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and that Christian did not show any indications of lacking any proper nutrition.

A review of the record in this case makes it clear the State focused on demonstrating that Peggy had an extremely cluttered house and suffered from some mental health issues and that Christian was, accordingly, at risk of harm. The State failed to prove by a preponderance of the evidence that Christian was at risk or lacked proper parental care through Peggy's fault. We therefore direct that the juvenile court dismiss the proceedings, but that such dismissal shall be without prejudice to any new proceedings if the facts at the time of the filing of new proceedings justify such proceedings and if the allegations properly provide Peggy with due process.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA CURRY, APPELLANT.
790 N.W.2d 441

Filed February 23, 2010. No. A-09-536.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Speedy Trial: Proof.** The State has the burden of proving that one or more of the excluded periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action.
4. **Speedy Trial: Indictments and Informations: Time.** Nebraska's speedy trial statutes provide in part that every person indicted or informed against for any offense shall be brought to trial within 6 months, and such time shall be computed as provided in those statutes.
5. **Speedy Trial: Indictments and Informations.** Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed.
6. **Speedy Trial.** Certain periods of delay are excluded from the speedy trial computation, including (1) 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, including motions to suppress evidence, motions to quash the indictment or information, demurrers, and pleas in abatement, and (2) the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel.

7. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
8. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. Such motions include a defendant's motion to suppress evidence and a motion for discovery filed by the defendant.
9. ____: ____. In a speedy trial analysis under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), the excludable period commences on the day immediately after the filing of a defendant's pretrial motion.
10. ____: ____. Final disposition under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) occurs on the date the defendant's motion is granted or denied.
11. **Speedy Trial: Pretrial Procedure: Presumptions.** Pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.
12. **Speedy Trial: Indictments and Informations: Time.** The time chargeable to the State ceases to run or is tolled during the interval between the State's dismissal of an initial information and the filing of a second information charging the defendant with the same crime as alleged in the dismissed information.
13. ____: ____: ____. When two successive informations charge a defendant with the same crime, the time which runs on the speedy trial clock while the first information is pending must be combined with the calculations of includable and excludable time during the pendency of the second information, before the motion to discharge is filed, in order to determine whether the allowable time under the speedy trial act has run.
14. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not a personal right that can be waived only by a defendant.
15. **Speedy Trial: Pretrial Procedure: Attorneys at Law.** Defense counsel's motions to withdraw are pretrial motions tolling the speedy trial clock; the speedy trial clock is tolled from when a motion to withdraw is made until new counsel is appointed.
16. **Courts: Speedy Trial.** Trial courts are to make specific findings in order to facilitate appellate review of all determinations of excludable periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995).
17. **Speedy Trial: Indictments and Informations: Dismissal and Nonsuit.** The speedy trial clock cannot run past the date that the information was dismissed.
18. **Speedy Trial: Appeal and Error.** The speedy trial clock remains tolled until a motion to discharge is finally resolved, including during an appeal until action is taken on the appellate court's mandate.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed as modified.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

On February 27, 2007, Joshua Curry was charged with first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), a Class II felony. The information alleged that Curry, being more than 19 years of age, did subject K.B., who was less than 16 years of age, to sexual penetration on July 1, 2006, in Cheyenne County, Nebraska. Upon the State's motion, this information was dismissed without prejudice on July 25, 2007. For convenience, this information shall be referred to hereinafter as the "first information."

On January 8, 2009, a complaint was filed in Cheyenne County Court charging Curry with the same offense as charged in the first information. On January 15, a preliminary hearing was held. Curry was bound over to the Cheyenne County District Court, and an information was filed on January 20. This information shall hereinafter be referred to as the "second information." On March 6, Curry filed a motion to discharge under Nebraska's speedy trial act, which motion the district court denied on May 27. Two days later, Curry filed a notice of appeal to this court from the denial of his motion to discharge.

