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STATE OF NEBRASKA, APPELLEE, V. VICTOR VELA-MONTES, APPELLANT.

807 N.W.2d 544

Filed December 13, 2011. No. A-10-1043.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal.
4. **Motions for Continuance.** Neb. Rev. Stat. § 29-1206 (Reissue 2008) states that applications for continuance shall be made in accordance with Neb. Rev. Stat. § 25-1148 (Reissue 2008) and that in criminal cases, the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.
5. **Speedy Trial.** Neb. Rev. Stat. § 29-1208 (Reissue 2008) provides that a defendant who is not brought to trial before the running of the time for trial, as extended by excludable periods, shall be entitled to absolute discharge.
6. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) are applicable when the defendant is not tried within 6 months.
7. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
8. **Motions for Continuance: Appeal and Error.** Noncompliance with the mandates of Neb. Rev. Stat. § 25-1148 (Reissue 2008) is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance.
9. **Evidence: Waiver.** Oral statements of counsel should not be received as evidence, although objection to their reception may be waived.
10. **Motions for Continuance: Prosecuting Attorneys: Waiver: Appeal and Error.** It is not error for a trial court to grant a continuance when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor and the defense does not object to the procedure.
11. **Motions for Continuance.** The plain requirements of Neb. Rev. Stat. § 25-1148 (Reissue 2008) are not difficult to comply with, especially when the defendant unequivocally objects to the State's failure to do so.
12. ____. The State's failure to comply with the dictates of Neb. Rev. Stat. § 25-1148 (Reissue 2008) deprives a defendant of a mere technical right.

13. **Judgments: Words and Phrases: Appeal and Error.** In the context of appealable orders, a substantial right is an essential legal right, not a mere technical right.
14. **Criminal Law: Judgments: Appeal and Error.** No judgment shall be set aside in any criminal case for error as to any matter of procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred.
15. **Affidavits: Testimony.** The right to have a motion supported by affidavits or sworn testimony is a mere technical right, not an essential legal right.
16. **Motions for Continuance: Records: Appeal and Error.** In determining whether a trial court has abused its discretion in ruling on a continuance, it is proper for the reviewing court to look at the entire record in the case.
17. **Evidence: Motions to Dismiss: Appeal and Error.** In numerous instances, the Nebraska appellate courts have considered evidence relevant to earlier proceedings where such evidence was adduced at the time of a hearing on a motion for discharge.
18. **Motions for Continuance: Appeal and Error.** An appellant has suffered no loss of a substantial right by the grant of the State's motion for continuance when the State did not support the motion with an affidavit or sworn testimony.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Daniel R. Stockmann, of Dunn & Stockmann, L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

INTRODUCTION

Victor Vela-Montes appeals from an order denying his motion for absolute discharge on speedy trial grounds. At the hearing on his motion for discharge, the district court received evidence precisely confirming the prosecutor's representations made at the time the State obtained a continuance. Vela-Montes argues that because the evidence was not produced at the earlier hearing in the form of an affidavit or live witness, the court erred in overruling his motion for discharge. We conclude that the receipt of this evidence did not affect a substantial right and that the court did not abuse its discretion in granting the motion to continue. Accordingly, the speedy trial clock had

not expired and the district court properly denied Vela-Montes' motion for discharge.

BACKGROUND

On February 26, 2009, the State charged Vela-Montes with two counts of first degree sexual assault. On November 2, Vela-Montes filed a motion for continuance of the trial scheduled to begin on November 4. The court granted this motion and set trial for November 30.

On November 23, 2009, the State filed a motion to continue the trial. The State did not submit testimony, exhibits, or affidavits regarding the basis for the continuance, and Vela-Montes did not agree or stipulate to a continuance. The prosecutor made an unsworn statement to the court that one of the victims in the case was unavailable to testify on the date the case had been set for trial. The prosecutor stated:

> I am asking for a continuance of the trial date. One of the victims on the case . . . has contacted me since I gave her the date of November 30. She indicates to me that she's beginning classes full-time on November 30 and won't be available to testify that week. She has to take these classes as a requirement, a prerequisite, I guess, to get into what she wants to do as it pertains to the Army. And these classes run November 30 to February 25; however, she did indicate to me that she would be available in February and March to testify so that's the reason I'm asking for this continuance.

