

**IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA**

STATE OF NEBRASKA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 [REDACTED], )  
 )  
 Defendant. )

CASE NO. [REDACTED]  
 ORDER  
*Granting Motion for Discharge*

This matter came on for hearing on November 26 and December 3, 2024, on the Defendant’s Motion for Absolute Discharge – Speedy Trial Expired. Assistant Attorney General [REDACTED] represented the State and attorney Mallory Hughes appeared with the Defendant. The hearing was held by Zoom videoconferencing. The Court took Judicial Notice of the file and evidence was adduced. Counsel argued the matter and the Court took it under advisement. The Court, now being fully advised in the premises, finds that the Motion for Absolute Discharge should be granted.

**Procedural Background**

On November 28, 2023, the Defendant was charged with Theft by Deception, \$5,000 or more, a Class IIA Felony. The State alleges that on or about June 24, 2020, Defendant obtained \$5,000 or more in property from the [REDACTED] [REDACTED] by deception, and did so by intentionally: 1) creating or reinforcing a false impression as to law, value, intention or other state of mind; 2) preventing another from acquiring information which affected their judgment of a transaction; or 3) failing to correct a false impression which [REDACTED] previously created or reinforced. A Class 2A Felony is punishable by up to twenty (20) years in prison. In addition, the Court may order

restitution for any injury, property damage, or loss sustained by the victim as a direct result of the offense.

On December 8, 2023, a Plea in Abatement was filed by Defendant's counsel, [REDACTED]. On February 26, 2024, the Court overruled the Plea in Abatement and ordered Defendant to appear for arraignment on March 6, 2024. On February 28, 2024, Defendant filed a motion for depositions, motion for discovery, and motion for disclosure. All three motions were scheduled for a "no-show" discovery hearing on March 26, 2024. On February 29, 2024, Defendant entered a not guilty plea by filing a written waiver.

On March 8, 2024, Mallory Hughes and Paul Lembrick entered their appearances on behalf of the Defendant. Mallory Hughes filed an Appearance of Counsel and Paul Lembrick filed an Appearance of Co-Counsel. On March 12, 2024, [REDACTED] filed a Motion to Withdraw stating: "Defendant has specifically terminated undersigned counsel" and "Attorneys Mallory Hughes and Paul Lembrick have each already filed an Entry of Appearance as counsel and co-counsel for the Defendant in this matter." There was no notice of hearing filed with the motion or thereafter.

On March 15, 2024, [REDACTED] filed an amended motion for discovery and an amended motion for depositions. Both motions were scheduled for a "no-show" hearing before the Court on March 26<sup>th</sup>. On March 26, 2024, the Court entered the following Judge's Note or docket entry:

Discovery is granted to all parties, as requested in pending motions, to the extent allowed by statute. Without good cause shown, compliance ordered within 14 days. Without good cause shown, depositions taken by defendant within 30 days hereafter at a time and place agreed upon by the parties. State to file Certificate of Compliance. State reminded of duty to disclose exculpatory matters. Defendant is to reciprocate.

On April 22, 2024, the State filed a certificate of discovery compliance. On May 16, 2024, the State filed another certificate of discovery compliance.

On October 18, 2024, Defendant filed this motion for absolute discharge on statutory and constitutional speedy trial grounds. Defendant contends that the deadline to bring ██████ to trial was September 12, 2024, six months from the date the information was filed against ██████ (11/28/2023 + 6 months = 5/28/2024), excluding the time Defendant's Plea in Abatement was under advisement (12/8/23 – 2/26/24 = 80 days) and the time Defendant's discovery motions were under advisement (2/28/24 – 3/26/24 = 27 days). (5/28/24 + 107 days = 9/12/24).

At the hearing on Defendant's motion, the State introduced evidence consisting of two JUSTICE printouts from the Nebraska Judicial Branch website; one showing the Case Summary, Register of Actions, and Judges Notes for the case, and one showing search results listing ██████ as Defendant's attorney.<sup>1</sup> On December 3, 2024, Defendant's counsel was granted leave to reopen the record to introduce emails showing that the State corresponded with Hughes concerning discovery.