The ultimate question in this appeal is whether the 6 months in which to bring Curry to trial on the charge of first degree sexual assault had run when he filed his motion to discharge on March 6, 2009, after excludable time periods and periods in which the speedy trial statutes were tolled are calculated. We find that the time in which to bring Curry to trial had not run,

and thus, we affirm the district court's denial of the motion to discharge, but we modify the calculation of the days remaining on the speedy trial clock as explained below.

II. ASSIGNMENT OF ERROR

Curry's single assignment of error is that "the [district] court erred in finding that time periods which caused no delay should count against [him] and be excluded from the statutory speedy trial computation" by application of Neb. Rev. Stat. § 29-1207(4)(a) and (b) (Reissue 1995).

III. STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

IV. PROCEDURAL AND FACTUAL BACKGROUND

This case, like most speedy trial appeals, involves the detailing of a variety of procedural events and motions during the course of the prosecution of a case and application of largely well-established principles under Nebraska's speedy trial act to determine periods of time which are excluded from the speedy trial clock. This case is somewhat more involved because the first information was dismissed, and then a second information alleging the same crime was refiled. We believe that it is most efficient to recite the pertinent procedural events in the analysis section of our opinion.

V. ANALYSIS

1. General Principles of Law for Speedy Trial Analysis

[3-11] We begin by first setting forth the fundamental principles of law which govern our analysis, the first of which is

that the State has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action. *State v. Groves*, 238 Neb. 137, 469 N.W.2d 364 (1991). The Nebraska Supreme Court has conveniently set forth additional applicable principles in its recent opinion in *State v. Williams*, which we quote:

> Nebraska's speedy trial statutes provide in part that "[e]very 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." Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed. Certain periods of delay are excluded from the speedy trial computation, including: "(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, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement . . . . (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.
>
> The plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. Such motions include a defendant's motion to suppress evidence and a motion for discovery filed by the defendant. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is "'"granted or denied."'" Pursuant to § 29-1207(4)(a), it is

> presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.

277 Neb. at 140-41, 761 N.W.2d at 522.

2. Treatment of Successive Informations Charging Same Crime

[12,13] This case involves a dismissed information, followed by a lapse of nearly 18 months before the filing of the second information charging Curry with the identical crime. It is clear that the time chargeable to the State ceases to run or is tolled during the interval between the State's dismissal of the initial information and the filing of the second information charging the defendant with the same crime as alleged in the dismissed information. See *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). Thus, when the first information against Curry was dismissed without prejudice on July 25, 2007, and a second information charging the same crime was filed on January 20, 2009, the running of the speedy trial clock between those two dates was tolled, and this timeframe is not chargeable to the State. However, *French, supra*, makes it clear that the time which ran on the speedy trial clock while the first information was pending must be combined with the calculations of includable and excludable time during the pendency of the second information, before the motion to discharge was filed, in order to determine whether the allowable time under the speedy trial act has run.

The original information in this case was filed on February 27, 2007. For speedy trial calculation purposes, we exclude the day the information was filed, count forward 6 months, and back up 1 day. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Therefore, under the first information, Curry had to be tried by August 27. However, the first information was dismissed on July 25, ending that prosecution. Thus, ignoring excluded time periods for the moment, it is clear that the speedy trial clock had not run when the second information charging the same offense was filed January 20, 2009. Therefore, the time period between the dismissal of the first information on July 25, 2007, and the filing of the second information, using

January 19, 2009, as the last day, produces a total of 544 excluded days—and we have included in our calculation the fact that 2008 was a leap year.

The trial court determined that there were 24 days excluded from the speedy trial clock during the pendency of the first information, plus 32 days remaining on the speedy trial clock when the first information was dismissed on July 25, 2007. Therefore, the trial court found that there were 56 days left on the speedy trial clock when the second information was filed on January 20, 2009.

3. First Information and Speedy Trial Clock

(a) Are Days Excluded Because of First Counsel's Motion to Withdraw?

