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

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 reviews the constitutional and statutory right to a speedy trial and discusses the case law interpreting that right. The first part was printed in July 2002.

Part I of this two-part article addressed the constitutional right to a speedy trial and provided a preliminary discussion of the statutory right to a speedy trial.¹ Part II discusses various issues that arise under Colorado's speedy trial statute, including: (1) delays caused by appellate proceedings; (2) interactions between the right to a speedy trial and the right to the effective assistance of counsel; and (3) delays that are attributable to actions by the prosecution or the court.

Speedy Trial and Appellate Proceedings

If a defendant's conviction at trial is reversed on appeal, any new trial must commence within six months of the date the trial court receives the mandate from the appellate court.² This rule does not apply to a conviction resulting from a plea of guilty.³

If an interlocutory appeal is taken in a case, the period of delay caused by the appeal is not included in calculating the statutory speedy trial period, regardless of whether the interlocutory appeal is commenced by the defendant or the prosecution,⁴ and regardless of whether the appeal is procedurally flawed or denied by the appellate court.⁵ The delay caused by the appeal and a reasonable amount of time for resetting the matter for trial following remand to the trial court are excluded from the speedy trial calculation.⁶ Similarly, any delay caused by an original proceeding pursuant to C.A.R. 21 tolls the speedy trial statute.⁷

The breadth of this exclusion of time spent on interlocutory appeals is not without limit. An interlocutory appeal must: (1) have been taken in good faith; (2) have arguable merit; (3) not have been taken for the purposes of delay; and (4) have raised issues that substantially impacted the prosecution's case.⁸

In *People v. Witty*,⁹ the defendant successfully moved to recuse the District Attorney's Office on the ground that the charges against him involved an allegation that he defrauded a pension fund that covered employees in the prosecutor's office. The prosecution took an appeal to the Colorado Court of Appeals, which was denied on the ground that no final judgment had entered in the case. The defendant subsequently entered a guilty plea, reserving the right to appeal the speedy trial issue because far more than six months had passed since he entered his plea of not guilty.

The Court of Appeals addressed the speedy trial issue this time, and held that the speedy trial statute had been violated, finding that the appeals were not interlocutory for purposes of the statute. An order disqualifying a prosecutor may cause a minor delay while a new prosecutor is appointed; such an order "has no substantial effect on the prosecution's case for purposes of determining whether appeal of that order is an interlocutory appeal."¹⁰ The court went on to add that "a defendant . . . should not have his or her period of incarceration extended while the government sorts out who should prosecute."¹¹ The defendant's guilty plea was vacated and the *Witty*

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case was remanded to the trial court with directions to dismiss the charge.

For appeal time to be excluded from the speedy trial calculation, the appeal must be taken in the pending case. In *People v. Rosidivito*,¹² the prosecution, in a separate action, obtained a trial court order unsealing the defendant's record. The defendant appealed pursuant to C.A.R. 21. The Colorado Court of Appeals held that the delay caused by the defendant's C.A.R. 21 appeal should not be added to the period in which he must be brought to trial. The court concluded that the defendant's right to appeal in the separate case cannot be conditioned on his waiver of speedy trial in the pending criminal case.¹³

Speedy Trial and the Right To Effective Assistance of Counsel

Another issue that recurs with some frequency is the tension that arises between the right to a speedy trial and the right to the effective assistance of counsel. The right to counsel is as important and fundamental as the right to a speedy and public trial. For a variety of reasons, counsel may not be prepared to proceed to trial, or may not be able to continue to represent the defendant. If these problems necessitate a continuance or the hiring or appointment of new counsel, speedy trial problems may arise, particularly when the effective assistance issue arises at, or near, the time of trial.

In general, unless a criminal defendant is brought to trial within six months of the date he or she enters a plea of not guilty, charges against the defendant must be dismissed.¹⁴ If the defendant validly waives the right to a speedy trial to resolve the effective assistance issue, the statutory speedy trial issue is resolved by that waiver. However, if the defendant refuses to waive the right to speedy trial, the issue becomes more complicated.