Defense counsel objected to the motion and argued that "the State is not even asking for a continuance in the proper manner. The statute for requesting a continuance requires an affidavit be submitted in support of the motion to continue." Defense counsel further argued to the court:

> I think the reason at least partially the statute requires an affidavit is that there needs to be some sort of evidence submitted, I think, by the State as to why [it] need[s] a continuance, not just an argument. [The State has not] submitted any evidence, affidavit or otherwise, as to why [it] need[s] the continuance or why there's been good cause shown to justify the continuance.

Over objection by Vela-Montes to both the method of the request and the continuance itself, the court sustained the motion and continued the trial to February 1, 2010.

On January 19, 2010, Vela-Montes filed a motion for discharge arguing that the 6-month statutory speedy trial time under Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2008) had expired and that his constitutional right to a speedy trial had been violated.

On January 25, 2010, the district court held a hearing on Vela-Montes' motion for discharge. The State presented testimony from the victim whose unavailability had prompted the State's November 2009 motion to continue. The victim testified that prior to the State's filing the motion to continue, she had informed the State that she would be unavailable to testify on the previously set trial date because of her class schedule and that she would not be available to testify until February 2010. Vela-Montes objected to the testimony of the victim, arguing that while such evidence may have been relevant in connection with the earlier hearing on the State's motion to continue, it was not relevant now in connection with the motion for discharge. The court overruled Vela-Montes' objection and denied his motion for discharge. On January 27, the court entered an order denying the motion for discharge.

Vela-Montes filed his first appeal, in case No. A-10-106, on January 27, 2010. We subsequently remanded the case back to the district court with directions that the court make specific findings of each period of delay excludable under § 29-1207(4)(a) to (f), which the court had failed to do in its prior order.

On October 13, 2010, the district court entered a supplemental order pursuant to this court's mandate. In this supplemental order, the district court found that the pretrial motions of Vela-Montes added a total of 132 days to his speedy trial clock and that the State's motion to continue trial for good cause to February 1, 2010, added an additional 63 days. Therefore, according to the district court, a total of 195 days were to be added to Vela-Montes' speedy trial clock.

For the sake of clarity, we note at this point that the district court improperly calculated the number of excludable days

on the prior remand, and the State agrees. It appears that the trial court did not recognize that an excludable period under § 29-1207 commences on the day immediately after the filing of a defendant's pretrial motion. See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). The district court incorrectly included the day of the filing of each of the pretrial motions, thereby excluding 1 day too many for each time period. Those time periods dealt with discovery and continuance motions. Proceedings related to some of these motions have not been made a part of the record, but they are not the subject of any dispute.

Vela-Montes and the State agree that Vela-Montes' 6-month speedy trial clock within which to be brought to trial, exclusive of consideration of the time attributable to the State's continuance, expired on January 4, 2010. The only disputed issue is whether the time from December 1, 2009, to February 1, 2010, attributable to the State's continuance, was properly excluded from the speedy trial calculation.

ASSIGNMENT OF ERROR

Vela-Montes assigns that the district court committed reversible error by overruling his motion for discharge when the State failed to bring his case to trial within the statutory 6-month period.

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. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010). But statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Id.*

[3] A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003).

ANALYSIS

Vela-Montes constructs a technical argument. He asserts that the time attributable to the State's November 2009 motion to continue should not be excluded from the speedy trial calculation, because the State failed to properly seek the continuance and because he appropriately objected to the method used by the State and to the continuance itself. He argues that the later evidence bearing on the necessity of the continuance must be disregarded. Thus, the timing of the production of this evidence is critical to his argument.

[4] We begin by recalling the statutory provisions regarding continuances in the context of the statutory right to speedy trial. Neb. Rev. Stat. § 29-1206 (Reissue 2008) states that applications for continuance shall be made in accordance with Neb. Rev. Stat. § 25-1148 (Reissue 2008) and that in criminal cases, the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case. Section 25-1148 provides that an application for continuance shall state

> the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance . . . is asked. After the filing of such application and the affidavits in support thereof, the adverse party shall have the right to file counter affidavits in the matter. Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application. The court may, upon the hearing, in its discretion, grant or refuse such application, and no reversal of such cause or proceeding shall be had on account of the action of the court in granting or refusing such application except when there has been an abuse of a sound legal discretion by the court.