While Curry's single assignment of error can be seen as overly generalized because it does not specify exactly how he claims the trial court went astray in its calculation, the argument section of Curry's brief does inform us of the portions of the trial court's calculation he alleges were error. With respect to the first information, Curry argues that the trial court erred when it found that 8 days were excludable due to the first attorney's motion to withdraw as counsel. We address this argument first.

The record shows that Curry's first attorney filed a motion to withdraw on April 26, 2007, alleging simply that he "has a conflict of interest in representing [Curry]." The trial court's journal entry of May 7 recites that a hearing was held on this motion on May 4; that Curry was present, as was a deputy county attorney; and that the first attorney appeared telephonically. The journal entry recites that the attorney represented both Curry and another individual, that the two clients were "involved in an altercation in jail," and that as a result, the attorney "believe[d] that he ha[d] a conflict in representing either party, and wishe[d] to avoid any appearance of impropriety due to representing either or both part[ies]." The trial court granted the motion to withdraw. There is no record of what was said at the hearing on May 4, beyond what can be gleaned from the journal entry of May 7. On May 10, the trial court appointed another lawyer to represent Curry.

[14] Curry's basis for his claim that these 8 days were wrongfully excluded by the trial court is that he "was without counsel once counsel pursued motions to withdraw without [a] sound basis." Brief for appellant at 6 (emphasis omitted). In support of this claim, Curry cites us to *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). In that case, the Supreme Court cited *Townsend v. Superior Court*, 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975), in support of its finding that it has been recognized that defense counsel's authority to waive a defendant's statutory right to a speedy trial cannot extend to excuse "'"representation [that] is so ineffective that it can be described as a 'farce and a sham.'"'" *McHenry*, 268 Neb. at 232, 682 N.W.2d 225**.** Initially, we point out the fact that obviously distinguishes *Townsend, supra*, from the instant case—there is no waiver of the right to a speedy trial in Curry's case, and a waiver is different from calculating excluded time periods. *McHenry, supra*, was a postconviction case in which it was asserted that defense counsel was ineffective for filing a motion that resulted in a 2-month continuance even though the defendant refused to sign a waiver of speedy trial rights as his trial counsel had requested. The Supreme Court, as a predicate to the finding of no deficient performance of counsel, said it is clear that the statutory right to a speedy trial is not a personal right that can be waived only by a defendant. The Supreme Court reasoned that the request for a continuance, despite defendant's objection to seeking such, was not the sort of "farce or sham" representation that would result in the continuance time's not being excluded from the speedy trial clock, given that the continuance was for only 2 months in a complex murder trial involving two codefendants.

We understand Curry's application of *McHenry, supra*, to his case to be that the motion of first defense counsel to withdraw, for which the trial court found 8 excludable days, was a "farce or sham" such that no excludable time should be charged to Curry. We have set forth above what the record reveals about the motion of Curry's first attorney to withdraw. Curry argues, as we understand it, that because the motion to withdraw was without a sound basis and was a sham, Curry was without counsel from the time the motion was made.

We reject the argument for several reasons. First, there is no record of the hearing at which the motion was taken up, and it is incumbent on Curry as the appellant to present a record supporting his claim of error. Absent such, as a general rule, the decision of the lower court will be affirmed. *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992). Second, the district court's recital of the reason for counsel's request to withdraw certainly does not allow us to conclude that the motion to withdraw was a farce or sham such that the time for the resolution of the motion should not have been charged to Curry and excluded from the speedy trial clock. The issue then becomes simply whether a motion of defense counsel to withdraw is a "period of delay resulting from other proceedings concerning the defendant" under § 29-1207(4)(a) and is excluded from the speedy trial clock.