### **Arguments and Analysis**

The State argues that ██████ statutory right to a speedy trial has not been violated because 1) ██████ motion to withdraw is still pending (filed 3/12/24); 2) the discovery motions are still pending (filed 2/28/24); and (alternatively,) 3) the period of time between February 28 and March 26, 2024 should be excluded for good cause because the State did not receive notice from JUSTICE that the discovery motions had been ruled on. The

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<sup>1</sup> It should be noted that Exhibit 3, a printout of a search result on JUSTICE, shows ██████ as Attorney for Defendant, but Exhibit 2, a printout of the Case Summary from the Nebraska Judicial Branch website, lists Defendant's attorney as Paul Lembrick.

State further argues that [REDACTED] constitutional right to a speedy trial has not been violated because there has been no presumptively prejudicial delay.

### **I. Statutory Right to Speedy Trial**

The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 1208. Section 29-1208 provides that a criminal defendant is entitled to absolute discharge if [REDACTED] is not brought to trial before the running of time as provided by § 29-1207. Section 29-1207 provides that a defendant shall be brought to trial within six months starting from the date the indictment is returned or the information filed, excluding periods of delay falling into any of the exceptions listed in § 29-1207(4).

To calculate the speedy trial time a court must exclude the day the information was filed, count forward six months, back up one day, and then add any time excluded under § 29-1207(4). *State v. Nelson*, 313 Neb. 464, 470, 984 N.W.2d 620 (2023). The State bears the burden to show, by a preponderance of the evidence, the applicability of one or more of the excluded time periods under § 29-1207(4). *Id.* at 470-71. The parties agree that the original speedy trial deadline in this case, six months after the Information was filed on November 28, 2023, was May 28, 2024.

Section 29-1207 provides “(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, . . . the time from filing until final disposition of pretrial motions of the defendant . . . .” The Nebraska Supreme Court has held that § 29-1207 requires the exclusion of all time between the filing of a defendant’s pretrial motion and the final disposition of such motion, regardless of the delay of disposition. *See State v. Webb*, 311 Neb. 694, 700, 974 N.W.2d 317 (2022). Final

disposition, for purposes of § 29-1207, occurs on the date the motion is “granted or denied.” *State v. Williams*, 277 Neb. 133, 141, 761 N.W.2d 514 (2009).

A. Did [REDACTED] Motion to Withdraw toll the speedy trial clock?

The State first argues that the speedy trial clock has been automatically tolled under § 29-1207(4) since March 12, 2024, when [REDACTED] filed [REDACTED] Motion to Withdraw as counsel for the Defendant. The State contends that there has been no disposition of the motion. In support of its argument, the State offers a JUSTICE printout to show that the record reflects the Court has not ruled on the motion, and it remains pending.

Defendant asserts that [REDACTED] new counsel, Hughes and Lembrick, had already entered their appearances on March 8, 2024, before the motion was filed. In fact, [REDACTED] motion specifically states “Defendant has specifically terminated undersigned counsel as [REDACTED] attorney of record, and Attorneys Mallory Hughes and Paul Lembrick have each already filed an Entry of Appearance as counsel and co-counsel for the Defendant in this matter.” Further, the State recognized Hughes and Lembrick as Defendant’s counsel during the proceedings. Both parties cite the cases of *Reiger* and *Curry*.

In *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005), *overruled on other grounds*, 270 Neb. 904 (2006) (excludable time due to motion to withdraw not addressed on appeal), the Court of Appeals held that a motion to withdraw as counsel tolls the speedy trial clock under § 29-1207. In so doing, the Court stated: “We think it obvious that as a matter of fundamental fairness, when a motion to withdraw is filed on the ground that the defendant’s lawyer has a conflict of interest, no action of consequence to the defendant can occur in the pending case until the motion is resolved.” *Id.* at 454-455. In *Rieger*, defendant’s public defender moved on his own to withdraw because of a conflict

of interest. *Id.* at 447. The Court excluded five days between the granting of the motion to withdraw and the date a new attorney was actually appointed, because defendant was without representation and the proceedings could not go forward. *Id.* at 445.

