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VI. CONCLUSION

We find that the county court did not err when it granted Kaaren's petition for guardianship of Jordan, and accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JOSHUA E. FLOREA, APPELLEE.
820 N.W.2d 649

Filed September 18, 2012. No. A-12-067.

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.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2010) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
5. **Speedy Trial: Indictments and Informations.** During the period between dismissal of a first information and the filing of a second information which alleges the same charges, the speedy trial time is tolled and the time resumes upon the filing of the second information, including the day of its filing.
6. **Double Jeopardy.** The application of Neb. Rev. Stat. § 29-2316 (Reissue 2008) turns on whether the defendant has been placed in jeopardy by the trial court.
7. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Exception sustained, and case remanded for further proceedings.

Tad D. Eickman, Saline County Attorney, for appellant.

Jeremy C. Jorgenson for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska filed an application for leave to docket an appeal, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008), in connection with the order of the district court which granted Joshua E. Florea's motion for absolute discharge on speedy trial grounds. We granted leave to the State to docket the appeal. On appeal, the State asserts that the district court erred in concluding that Florea's statutory right to a speedy trial had been violated and in granting his motion for discharge. Because we find that the district court's decision was clearly erroneous, we sustain the State's exception and remand the case back to the district court for further proceedings.

II. BACKGROUND

The relevant factual matters in this appeal concern the dates of various filings, motions, and rulings thereon. As such, we confine our recitation of the background to a brief description of the pertinent procedural history surrounding the case.

On April 5, 2011, the State filed an information in the district court charging Florea with (1) driving under the influence, fourth offense; (2) refusal to submit to a preliminary breath test; (3) refusal to submit to a chemical test; (4) crossing over the centerline; and (5) driving on a highway shoulder.

On July 25, 2011, the State filed a motion to dismiss the April information without prejudice. That same day, the district court entered an order granting the State's motion.

On October 13, 2011, the State filed a second information charging Florea with (1) driving under the influence, fourth offense; (2) refusal to submit to a preliminary breath test; (3) refusal to submit to a chemical test; (4) crossing over the centerline; and (5) driving on a highway shoulder. The October information appears to be a refiling of the charges contained in the April information—except that in the October information, refusal to submit to a chemical test was charged as a Class III

felony, and in the April information, refusal to submit to a chemical test was charged as a Class W misdemeanor.

On November 2, 2011, Florea was arraigned on the charges contained in the October information and pled not guilty to each charge.

On November 10, 2011, Florea filed a motion for absolute discharge. In the motion, he alleged that his right to a speedy trial had been violated because he had "undergone prosecution for an alleged incident that was originally charged" more than 6 months prior to his filing of the motion for discharge. Florea requested that the district court dismiss the charges against him with prejudice.

A hearing was held on Florea's motion for discharge. After the hearing, the district court entered an order granting Florea's motion and dismissing the October information with prejudice. In granting the motion, the district court relied on the Nebraska Supreme Court's decision in *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). The district court stated:

> The Information that starts the running of [Florea's] speedy trial rights [was filed on] April 5, 2011. Although the charges were originally dismissed in July, this does not toll the running of the clock, as *Sumstine* clearly indicates. The charges [contained in the October information] are the same, or in the case of [the charge of refusal to submit to a chemical test], an offense committed simultaneously with a lesser included offense charged in the [April] Information.
>
> Excluding the date of April 5, and counting forward six months, and backing up one day, the last date on which [Florea] could have been brought to trial was October 5 . . . . There is no time excluded under Neb. Rev. Stat. §29-1207(4). As a consequence, [Florea's] statutory speedy trial rights have been violated. The [October] Information is dismissed with prejudice, at the State's costs.

Subsequent to the entry of the district court's order, the State filed an application for leave to docket an appeal. We granted the State's request.