In *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005), we noted that the question of whether a motion of counsel to withdraw because of a conflict should stop the running of the speedy trial clock, and how any time would be calculated, had not been addressed by either appellate court. While our *Rieger* decision was rendered under the interstate Agreement on Detainers requiring trial within 180 days, ultimately *Rieger* helps answer the question posed above. In our *Rieger* decision, we found as follows:

> We now hold that such a motion does toll the running of the 180 days under the [interstate Agreement on Detainers]. 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. Other jurisdictions have held that counsel's motions to withdraw are pretrial motions tolling the speedy trial clock. See *U.S. v. Hammad*, 902 F.2d 1062 (2nd Cir. 1990) (delay, occasioned when court was informed by defense counsel that he intended to withdraw as counsel, was excludable under self-executing provision of federal speedy trial act for delay resulting from pretrial motion). See, also, *U.S. v. Joost*, 133 F.3d 125 (1st Cir. 1998); *U.S. v. Parker*, 30

F.3d 542 (4th Cir. 1994); *U.S. v. Driver*, 945 F.2d 1410 (8th Cir. 1991).

13 Neb. App. at 454-55, 695 N.W.2d at 687-88.

[15] The Nebraska Supreme Court granted a petition for further review of our *Rieger* decision. In *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006), the Supreme Court reversed our decision on the basis that our use of the 6 months provided in Nebraska's speedy trial act was incorrect when the interstate Agreement on Detainers provided that the defendant shall be brought to trial within 180 days after the prosecutor and court with jurisdiction receive the defendant's proper request for disposition of untried charges. However, because the 5 days we had excluded from the running of the time in which to bring the defendant to trial because of his attorney's motion to withdraw did not impact the result, the Supreme Court declined to address the defendant's claim that we had erroneously excluded time attributable to his counsel's motion to withdraw. Thus, at this juncture, the only published Nebraska appellate court decision on whether time attributable to defense counsel's motion to withdraw is still our holding in *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005). We believe that our rationale from our *Rieger* decision for excluding the time for the resolution of defense counsel's motion to withdraw is still sound. Plus, we note additional authority from other jurisdictions, not cited in our *Rieger* opinion, that holds that the speedy trial clock is tolled from when a motion to withdraw is made until new counsel is appointed. See, *U.S. v. Oberoi*, 295 F. Supp. 2d 286 (W.D.N.Y. 2003); *Linden v. State*, 598 P.2d 960 (Alaska 1979); *State v. Brown*, 157 N.H. 555, 953 A.2d 1174 (2008); *State v. Younker*, No. 07CA18, 2008 Ohio App. LEXIS 5736 (Ohio App. Dec. 16, 2008).

Accordingly, we hold that the speedy trial clock is stopped on the day following the filing of counsel's motion to withdraw—in this case, April 27, 2007. While the general rule is that the excluded time period for a defendant's motion ends on the day the motion is granted or denied, see *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009), we find that in the case of a motion of counsel to withdraw, the clock does not start again until new counsel has been appointed. See, *Oberoi,*

supra; *Brown, supra*; *Younker, supra.* This exception to the general rule from *Williams, supra*, 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.

In this case, the trial court granted the motion to withdraw on May 7, 2007, but the court did not appoint new counsel until its order of May 10 that recites: "On the basis of the financial affidavit presented to the Court the application for court appointed counsel is approved." Although our record does not contain such application from Curry, it is a fair inference that it was filed at or about the time of the court's order of May 7 allowing the withdrawal of Curry's first attorney. Thus, the motion to withdraw was not completely resolved until the trial court's order appointing substitute counsel on May 10. Therefore, we find, as a matter of law, that the timeframe that is excluded from the speedy trial clock with regard to the first information for the motion of Curry's first counsel to withdraw began April 27 and ended May 10—a total of 14 days, not 8 days as found by the trial court.

(b) Additional Excludable Days
Regarding First Information

With reference to the first information, the trial court found that there were, in addition to the 8 days it excluded for the motion of counsel to withdraw, "[t]welve (12) days for 2nd Motion to take Depositions" and "[t]wo (2) days for Motion in Limine and other pre-trial motions" excluded from the running of the speedy trial clock. Curry makes no complaint of such exclusions, and we find that such were properly excluded.