In *State v. Curry*, 18 Neb. App. 284, 790 N.W.2d 441 (2010), the Court of Appeals extended the excludable time period on a motion to withdraw to include the time before new counsel was appointed. In that case, the Court granted the motion to withdraw on May 7, 2007, but did not appoint new counsel until its order of May 10, 2007. The Court found “that in the case of a motion of counsel to withdraw, the clock does not start again until new counsel has been appointed.” *Id.* at 293. “This exception to the general rule . . . that the excluded time for defendants’ motions ends when such are granted or denied is consistent with our rationale in *Rieger* that the prosecution is essentially halted by the motion to withdraw and cannot effectively resume until new counsel is in place.” *Id.* at 294.

Here, as Defendant points out, Hughes and Lembrick had already entered their appearance as counsel when [REDACTED] motion was filed. There is no time during which the defendant was unrepresented and proceedings were “halted.” In fact, Defendants new counsel filed discovery motions on March 15, 2024. The State’s certificates of discovery compliance, filed on April 22 and May 16, 2024, state that “the items and reports noted below have been furnished to the Defendant’s counsel of record, Mallory Hughes . . . .” Thus, it is apparent that the State did not halt its prosecution of the Defendant as a result of [REDACTED] motion.

In addition, Neb. Rev. Stat. § 25-908 defines a motion as: “an application for an order addressed to the court . . . by any party to a suit . . . .” Neb. Rev. Stat. § 25-910 states: “Where notice of a motion is required, it must be in writing and shall state (1) the

names of the parties . . . , (2) the name of the court or judge . . . , (3) the place where and the day on which it will be heard, . . . .”

Third District Local Rule 3-2 states: “(A) When any motion requiring a hearing is filed, it shall be filed with a notice of hearing with a date, time, manner of hearing, . . . . (B) A time of hearing shall be secured by contacting the judge’s bailiff. . . . Failure to file a notice of hearing and certificate of service within 10 days after filing a motion will be deemed an abandonment of the motion without further action by the court. . . . “

Although [REDACTED] motion to withdraw prayed for an Order from the Court, it did not contain a Notice of Hearing as required by statute and the local rules of the Third District. Therefore, the Court was never notified that the motion was filed, no hearing was ever held, and the case proceeded without a ruling on the motion. According to Local Rule 3-2(B), the motion was deemed abandoned after 10 days from the date of filing because no notice of hearing was filed.

The Court finds that there is no excludable time period caused by [REDACTED] Motion to Withdraw because there was never a halt in the proceedings as a result of the motion. Even if the Court were to deem some period of time excludable, in this circumstance, where defendant was not without representation, the most that could be excluded would be ten days. Thereafter, the Court was not obligated to rule on the motion because it was deemed abandoned by operation of Third District Local Rule 3-2.

*B. Are Defendant’s discovery motions still pending?*

The State also argues that the Defendant’s motions for discovery, disclosure, and depositions, filed February 28, 2024, were never ruled on by the Court and are still pending, tolling the speedy trial clock. The State claims that, pursuant to Neb. Rev. Stat.

§ 25-2209, the Court's Judge's Note or docket entry was not an official disposition of Defendant's motions.

Section 25-2209 provides that "(c) Judge's docket notes means the notations of the judge detailing the actions in a court proceeding and the entering of orders and judgments; . . . (e) Register of actions means the official court record and summary of the case; . . . ." The State refers to this statute to assert that the Judge's Note on the discovery motions, entered on March 26, 2024, was just a notation of a ruling that never happened; the official record is the Register of Actions on JUSTICE. Further, that the official record, the Register of Actions, shows that the Court has not yet ruled on the February 28 motions either in a court proceeding or written order.