Although Vela-Montes presents a narrow attack focusing on the hearing on the State's motion for continuance, the

issue is presented to this court in the context of a speedy trial determination. As such, the relevant context for resolving the issue in this appeal is within the confines of Nebraska's statutory speedy trial guarantee.

[5-7] Section 29-1208 provides that a defendant who is not brought to trial before the running of the time for trial, as extended by excludable periods, shall be entitled to absolute discharge. The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *Id.*

There is no dispute about most of the relevant excludable time periods, and the only significant dispute is whether the time attributable to the State's November 2009 continuance should have been excluded. Vela-Montes argues that the time may not be excluded. If, however, as the State contends, that time is properly excluded, then the motion for discharge was properly denied.

Vela-Montes argues that the State's motion for continuance was wrongly granted by the court because the State failed to follow statutorily mandated procedures for requesting a continuance and because the motion for continuance was supported only by the unsworn representations of the prosecutor, over Vela-Montes' objection. We disagree.

[8] The Nebraska appellate courts have held that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999).

[9,10] In *State v. Roundtree, supra*, the prosecutor orally moved for continuance before trial because of the alleged unavailability of witnesses. The State did not file a written

motion, did not file any affidavits, and did not present any sworn testimony in support of the motion. Rather, the prosecutor made several unsworn statements of fact during the hearing to justify a continuance. Defense counsel did not object to the State's failure to comply with § 25-1148, acknowledged having prior knowledge of the State's intent to seek the continuance, did not challenge the alleged unavailability of the witness, and objected to the granting of the continuance solely on the basis of constitutional speedy trial rights. On appeal, we recognized that § 25-1148 had not been complied with, but relied heavily on the fact that defense counsel did not object to the procedure employed by the State. We specifically recognized that oral or other informal statements are a poor procedure when speedy trial rights are involved. *State v. Roundtree, supra*. We also noted that oral statements of counsel should not be received as evidence, although objection to their reception may be waived. *Id.* We ultimately concluded that "it is not error for a trial court to grant a continuance when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor and the defense does not object to the procedure." *Id.* at 640, 658 N.W.2d at 318. Thus, we specifically held that the defense's silence waived any requirement of compliance with § 25-1148.

Similarly, in *State v. Shipler, supra*, the State failed to comply with § 25-1148. Although the State filed a written motion, it failed to include affidavits to support the factual basis for the motion and, instead, relied on unsworn oral statements of the prosecutor at the hearing on the motion to demonstrate that the continuance was warranted. As in *State v. Roundtree*, this court found no abuse of discretion by the trial court in granting the motion, notwithstanding the State's failure to comply with § 25-1148. Again, we relied on the failure of the defendant to object to the State's failure to comply with § 25-1148 at the hearing on the motion to conclude that there was no abuse of discretion. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008).

[11] In contrast to *State v. Roundtree* and *State v. Shipler*, Vela-Montes specifically and vigorously objected to the State's

failure to comply with § 25-1148 and to the State's use of unsworn statements to support the motion to continue. We recognized in *State v. Roundtree* that when the facts or procedures being used by the State to seek a continuance are questioned, it is a simple matter to require the prosecutor to present evidence or sworn testimony to support the State's assertions. The plain requirements of § 25-1148, and our prior suggestions that they be followed, are not difficult to comply with, especially when the defendant unequivocally objects to the State's failure to do so.

[12-15] However, we assess the procedural defect in the broader context of Nebraska jurisprudence focusing on the parties' substantial rights, and thus, we concentrate on whether the continuance was justified in light of the evidence confirming the prosecutor's representations of cause. The State's failure to comply with the dictates of § 25-1148 deprived Vela-Montes of a mere technical right. In the context of appealable orders, we have said that a substantial right is an essential legal right, not a mere technical right. See, e.g., *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). And a fundamental principle of the review of judgments in criminal cases dictates that no judgment shall be set aside in any criminal case for error as to any matter of procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred. See Neb. Rev. Stat. § 29-2308 (Reissue 2008). In a similar vein, the right to have a motion supported by affidavits or sworn testimony is a mere technical right, not an essential legal right. The substantial legal right was to have the continuance granted only where sufficient cause actually existed, which the evidence clearly established. Thus, Vela-Montes, though he objected to the State's method of requesting the continuance, did not lose a substantial right. And the fundamental principle of the review of judgments in criminal cases constrains us from reversing a ruling affecting a mere technical right.