Next, Curry asserts that the trial court did not properly deal with the State's motion to continue in its speedy trial calculation, because the trial court made "no finding that the continuance was granted upon good cause shown." Brief for appellant at 7. While we ultimately conclude that the treatment of the continuance does not involve whether there was good cause for such, the fact is that the trial court did not address this motion for continuance in its order. The record shows that on June 20,

2007, the State moved "to continue the Jury Trial . . . for the reason that court reporters [were] unavailable for depositions at [that] time" and "[a]dditional time [was] needed to obtain depositions prior to trial." In a journal entry file stamped June 28, the court recited that a hearing with all counsel had occurred on June 26; the journal entry stated, "The Court, being duly advised, finds that the motion is granted and that the Jury Trial is continued to [the] 8th day of August 2007 . . . ." In the trial court's rather detailed order overruling the motion to discharge, there is no mention whatsoever of this motion to continue; thus, in the trial court's order, the speedy trial clock was not tolled for the State's motion to continue. Defense counsel asserted at oral argument that there was no showing of "good cause" and that as a result, no time could be excluded for the State's motion for continuance.

[16] The "catchall" provision of § 29-1207(4)(f) provides for excludable time for "[o]ther periods of delay not specifically enumerated [in § 29-1207(4)], but only if the court finds that they are for good cause." It is clear that trial courts are to make specific findings in order to facilitate appellate review of all determinations of excludable periods under § 29-1207(4). See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Therefore, the trial court's order is deficient in its failure to make findings regarding this motion—but the record shows that the motion for continuance is not properly resolved under the "catchall" provision quoted above.

The record before us includes the hearing on the State's motion that occurred on June 26, 2007, with both counsel as well as Curry present. The record of this proceeding covers seven pages; thus, we summarize what occurred. Both counsel were in agreement on the need to take depositions of the alleged victim and another witness and that the earliest a court reporter was available was July 11—the then-set trial date being July 18. Both counsel were of the view that such trial date was too close to the July 11 depositions, such that additional time would be needed to study the results of the depositions, plus of the view that it was possible that other issues would be generated by the depositions that could not be taken until July 11. After these statements by counsel, an

extensive discussion followed about finding a new trial date in early August. It is clear from his responses when questioned by the trial court that Curry understood the need for the continuance. Moreover, a fact finder could easily conclude from the record of this hearing that Curry was knowingly agreeable to the proposed continuance. The matter was left, at the conclusion of the hearing on June 26, that counsel would jointly discuss the status of other pending cases on the docket and that they would meet the next day informally with the trial judge about what they had concluded regarding a trial date. There is no record of that informal meeting, but on June 28, the court filed a journal entry granting the continuance and setting the matter for trial on August 8. We find that it is beyond dispute that Curry's counsel, if not Curry personally, consented to the granting of the State's motion for continuance. However, on July 25, the State filed a motion to dismiss "due to witness unavailability" which was granted "without prejudice" on that same date.

As we have outlined above, such dismissal tolled the speedy trial clock on July 25, 2007. However, Curry argues that trial was set for July 5 and that "any period of delay after July 5 . . . was attributable to the State's motion to continue." Brief for appellant at 8. Curry's argument that such time is chargeable to the State is based on a lack of a finding of good cause for the continuance under § 29-1207(4), but it ignores the transcript of the hearing at which the defense consented to the continuance. Initially, we note that in an order of March 6, the court had set July 5 as the last day to tender "any negotiated plea" and decreed that "a Jury Trial [was thereby] set for the 18th day of July." In the final analysis, Curry's argument ignores § 29-1207(4)(b), which provides for the exclusion of "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." After examination of the proceedings of June 26, it is clear that the State's motion for continuance was granted with the consent of Curry's counsel, if not also by Curry himself. Thus, we turn to how much time is excluded from the speedy trial clock because of the mutually agreed-upon continuance.