If the defendant requests a continuance, the basic rule that six months is added to the statutory speedy trial period may be applicable. If the need for a substitution of counsel is properly chargeable to the defendant, and counsel must have a continuance to effectively represent the defendant, the speedy trial period may be extended by the operation of CRS § 18-1-405(3). A continuance is "chargeable to defendant if it was caused by an affirmative act of his, with his express consent, or by other affirmative conduct evincing consent."¹⁵

The determination of whether the continuance necessitated by the substitution of counsel is properly chargeable to the defendant must be made on a case-by-case basis.¹⁶ If the delay is created by a substitution of defense counsel caused by the defendant's unwillingness to cooperate with his or her original counsel, the resulting delay may be attributable to the defendant. This rule applies even if the defendant objects to the substitution of counsel and to the continuance needed to enable new counsel to prepare for trial.¹⁷

A continuance due to defense counsel's unavailability to try a case within the statutory speedy trial period may be chargeable to the defendant, thus extending the statutory speedy trial deadline.¹⁸ Even in the absence of a showing that defense counsel was unavailable, delays in scheduling a trial to accommodate defense counsel have been attributable to the defendant in determining whether the speedy trial statute has been violated.¹⁹

The constitutional right to counsel impacts these situations regardless of the applicability of the statute. The Colorado Court of Appeals has held that the protection of certain constitutional rights justifies a delay in trying a criminal case. That court has approved an extension of the six-month speedy trial time period to protect the constitutional right to counsel when defense counsel was unprepared to proceed on the trial date through no fault of the defendant.²⁰

If defense counsel has caused a delay in the proceedings by failing to file motions in a timely fashion, that period of delay may well be attributable to the defendant and toll the speedy trial statute. The Colorado Supreme Court applied this principle when defense counsel made an oral motion to dismiss on joinder grounds on the morning of trial, and the court and prosecution needed time to research and resolve the issue.²¹ However, it is not appropriate to toll the statute and continue the case when defense counsel does not file a notice of defense or list of witnesses when the defense is general denial and the defendant does not intend to call any witnesses.²²

In all of these situations, if the delay is not the fault of the defendant, the trial court should make every effort to accommodate both the speedy trial and effective assistance rights of a defendant. In *People ex rel. Gallagher v. District Court*,²³ the Colorado Supreme Court held that the delay arising from the replacement of counsel—

whose schedule did not allow him to try the case before a speedy trial deadline—was not properly chargeable to the defendant. The Court ordered the trial court to bring the defendant to trial within the two months remaining before the expiration of the statutory speedy trial deadline. The Court made it clear that the trial court had not made the appropriate effort to find counsel who could try the case within the speedy trial framework.

Both the determination of whether to allow counsel to withdraw and the granting of a continuance are left to the sound discretion of the trial court. These issues will not be reversed on appeal absent an abuse of discretion.²⁴

Delays Attributable to Prosecution or Court

Continuances at the request of the prosecution, without the consent of the defendant, generally do not extend the period of speedy trial. However, there is one instance in which the statutory right to a speedy trial can be extended by the prosecution's motion to continue, even over a defendant's objection. CRS § 18-1-405(6)(g)(I) allows up to six additional months to be added to the speedy trial time if the prosecution establishes the following three factors: (1) evidence that is material to the state's case is unavailable; (2) the prosecution has exercised due diligence to obtain such evidence; and (3) reasonable grounds exist to believe that the evidence will be available at a later date.

Extensions of the speedy trial time under CRS § 18-1-405(6)(g)(I) have been approved when the prosecution: (1) needed time to complete the trial of a co-defendant and make the co-defendant available to testify;²⁵ (2) demonstrated both due diligence in obtaining the victim's presence at trial and the availability of the victim at a later date;²⁶ (3) demonstrated due diligence by issuing regular subpoenas and making lodging arrangements for out-of-state witnesses, in the good faith belief that the witnesses would continue to cooperate;²⁷ or (4) thought, in good faith, that an essential witness would have given birth and would be available by the trial date.²⁸

On the other hand, the Supreme Court has held that a mere unsupported allegation that a material witness will be unavailable on the trial date is insufficient to satisfy the three prongs of CRS § 18-1-405(6)(g)(I).²⁹ In *Sweet v. Myers*, the Court held that a mere claim that a witness would be unavailable did not amount to a showing

of due diligence by the prosecution to obtain the presence of the witness on the scheduled trial date, particularly because there was no evidence that the witness would be available at a later trial date.³⁰

Actions of the prosecution, other than formal requests for a continuance, also may cause delays that are attributable to the prosecution. For example, when the prosecution fails to comply with discovery requirements in a timely fashion, the delay resulting from the defendant's request for a continuance to evaluate the new information has been charged to the prosecution, not to the defendant.³¹ Even in this situation, appellate courts consider other factors, such as the defendant's objection to any speedy trial waiver and the availability of new trial dates within the speedy trial period.³²