We reject Vela-Montes' argument that he was deprived of a substantial right—the statutory right to speedy trial—as this merely attempts to bootstrap a substantial right to the

mere technical right actually affected. At oral argument, Vela-Montes' counsel forthrightly conceded that the evidence later presented, *if presented at the time of the hearing on the motion for continuance*, would have been sufficient to support the district court's order granting the continuance. Thus, it is not the character of the evidence presented, but merely the timing of the presentation, that constitutes the foundation of Vela-Montes' assigned error.

[16] During the hearing on Vela-Montes' motion for absolute discharge, the State presented sworn testimony to demonstrate that the factual basis for the prior continuance was justified. Vela-Montes objected, arguing that the evidence might have been relevant at the prior hearing on the State's motion to continue but could not be used later at the hearing on the motion for discharge to retroactively support an improperly awarded continuance. In determining whether a trial court has abused its discretion in ruling on a continuance, it is proper for the reviewing court to look at the entire record in the case. See *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991). We conclude that the court did not err in receiving such evidence at the motion for discharge for at least two reasons.

First, we emphasize that the evidence presented at the hearing on the motion for discharge did not vary in any material respect from what was adduced at the hearing on the State's motion to continue. As earlier set forth, during the hearing on the State's motion to continue, the prosecutor asserted that one of the victims would not be available to testify on the scheduled trial date due to prerequisite classes running from November 30, 2009, to February 25, 2010. The prosecutor represented that the bailiff informed her that the earliest date the court was available for trial was February 1. During the hearing on the motion for discharge, the victim who precipitated the State's November 2009 motion for continuance testified that when she was informed that the trial date was continued until November 30, she told the prosecutor that her college classes were beginning that day and that she would be unavailable to testify due to her school schedule. The State also called the bailiff to testify, and she testified that upon the State's November 2009 motion to continue, she

looked through the court's calendar and ascertained that the next available jury panel was February 1, 2010. This sworn testimony is materially the same as the prosecutor's unsworn statements made in support of the motion for continuance. Clearly, the precise conformity between the proffered justification and the later evidence drives our conclusion that Vela-Montes was not deprived of a substantial right—had there been any significant variance, we could not reach the same conclusion.

[17] Second, in numerous instances, the Nebraska appellate courts have considered evidence relevant to earlier proceedings where such evidence was adduced at the time of a hearing on a motion for discharge. For instance, in *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002), at the hearing on the defendant's motion for discharge, the State filed an affidavit of good cause which listed events that had occurred during the proceedings which the State asserted constituted good cause for the delay in bringing the defendant to trial. The trial court's decision noted some of the items contained in the State's affidavit. On appeal, we observed with respect to one time period at issue that "[t]he State's affidavit of good cause noted that [the defendant] requested this continuance in order to prepare for the State's newly filed motion for joint trial and to prepare a witness list." *Id.* at 798, 639 N.W.2d at 146. And in *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982), an issue during the hearing on the motion for discharge was whether the defendant or his counsel was ever notified to appear for arraignment or trial. The trial court heard the testimony of the county judge who bound the defendant over for trial and the testimony of the defendant's former counsel. After the court found that the defendant left the jurisdiction and was unavailable for trial for over 8 months, the court denied the motion for discharge. In *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972), the State and the defendant presented evidence during the hearing on the motion for discharge related to the state of the court's docket and future business of the court, which evidence the Nebraska Supreme Court considered on appeal. Thus, we cannot conclude that the district court erred in receiving evidence during the hearing on the motion for discharge

which demonstrated that the earlier motion for continuance was for good cause.

[18] Under these particular circumstances, we conclude that the district court did not abuse its discretion in granting the State's motion for continuance. Vela-Montes suffered no loss of a substantial right by the grant of the State's motion when the State did not support the motion with an affidavit or sworn testimony.

Of course, the whole question could easily have been avoided had the prosecuting attorney simply complied with § 25-1148 when requesting the continuance. But because the district court did not abuse its discretion in granting the State's motion for continuance, the time attributable to the motion was properly excluded from the speedy trial clock. And because that time was properly excluded, Vela-Montes' speedy trial clock had not expired at the time he filed his motion for discharge. Accordingly, the district court did not err in denying his motion for absolute discharge.