The State's motion for continuance was filed June 20, 2007, and while such was ultimately granted and the trial was reset for August 8, the first information under which the case was proceeding was dismissed on July 25. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997), teaches that ordinarily, the period of time from the filing of a motion to continue until the new trial date would be excluded under either § 29-1207(4)(c)(i) or § 29-1207(4)(b). In *Turner, supra*, the court dealt first with the State's motion for a continuance because results from the testing of sperm samples for DNA were not yet available. Section 29-1207(4)(c)(i), providing for tolling of the speedy trial clock when necessary evidence is unavailable despite the State's due diligence, was used in *Turner, supra*, to exclude the 74 days from the day after the filing of the motion until the new trial date—January 5 to March 20, 1995. Helpfully, *Turner, supra*, also dealt with the defendant's motion to continue filed May 11 to secure an independent DNA analysis and a second such motion from the defendant filed July 11, which resulted in a trial date of November 13, when the trial actually began. The *Turner* court relied on § 29-1207(4)(b), noting that a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel is excluded from the speedy trial calculation. Thus, the court found, "[T]he entire period from the date of the first motion for continuance (May 11) until the time of trial (November 13) is properly excluded. This totals 186 days." *Turner*, 252 Neb. at 632, 564 N.W.2d at 239. (Since the *Turner* decision, there has been a change in that the count for excluded days now is to begin with the day following the filing of the motion, rather than with the date the motion was filed as was done in *Turner.* See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). See, also, *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *affirmed as modified* 267 Neb. 145, 672 N.W.2d 627 (2004).)

[17] Accordingly, applying *Turner, supra*, we would begin the count of excluded days for the mutually agreed-upon continuance under § 29-1207(4)(b) from the day after the State's motion to continue was filed, June 21, 2007, and continue to exclude days until the new trial date, August 8—except for the

fact that the information was dismissed on July 25. Clearly, the speedy trial clock cannot run past the date that the information was dismissed, as there was then no prosecution pending. See *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). As a result, there were 35 days attributable to the motion for continuance during which the speedy trial clock was tolled, from June 21 to July 25, and we include those days in our final calculation, remembering that a correct result (overruling the motion to discharge) will not be reversed when the trial court's reasoning is incorrect (trial court's speedy trial count was incorrect). See *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

4. Second Information and Speedy Trial Clock

As previously outlined, the law is that when a second information is filed charging the defendant with the same crime as was charged in the first information, the speedy trial clock is tolled between the dismissal of the first information and the filing of the second information. Nonetheless, there is only one 6-month period of time in which the State must bring the defendant to trial under the speedy trial act. Thus, the excluded timeframes during the pendency of both informations are added together to determine whether the speedy trial clock has run on the second information. We now turn to the procedure and facts surrounding the second information.

Curry asserts that when there is a complaint in county court followed by a bindover to district court, "foregoing [sic] a direct filing [in district court] would be a delay attributable to the State." Brief for appellant at 8. Curry cites us to *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982), for his proposition that "unreasonable delay occurring prior to the filing of an information will be considered in determining whether [a] defendant has been denied speedy trial." Brief for appellant at 9. Admittedly, a portion of the quoted proposition is found in *Gingrich, supra.* But, it is set forth only for the purpose of determining whether there had been a denial of the constitutional right to a speedy trial, not with respect to the statutory right. In this case, Curry asserts only his statutory

rights under Nebraska's speedy trial act. Thus, *Gingrich, supra*, and similar cases are not on point. Our analysis is undertaken only with respect to excludable timeframes under § 29-1207, as it was with respect to the first information, as no constitutional speedy trial issue has been raised in the court below or on appeal. As said earlier, we hold that the speedy trial clock is tolled for the timeframe between the dismissal of the first information and the filing of the second information. Curry concludes his brief with the statement that "[p]eriods of delay attributable to [Curry] total only thirty-four (34) days" and the assertion that as a result, the speedy trial clock had run when he filed his motion to discharge on March 6, 2009; we assume Curry's 34 days encompass both informations. We have already dealt with excludable time periods for the first information.