In *Pearce v. Mut. Of Omaha Ins. Co.*, 28 Neb. App. 410, 945 N.W.2d 516 (2020), the Court of Appeals examined whether a docket entry denying a motion to alter or amend was an order disposing of the motion. The Court ultimately held that, although it was a docket entry and not a separate file-stamped document, the written entry made by the district court denying the motion to alter or amend was nevertheless an order disposing of the motion. *Id.* at 418-419. In so doing, the Court cited Neb. Rev. Stat. § 25-914, which states: "[e]very direction of a court or judge, made or entered in writing and not included in a judgment, is an order." The Court explained that "an unsigned journal entry without a file stamp" cannot constitute a final, appealable order, but it "can constitute an interlocutory order." *Id.* at 421 (citing *Donscheski v. Donscheski*, 17 Neb. App. 807, 771 N.W.2d 213 (2009)).

In this case, the Court's Docket Entry of March 26, 2024, specifically "granted" discovery to all parties, set forth specific deadlines, and "ordered" compliance. Therefore, it disposed of the Defendant's discovery motions.



1. *Is there good cause for excluding the discovery time period?*

The State argues alternatively that the period of time between when Defendant filed ■ February 28 motions and the motion for discharge should be excluded under § 29-1207(4)(f) for good cause. Section 29-1207(4)(f) excludes “periods of delay not specifically enumerated ... but only if the court finds that they are for good cause.” “Good cause,’ as used in the speedy trial statutes, means a substantial reason and one that affords a legal excuse.” *State v. Rashad*, 316 Neb. 101, 108, 3 N.W.3d 325 (2024). A finding of good cause “must be supported by the evidence in the record, and the State bears the burden of establishing facts showing that good cause existed.” *Id.*

The State asserts that they are not automatically notified of a judge’s note or docket entry and thus, the Court should find that good cause existed for excluding that period of time between the Defendant’s filing of discovery motions and the motion for discharge. However, the Defendant filed three discovery motions on February 28, 2024, and two motions on March 15, 2024. All five of those motions set the discovery matters for hearing on March 26, 2024. Therefore, the State had notice that there would be a court ruling on those motions on or around March 26, 2024. In addition, the State complied with the Judge’s March 26<sup>th</sup> docket entry or order by providing discovery and filing certificates of compliance. The evidence does not support a finding of good cause for excluding that time period because it shows that the State received notice of the order disposing of the motions and no delay in the proceedings occurred.

**II. Constitutional Right to Speedy Trial**

Defendant’s motion is premised on both statutory and constitutional grounds. The State argues that neither Defendant’s statutory nor constitutional rights to a speedy trial

have been violated. The Sixth Amendment to the U.S. Constitution and Article I § 11 of the Nebraska Constitution provide that in all criminal prosecutions, the accused shall have the right to a speedy trial. The Nebraska Supreme Court has stated: “While the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other, we have recognized that § 29-1207 provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions.” *State v. Lovvorn*, 303 Neb. 844, 852, 932 N.W.2d 64 (2019) (citing *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014)).

### **Conclusion**

It is undisputed that the Defendant has not been tried within six months of the Information filed against ■■■. Thus, the burden is upon the State to prove, by a preponderance of evidence, that one or more of the excluded time periods under § 29-1207(4) is applicable. The Court finds that the State has not met its burden in this case.

Other than filing the plea in abatement, the Defendant has not done anything to delay, continue, or hinder the speedy prosecution of ■■■ case. “The primary burden to ensure that cases are brought to trial lies with the courts and the prosecutors.” *State v. Schmader*, 13 Neb. App. 321, 328, 691 N.W.2d 559 (2005). The Court does not need to determine whether there has been a presumptively prejudicial delay. On the record before it, the Court cannot find “good cause” to support setting a trial in this case beyond the six month statutory deadline. Accordingly, Defendant’s speedy trial rights have been violated and the case must be dismissed.

IT IS THEREFORE ORDERED that Defendant’s Motion for Absolute Discharge is SUSTAINED; this case is dismissed with prejudice.

Dated this 21st day of January 2025.

BY THE COURT:

  
DISTRICT JUDGE