CONCLUSION

We conclude that the district court did not abuse its discretion in granting the State's motion to continue over Vela-Montes' objection. Although Vela-Montes had a technical right to have the State comply with the statutory requirement of § 25-1148 that the motion to continue be supported by an affidavit, the State's failure did not affect a substantial right of Vela-Montes, particularly when the oral representations by the State at the hearing on the motion to continue did not materially vary from the evidence adduced at the hearing on the motion for discharge. As such, we conclude that the speedy trial clock had not expired and that the court did not err in denying Vela-Montes' motion for absolute discharge. The last date for commencement of trial, disregarding periods of extension, would have been August 26, 2009. Extending the time by 191 days, the last day for commencement of trial was March 5, 2010. Vela-Montes' motion for discharge was filed on January 19. Thus, we modify the district court's order to correct the concededly incorrect calculation of the days remaining before expiration of the time to commence

trial—thereby determining that 45 days remain. Accordingly, we affirm as modified.

AFFIRMED AS MODIFIED.

IRWIN, Judge, dissenting.

I respectfully disagree with the conclusions of the majority that the motion to continue was properly granted without any supporting evidence, based solely on the prosecutor's unsworn assertions, over Vela-Montes' specific objection to the procedures being employed, and that it was acceptable for the State to wait until the later hearing on the motion to discharge to produce evidence in support of the motion to continue. When the period of time associated with this improperly granted motion to continue is considered in the speedy trial calculation, it is clear that Vela-Montes was not brought to trial within the statutorily allotted time and that his statutory right to a speedy trial was violated. As such, I would reverse, and remand with directions to grant the motion to discharge.

I. INTRODUCTION

The majority specifically recognizes that the statutory provisions regarding continuances in the context of the statutory right to speedy trial include the requirement that the application for continuance "be supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance . . . is asked." See § 25-1148. The majority then concludes that Vela-Montes' assertion that the State's failure to adduce any sworn testimony to support the prosecutor's unsworn assertions in support of the motion to continue was merely a "technical" attack and was an assertion of a "mere technical right" to have the State comply with the statutory directives and support its motion with evidence. I disagree.

The majority accurately notes that the Nebraska appellate courts have held that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion to continue. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d

901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). The majority also accurately recognizes that in prior cases concerning the State's noncompliance with the mandates of § 25-1148, a substantial factor considered by the appellate court was the defendant's failure to object to, or waive any challenge to, the noncompliance. See, *State v. Shipler, supra*; *State v. Roundtree, supra*. The majority then concludes that despite the statutory dictates that the State adduce evidence and not mere unsworn assertions in support of the motion to continue, despite Vela-Montes' specific and clear objections to the failure to comply with the statutory dictates, and despite the ease of compliance with the plain requirements of § 25-1148 and this court's prior suggestions to follow them, his right to have evidence adduced in support of a motion to continue that delayed his speedy trial was a "mere technical right" and not a legal right. The majority cites no authority for this conclusion.

II. STATUTORY SPEEDY TRIAL GUARANTEE

Although the crux of the issue in this case is, as noted, whether the State's motion to continue was properly granted where the State failed to adhere to the statutory requirements of §§ 29-1206 and 25-1148 and where Vela-Montes specifically objected to the State's nonadherence, the issue is presented to this court in the context of a speedy trial determination. As such, the relevant context for resolving the issue in this appeal is within the confines of Nebraska's statutory speedy trial guarantee.

In 1971, the Nebraska Legislature enacted 1971 Neb. Laws, L.B. 436. See, Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 2008 & Cum. Supp. 2010); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). These provisions were concerned with two things: (1) the right of the accused to a speedy trial and (2) the promotion of the interest of the public in the prompt disposition of criminal cases. See *State v. Alvarez, supra*. See, also, § 29-1206.

Section 29-1207 reads, in pertinent part, as follows:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed . . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date[.]
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause.

Section 29-1208 provides that if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he shall be entitled to absolute discharge.

The primary burden is upon the State, that is, the prosecutor and the court, to bring an accused to trial within the time provided by law. *State v. Alvarez, supra.* 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 commencement of the criminal action. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008).