With regard to the second information, the trial court found only 4 days excludable due to Curry's motion to review bond filed January 26, 2009, that was noticed for hearing on January 30. The trial court said that no order could be found on such motion showing that Curry was heard on the motion. The trial court "[found] it improper to impute any further time to [Curry] for purposes of calculation of speedy trial time than that time that would otherwise have been properly imputed to him assuming that he had been heard on January 30." Thus, the court limited the excludable time to the 4 days beginning on January 27 and ending on January 30. While it is correct that there is no order in our record evidencing a ruling on such motion, the court's rationale for limiting the excludable time to 4 days is incorrect. The final disposition under § 29-1207(4)(a) of a defendant's motion occurs on the date the motion is "'"'granted or denied,'"'" see *State v. Williams*, 277 Neb. 133, 141, 761 N.W.2d 514, 522 (2009), not when the motion is heard. Thus, the trial court was clearly wrong as a matter of law in using the date that the motion to review bond was to be heard as the end of the excludable time.

[18] In the end, the record before the district court, as well as before us, fails to show that the motion was granted or denied. This means that on the record produced by the parties,

the motion to review bond had not been finally determined when Curry filed his motion to discharge on March 6, 2009. Consequently, the speedy trial clock was tolled from January 27 through March 6, when the motion to discharge was filed, a total of 39 days. And the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on our mandate, see *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000).

5. Final Speedy Trial Clock Calculation

We have proceeded to this point by narrative, and from such we have constructed the following timeline:

First Information	
February 27, 2007	First information filed
August 27, 2007	Last day, without excludable days
March 6, 2007	Curry's motion for disclosure filed
March 8, 2007	Motion ruled on: *1 day excluded*
April 26, 2007	First lawyer moves to withdraw
May 7, 2007	Motion to withdraw granted
May 10, 2007	Second lawyer appointed: *14 days excluded*
June 20, 2007	State files motion to continue
June 28, 2007	Continuance granted, by agreement; new trial date set for August 8
July 25, 2007	State moves to dismiss; granted same day; *35 days excluded for continuance* (June 21 to July 25), *plus 33 days left on speedy trial clock when information dismissed* (July 26 to August 27)
	Days left at dismissal: 1 + 14 + 35 + 33 = *83 days excluded*
July 25, 2007	Speedy trial clock tolled
Second Information	
January 20, 2009	Second information filed; speedy trial clock begins again; add 83 days to January 20—last day to begin trial is April 12, 2009

January 26, 2009	Curry files motion to review bond; not granted or denied
January 27, 2009	Excluded days begin for motion to review bond
March 6, 2009	Motion to discharge filed; 39 days excluded due to motion to review bond (January 27 to March 6)
As of March 6, 2009	Last day to begin trial is April 12, 2009, plus 39 days for motion to review bond; last day to begin trial is May 21

VI. CONCLUSION

The trial court found that as of the filing of the motion to discharge on March 9, 2009, the State had 11 days, or until March 20, in which to bring Curry to trial. Initially, we note the court's error in stating that March 9 was the date of the motion to discharge when it was actually March 6. Regardless, we find that such calculation was in error in that the State had until April 12, plus 39 excluded days for the motion to review bond, or until May 21, in which to bring Curry to trial, given that his motion to discharge was filed on March 6. Thus, there are 76 days remaining on the speedy trial clock when the district court takes action on our mandate. Accordingly, the trial court did not err in overruling the motion for discharge, but we modify its decision to add additional days to the speedy trial clock as outlined herein. The time during which a defendant's motion is on appeal to an appellate court is excludable time for speedy trial purposes. *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002).

AFFIRMED AS MODIFIED.