The prosecution cannot indiscriminately dismiss and re-file charges to avoid the mandate of the speedy trial statute.³³ However, if the prosecution re-files as a result of a change in circumstances that justifies the re-filing, the speedy trial calculation may start anew.³⁴ Dismissal and re-filing to comply with compulsory joinder requirements has been deemed a legitimate excuse.³⁵ The motive of the prosecution—good or bad faith—is a relevant consideration in these circumstances.³⁶

Miscellaneous Delays And Other Issues

CRS § 18-1-405 provides for the exclusion of certain other periods of time from the calculation of the speedy trial time period. In the event of a mistrial, the statutory speedy trial period is extended for a reasonable period of delay, not to exceed three months, caused by each mistrial.³⁷ A delay of two months in scheduling the retrial has been deemed reasonable when the new trial date was the first available date on the court's docket.³⁸ A retrial—after a mistrial—that occurs more than three months after the mistrial, but still within the original six-month speedy trial period, has been held to comply with the speedy trial statute.³⁹

CRS § 18-1-405(6)(i) provides that the time between the filing of a motion for change of venue and the ruling on that motion shall be excluded from the speedy trial time calculation. This subsection overruled pre-existing case law.⁴⁰ If the motion for change of venue is granted, the time between the granting of the motion and the first appearance in the appropriate court also is excluded. Additionally, if the

change of venue occurs after a trial date has already been set in the original venue, the court in the new venue has an additional three months from the first appearance of all parties within which to conduct the trial.⁴¹

By statute, the following are to be excluded from the calculation of the speedy trial period: (1) the period during which a defendant is incompetent to stand trial; (2) the period during which a defendant is being evaluated on the question of compe-

tency or sanity; and (3) the period during which a defendant "is unable to appear by reason of illness or physical disability."⁴²

The speedy trial time period is not to include any reasonable period of delay due to the joinder for trial of a co-defendant.⁴³ There are two limitations on this extension of the speedy trial time. First, the co-defendant's time for trial must not have run; and second, there must be good cause to deny a request for a severance of the defendants.⁴⁴

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The delay caused by the recusal of the original trial judge ordinarily does not justify extending the statutory speedy trial time period. In *People v. Arledge*,⁴⁵ the defendant's original motion to recuse the trial court was denied. Just before trial, the defendant supplemented the record and the trial court recused itself. The trial court then obtained a speedy trial waiver over the objection of defense counsel. The case was re-assigned and set for a date outside the original speedy trial time period, again over the objection of the defendant. The Colorado Supreme Court held that: (1) no part of the delay was attributable to the defendant; (2) the original trial court was without authority to obtain a waiver once it had recused itself; and (3) the prosecution or court had a duty to find a trial judge who could hear the matter in a timely fashion, including seeking the appointment of a senior judge.

The Colorado Supreme Court has indicated its disapproval of certain other procedures employed by trial courts that have the effect of extending the statutory speedy trial time limit. In *People v. Chavez*,⁴⁶ the Court expressly disapproved the practice of the trial judge in postponing arraignment until all pretrial matters had been concluded. Similarly, in *Barela v. People*,⁴⁷ the Court disapproved the trial court's practice of empaneling a jury, then conducting motions hearings, then swearing in the jury. In *Barela*, the prosecution took an interlocutory appeal after the last-minute motions hearing. The Court held that this procedure undermined the general scheme established by the Rules of Criminal Procedure ("C.R.Crim.P.") for resolving motions.⁴⁸ In neither *Chavez* nor *Barela* did the Court expressly hold that the trial court's procedures either did, or did not, justify an extension of the statutory speedy trial time period. However, the disapproval of these procedures suggests that the Court is not likely to view them as viable justifications for an extension of the statutory speedy trial period.

One source of occasional confusion is the effect bail has on the calculation of the statutory speedy trial time period. Simply granting bail to a defendant does not affect the statutory right to a speedy trial, even when the defendant posts a bond and is released.⁴⁹ If a defendant's bond is re-

voked and increased due to the commission of a felony offense while out on bond, the defendant must be brought to trial within ninety days of the increase, or within six months of arraignment, whichever is earliest.⁵⁰ If a defendant's bond is revoked and increased due to the prosecution's request that is based on factors other than the commission of a new offense, the speedy trial time limits are not affected.⁵¹

Conclusion

The court and prosecution in criminal cases have a continuing duty to ensure that an accused is brought to trial in a speedy fashion. The constitutional right to a speedy trial remains a cornerstone of the U.S. justice system, and of justice itself. The statutory right to a speedy trial is designed to implement this constitutional guarantee. In recent years, a number of amendments have made it more difficult for criminal defendants to successfully assert a speedy trial violation. Nonetheless, it is incumbent on the court and counsel for both the prosecution and defense to remain aware of and vigorously protect the right to a speedy trial.