The Legislature recognized by the enactment of the speedy trial provisions the social desirability for a variety of reasons of bringing the accused to trial at an early date. *State v. Alvarez, supra*. The mandates of the statute must therefore be followed. *Id.*

In the present case, Vela-Montes fulfilled his responsibilities when he timely filed a motion for absolute discharge and asserted that he had not been brought to trial within the time period set forth in Nebraska's speedy trial statutes. At that point, the State was required to demonstrate that sufficient excludable time periods existed for the statutory speedy trial period not yet to have run. As noted above, there is no dispute about most of the relevant excludable time periods and the only significant dispute is whether the time attributable to the State's November 2009 continuance should have been excluded. If that time is properly excluded, then the motion for discharge was properly denied; if that time is not properly excluded, then the motion for discharge was not properly denied.

III. EXCLUDABILITY OF STATE'S CONTINUANCE TIME

Both statute and case law provide guidance for trial courts when ruling on motions to continue. Section 25-1148 is the statutory polestar. Section 25-1148 provides that an application for continuance "*shall be* by written motion" and "*shall be* supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts" supporting the requested continuance. (Emphasis supplied.) Either party may introduce oral testimony upon the hearing of such application. *Id.* Section 29-1206 provides that applications for continuance in criminal cases are to be made in accordance with the statutory mandates of § 25-1148 and imposes an additional limitation that the trial court is to grant the continuance only upon a showing of good cause and only for so long as necessary, taking into account the request or consent of the parties and the public interest in prompt disposition of the case.

In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001); *State v. Donner*, 13 Neb. App. 85, 690 N.W.2d 181 (2004). A fundamental principle of

statutory construction is that penal statutes are to be strictly construed in favor of the defendant. See *id.* In this case, although § 25-1148 is not a penal statute, it is incorporated into penal proceedings through § 29-1206.

Although there is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions, as a general rule, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State v. Donner, supra*. However, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id.*

In the present case, the use of "shall" in § 25-1148 would appear to render the requirement that the motion to continue be in writing and supported by sworn testimony in affidavits mandatory in character, unless the spirit and purpose of the legislation require that it be construed as permissive. In that regard, the speedy trial provisions in general, the heightened requirements of § 29-1206 requiring a court to additionally find good cause and consider the public interest in prompt disposition of the case, and the context of penal proceedings would seem to suggest that a permissive reading would be contrary to the spirit and purpose of speedy trial and penal provisions of statutory construction.

Nonetheless, Nebraska appellate courts have held, without further explanation, that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). This is in contrast to the Nebraska Supreme Court's holding in a 1989 civil case that "[b]ecause appellants' request for a continuance was oral and, therefore, failed to comply with § 25-1148, which prescribes a written application for a continuance and supporting affidavit, [the

court was] *precluded from considering* whether the district court committed reversible error in denying a continuance . . . ," even in a situation where the basis for seeking continuance related to permissible discovery on a jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 884, 443 N.W.2d 577, 591 (1989) (emphasis supplied).

In cases where the criminal defendant has failed to comply with § 25-1148 and the trial court denied the requested continuance, the failure to comply with § 25-1148 has been used as a basis for finding that there was no abuse of discretion by the trial court in denying the motion. See, *State v. Carter, supra*; *State v. Matthews, supra.* In *State v. Santos, supra*, the Supreme Court reversed the trial court's denial of an oral motion for continuance made by the defendant where the circumstances forming the basis for the request arose from the court's action or inaction. In cases where the State has failed to comply with § 25-1148 and the trial court granted the requested continuance, however, the failure to comply with the statute was not sufficient to support a finding that the trial court abused its discretion in granting the motion. See, *State v. Shipler, supra*; *State v. Roundtree, supra*. However, the circumstances in which the State's failure to comply with § 25-1148 was presented in those cases differ significantly from the circumstances in the present case.

In *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.d 308 (2003), the prosecutor orally moved for continuance before trial because of alleged unavailability of witnesses. The State did not file a written motion, did not file any affidavits, and did not present any sworn testimony in support of the motion. Rather, the prosecutor made several unsworn statements of fact during the hearing to justify a continuance. Defense counsel did not object to the State's failure to comply with § 25-1148, acknowledged having prior knowledge of the State's intent to seek the continuance, did not challenge the alleged unavailability of the witness, and objected to the grant of the continuance solely on the basis of constitutional speedy trial rights.

