344 (Colo. 1966).
5. *People v. Slender Wrap, Inc.*, 536 P.2d 850 (Colo.App. 1975).
6. *People v. Velasquez*, 641 P.2d 943 (Colo. 1982).
7. *People v. O'Neill*, 523 P.2d 123 (Colo. 1976); *People v. Buggs*, 525 P.2d 421 (Colo. 1974); *Gonzales v. People*, 398 P.2d 236 (Colo. 1965); *Velasquez*, *supra*, note 6; *Franklin v. People*, 734 P.2d 133 (Colo.App. 1986).
8. *Slender Wrap, Inc.*, *supra*, note 5.
9. *People v. Fears*, 962 P.2d 272 (Colo.App. 1997); *People v. Chavez*, 779 P.2d 375 (Colo. 1989); *People v. Spencer*, 512 P.2d 260 (Colo. 1973); *People v. Buggs*, *supra*, note 7; *People v. Haines*, 549 P.2d 786 (Colo.App. 1976); *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).
10. *Medina v. People*, 387 P.2d 733 (Colo. 1963).
11. *Gonzales*, *supra*, note 7; *Adargo v. People*, 411 P.2d 245 (Colo. 1966); *Falgout*, *supra*, note 1; *People v. Small*, 493 P.2d 15 (Colo. 1972); *Rowse v. District Court*, 502 P.2d 422 (Colo. 1972); *Maes v. People*, 454 P.2d 792 (Colo. 1969); *People v. O'Neill*, *supra*, note 7.
12. *Jaramillo v. District Court*, 484 P.2d 1219 (Colo. 1971) (fifteen-month delay violated constitutional right where no substantial court congestion, defendant did nothing to cause delay, and prosecution deliberately postponed setting trial as part of plea bargaining efforts); *Gonzales*, *supra*, note 7 (two-year delay did not violate defendant's constitutional right where delay caused by continuances requested by defendant, defense counsel withdrew and was reappointed, and defendant entered and subsequently withdrew insanity plea); *Falgout*, *supra*, note 1 (nine-month delay did not violate constitutional right where no showing of lack of diligence by court or prosecution and defendant did not object to trial date or seek earlier trial date); *Franklin*, *supra*, note 7 (seven-week delay caused by prosecution's motion to continue in matter pending for three years did not violate constitutional right because request was reasonable and defendant had never previously objected); *O'Neill*, *supra*, note 7 (ten-month delay did not violate constitutional right in absence of showing that trial could have been held sooner); *Spencer*, *supra*, note 9 (fourteen-month delay did not violate defendant's constitutional right when much of delay caused by defendant's actions and no showing of prejudice to defendant as result of delay).
13. *Small*, *supra*, note 11 (delay caused in part by illness of defendant's counsel and at least four motions to continue attributable to defendant); *Medina*, *supra*, note 10 (when delay caused by withdrawal of counsel and appointment of new counsel, no violation of constitutional right); *Gonzales*, *supra*, note 7 (when numerous continuances granted at defendant's request, counsel appointed, withdrew, and subsequently reappointed, and defendant entered and subsequently withdrew insanity plea; resulting two-year delay did not violate the constitutional right).
14. *Jaramillo*, *supra*, note 12.
15. *Adargo*, *supra*, note 11.
16. *Spencer*, *supra*, note 9.
17. *Buggs*, *supra*, note 7 at 424; *see also Fears*, *supra*, note 9.
18. *Valdez*, *supra*, note 3 (post-trial motion may be denied without hearing if defendant fails to allege assertion of speedy trial right prior to commencement of trial); *Keller*, *supra*, note 2.
19. *Scott v. People*, 490 P.2d 1295 (Colo. 1971).
20. *People v. Jamerson*, 596 P.2d 764 (Colo. 1979). *See also Fears*, *supra*, note 9; *Scott*, *supra*, note 19.
21. *Scott*, *supra*, note 19.
22. *Slender Wrap, Inc.*, *supra*, note 5.
23. *People v. Deason*, 670 P.2d 792 (Colo. 1983); *People v. Marquez*, 739 P.2d 917 (Colo.App. 1987).
24. *Corsentino*, *supra*, note 9 at 1362.
25. *People v. Peltz*, 697 P.2d 766 (Colo.App. 1984) (no violation of defendant's statutory right to speedy trial where jury selection commenced before six-month period had run, even though jury selection not completed until after such period). *See also People v. Quinn*, 794 P.2d 1066 (Colo.App. 1990) (speedy trial not violated where jury selection began on last day allowed for speedy trial, but where jury not sworn in until two days later after conducting motions hearing).
26. This subsection effectively overruled pre-existing case law, which held that mere silence did not amount to a waiver of the statutory right to a speedy trial. *See, e.g., Rance v. County Court*, 564 P.2d 422 (Colo. 1977).
27. CRS § 18-1-405(5) and C.R.Crim.P. 48 (b)(1); *Corsentino*, *supra*, note 9.
28. *Fisher v. County Court*, 796 P.2d 65 (Colo. App. 1990).
29. *Id.*
30. CRS § 18-1-405(3).
31. CRS § 18-1-405(3.5).
32. CRS § 18-1-405(4).
33. *People v. Madsen*, 707 P.2d 344 (Colo. 1985).
34. CRS § 18-1-405(3).
35. CRS § 18-1-405(6)(a).
36. *People v. Marquez*, *supra*, note 23; *People v. Atkins*, 885 P.2d 243 (Colo.App. 1994).
37. *Keller*, *supra*, note 2.
38. *People v. O'Donnell*, 518 P.2d 945 (Colo. 1974).
39. CRS § 18-1-405(5).
40. *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982).
41. CRS § 18-1-405(3.5).
42. CRS § 18-1-405(3).
43. CRS § 18-1-405(6)(d).
44. *Id.*
45. *People v. Moyer*, 635 P.2d 194 (Colo. 1981).
46. *Marquez*, *supra*, note 23 (speedy trial statute tolled during time defendant unavailable because was being processed through federal justice system).
47. *Watson v. People*, 700 P.2d 544 (Colo. 1985) (defendant not deemed "voluntarily absent or unavailable" simply because incarcerated by federal authorities, unless prosecution shows defendant's presence could not be secured despite diligent efforts). *See also People v. Byrne*, 762 P.2d 674 (Colo. 1988) (trial court's finding that prosecution failed to exercise due diligence to obtain defendant's presence upheld on appeal when prosecutor knew defendant in custody of U.S. Marshal, but failed to request writ directing marshal to make defendant available for trial).
48. *People v. Bost*, 770 P.2d 1209 (Colo. 1989). Note, however, that the court also held that defendant's failure to assert his speedy trial right waived his claim. *See also* the Uniform Mandatory Disposition of Detainers Act at CRS §§ 16-14-101 to -108.
49. *People v. Wimer*, 604 P.2d 1183 (Colo.App. 1979) (neither extradition pursuant to Governor's warrant nor waiver of extradition proceedings rendered defendant "voluntarily absent or unavailable").
50. CRS § 18-1-405(6)(d).
51. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).
52. *Id.* *See also Snyder v. Moss*, 703 P.2d 1311 (Colo.App. 1985).
53. CRS § 18-1-405(4).
54. CRS § 18-1-405(6)(f).
55. *Tongish v. Arapahoe County Court*, 775 P.2d 63 (Colo.App. 1989). ■