NOTES

1. Furman, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part I," 31 *The Colorado Lawyer* 115 (July 2002).

2. CRS § 18-1-405(2).

3. *People v. Fennell*, 32 P.3d 1092 (Colo.App. 2000).

4. CRS § 18-1-405(6)(b).

5. *People v. Gallegos*, 46 P.2d 946 (Colo. 1997); *People v. Fears*, 962 P.2d 272 (Colo.App. 1997).

6. *People in re N.P.*, 768 P.2d 706 (Colo. 1989).

7. *People v. Powell*, 917 P.2d 298 (Colo.App. 1995).

8. *Gallegos, supra*, note 5 at n.59.

9. *Witty*, 36 P.3d 69 (Colo.App. 2000).

10. *Id.* at 74.

11. *Id.* at 75.

12. *Rosidivito*, 940 P.2d 1038 (Colo.App. 1996).

13. *Id.* at 1041.

14. CRS § 18-1-405(1).

15. *People v. Monroe*, 907 P.2d 690, 693 (Colo.App. 1995).

16. *People v. Scales*, 763 P.2d 1045 (Colo. 1988); *People v. Cerrone*, 867 P.2d 143 (Colo.App. 1993).

17. *Scales, supra*, note 16; *People v. Rocha*, 872 P.2d 1285 (Colo.App. 1993).

18. CRS § 18-1-405(3); *People v. Chavez*, 650 P.2d 1310 (Colo.App. 1982).

19. *People v. Wilson*, 972 P.2d 701 (Colo.App. 1998); *People v. Hamer*, 689 P.2d 1147 (Colo.App. 1984); *People v. Fetty*, 650 P.2d 541 (Colo. 1982).

20. *People v. Jefferson*, 981 P.2d 613 (Colo.App. 1998), *cert. denied*, Aug. 9, 1999.

21. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

22. *People v. Castro*, 835 P.2d 561 (Colo.App. 1992), *aff'd* 854 P.2d 1262 (Colo. 1993).

23. *People ex rel. Gallagher*, 933 P.2d 583 (Colo. 1997).

24. *Scales, supra*, note 16 (continuance); *McCall v. District Court*, 783 P.2d 1223 (Colo. 1989) (withdrawal of counsel).

25. *People v. Koolbeck*, 703 P.2d 673 (Colo.App. 1985).

26. *People v. Grenemyer*, 827 P.2d 603 (Colo.App. 1992).

27. *People v. Wolfe*, 9 P.3d 1137 (Colo.App. 1999), *rehearing denied*, Feb. 10, 2000.

28. *People v. Scialabba*, 31 Colo.Law. 168 (April 2002) (App.No. 00CA0472, *ann'cd* 2/28/02).

29. *Sweet v. Myers*, 612 P.2d 75 (Colo. 1980).

30. *Id.*

31. *People v. Duncan*, 12 P.3d 316 (Colo.App. 2000), *rehearing denied*, April 20, 2000.

32. *Id.*

33. *Amon v. People*, 597 P.2d 569 (Colo. 1979) (amendment of summons and complaint from "DUI-alcohol or drugs" to "DUI-alcohol" did not require a new plea of not guilty or re-start speedy trial time).

34. *Shiffner v. People*, 476 P.2d 756 (Colo. 1970).

35. *People v. Kraemer*, 795 P.2d 1371 (Colo.App. 1990).

36. *People v. Dunhill*, 570 P.2d 1097 (Colo.App. 1977).

37. CRS § 18-1-405(e); *Pinelli v. District Court*, 595 P.2d 225 (Colo. 1979).

38. *Pinelli, supra*, note 37 at 225 and 227.

39. *Mason v. People*, 932 P.2d 1377 (Colo. 1997); *see also People v. Pipkin*, 655 P.2d 1360 (Colo. 1983).

40. *See, e.g., People v. Colantonio*, 583 P.2d 919 (Colo. 1978).

41. CRS § 18-1-405(7).

42. CRS § 18-1-405(6)(a).

43. CRS § 18-1-405(6)(c).

44. *Id.*

45. *Arledge*, 938 P.2d 160 (Colo. 1997).

46. *Chavez*, 779 P.2d 375 (Colo. 1989).

47. *Barela*, 826 P.2d 1249 (Colo. 1992).

48. *Id.* at 1253.

49. *Jaramillo v. District Court*, 484 P.2d 1219 (Colo. 1971).

50. CRS § 16-4-103(2).

51. CRS § 16-4-107; *People v. Coleman*, 844 P.2d 1215 (Colo.App. 1992). ■

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