On appeal, this court recognized that § 25-1148 had not been complied with, but relied heavily on the fact that defense

counsel did not object to the procedure employed by the State. We specifically recognized that oral or other informal statements are a poor procedure when speedy trial rights are involved. *State v. Roundtree, supra*. We also specifically recognized that oral statements of counsel should not be received as evidence, although objection to their reception may be waived. *Id.* We ultimately concluded that it is not an abuse of discretion for a trial court to grant a continuance "when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor *and the defense does not object to the procedure.*" *Id.* at 640, 658 N.W.2d at 318 (emphasis supplied). We specifically held that "by the defense's silence, it ha[d] waived any requirement that" § 25-1148 be complied with. *State v. Roundtree*, 11 Neb. App. at 640, 658 N.W.2d at 318.

In *State v. Roundtree*, we specifically iterated that, as other appellate courts that had considered the question had warned, where there is a possible speedy trial issue, it is wise to use a written affidavit. We found no abuse of discretion, however, because the defendant and his counsel had been present and had not objected on the record to the oral motion and showing. *Id.*

Similarly, in *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008), the State failed to comply with § 25-1148. In *State v. Shipler*, the State did file a written motion, but failed to include affidavits to support the factual basis for the motion and, instead, relied on unsworn oral statements of the prosecutor at the hearing on the motion to demonstrate that the continuance was warranted. As in *State v. Roundtree*, this court found no abuse of discretion by the trial court in granting the motion, notwithstanding the State's failure to comply with § 25-1148. As in *State v. Roundtree*, we relied on the failure of the defendant to object to the State's failure to comply with § 25-1148 at the hearing on the motion to conclude that there was no abuse of discretion. See *State v. Shipler, supra*.

The present case differs from these prior cases in Nebraska and appears to present a question of first impression, as Vela-Montes specifically and vigorously objected to the State's failure to comply with § 25-1148 and to the State's use of

unsworn statements to support the motion to continue. Where the defendants in *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003), and *State v. Shipler, supra*, failed to object and were held to have waived the right to challenge the State's noncompliance with § 25-1148, Vela-Montes did not so fail.

At the hearing on the State's motion to continue, Vela-Montes specifically objected and argued to the trial court that the State was "not even asking for a continuance in the proper manner" and that "[t]he statute for requesting a continuance requires an affidavit be submitted in support of the motion to continue." Vela-Montes further argued that "there needs to be some sort of evidence submitted" by the State to support a request for continuance and urged the district court to overrule the motion because the State had not "submitted any evidence, affidavit or otherwise, as to why [it] need[s] the continuance or why there's been good cause shown to justify the continuance." Vela-Montes further objected when the State attempted to present such evidence at the hearing on his motion for discharge, arguing that the evidence might have been relevant at the prior hearing on the State's motion to continue but could not be used later at the hearing on the motion to discharge to retroactively support an improperly awarded continuance.

We recognized in *State v. Roundtree, supra*, that when the facts or procedures being used by the State to seek a continuance are questioned, it is a simple matter to require the prosecutor to present evidence or sworn testimony to support the State's assertions. The plain requirements of § 25-1148 and our prior suggestions that they be followed are not difficult to comply with, especially when the defendant unequivocally and persistently objects to the State's failure to do so. Although a defendant may be found to have waived the State's noncompliance with § 25-1148, Vela-Montes did not waive his objection thereto in this case. On the specific facts of this case, I would find that the district court abused its discretion in granting the State's motion to continue over Vela-Montes' objection that the State had failed to comply with the simple requirements of § 25-1148.

IV. EVIDENCE AT DISCHARGE HEARING

As noted, although the State failed to adhere to the plain requirements of § 25-1148 at the hearing on the State's motion to continue, despite Vela-Montes' objections, the State did present sworn testimony at the hearing on Vela-Montes' motion for absolute discharge in an attempt to demonstrate that the factual basis for the prior continuance was justified. The State has provided no authority, I am aware of none, and the majority cites none, which would support the notion that the State can retroactively justify an otherwise improperly sustained motion for continuance. While the majority readily accepts this procedure to the detriment of the criminal defendant, I would hold that to endorse this procedure would place the court on the slippery slope of allowing any number of inadequate showings in support of motions to continue to be remedied at later times. I would decline to allow such a procedure in a case such as this, where a criminal defendant's right to speedy trial is at issue.

V. RESOLUTION

As noted, there is no significant dispute in this case that Vela-Montes' speedy trial rights were violated if the time attributable to the State's motion to continue was not properly excludable from the speedy trial calculation. I would conclude that the time was not properly excludable, that the speedy trial clock expired, and that Vela-Montes' motion for absolute discharge under § 29-1208 should have been sustained.