III. ASSIGNMENTS OF ERROR

On appeal, the State generally argues that the district court erred in concluding that Florea's statutory right to a speedy trial had been violated and in granting his motion for absolute discharge. Specifically, the State argues that the district court misinterpreted the Nebraska Supreme Court's holding in *State v. Sumstine, supra*, and that, but for the district court's misinterpretation, there was still sufficient time left on the speedy trial clock to bring Florea to trial.

IV. STANDARD OF REVIEW

[1] 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. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). See, also, *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Karch, supra*; *State v. Vasquez, supra*.

V. ANALYSIS

[3,4] Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2010) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Vasquez, supra*. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged. *Id*. 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. *State v. Vasquez, supra*.

The information against Florea was initially filed on April 5, 2011. That information was dismissed by the State on July 25. On October 13, a second information was filed in the case. The

second information was essentially a refiling of the charges contained in the initial information.

After Florea pled not guilty to the charges contained in the second information, he filed a motion for absolute discharge. In the motion, he argued that the charges must be dismissed because the original information was filed more than 6 months earlier and there were no excludable periods to extend the 6-month statutory period.

The district court agreed with Florea's argument and granted his motion for absolute discharge. The court relied on its interpretation of *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991), in calculating the last day that Florea could be brought to trial. First, the district court found that the speedy trial time must be calculated by adding together the time periods when the two informations against Florea were pending, because the charges contained in the second information were the same as those in the initial information or, in the case of the charge of refusal to submit to a chemical test, an offense committed simultaneously with a lesser-included offense charged in the initial information. See *State v. Sumstine, supra*. Additionally, the court interpreted the Supreme Court's holding in *State v. Sumstine* to require that the time after the dismissal of the initial information and before the filing of the second information be included in the speedy trial calculation.

As a result of its interpretation of *State v. Sumstine, supra*, the district court concluded that there were no excludable periods since the filing of the initial information on April 5, 2011, and that the last day Florea could have been brought to trial on the charges was October 5, a few days prior to the day the State filed the second information. The court then determined that because more than 6 months had passed since the filing of the initial information, the charges against Florea must be dismissed with prejudice.

The State takes exception to the district court's finding that there were no excludable periods since the filing of the initial information on April 5, 2011. While the State agrees that the periods when the two informations were pending must be combined in determining the last day for commencement of trial under the speedy trial act, the State disagrees that the time after

the dismissal of the initial information and before the filing of the second information must also be included in the speedy trial calculation.

[5] A careful reading of the Nebraska Supreme Court's holding in *State v. Sumstine, supra*, reveals that the State's assertion has merit. In *State v. Sumstine*, the court specifically stated that during the period between dismissal of the first information and the filing of the second information, the speedy trial time is tolled:

> [W]hile time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.

239 Neb. at 714, 478 N.W.2d at 245. See, also, *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). The time resumes upon the filing of the second information, including the day of its filing. *State v. Sumstine, supra*.

In its calculations, the district court erroneously included the time that passed between the State's dismissal of the initial information on July 25, 2011, and its filing of the second information on October 13. When we recalculate the speedy trial time, taking into account that the time was tolled from July 25 to October 13, we conclude that when Florea filed his motion for absolute discharge on November 10, the State still had time to bring him to trial.

The initial information against Florea was filed on April 5, 2011. Assuming there were no excludable time periods and disregarding the time tolled during the dismissal, the last day the State could have brought Florea to trial would have been October 5. However, the time chargeable to the State ceased during the interval between the State's dismissal of the initial information on July 25 and the filing of the second information on October 13. The period excluded by this tolling is 79 days.

Considering the time the speedy trial clock was tolled, the last date for commencement of trial was extended to December 23. As such, when Florea filed his motion for absolute discharge on November 10, the State still had over a month to bring Florea to trial. The district court erred in granting Florea's motion and dismissing the charges pending against him.

[6,7] For the reasons stated above, we find merit in the State's exception to the district court's ruling. Disposition of the case is therefore governed by Neb. Rev. Stat. § 29-2316 (Reissue 2008). It provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

The application of § 29-2316 turns on whether the defendant has been placed in jeopardy by the trial court. Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

Here, Florea filed his motion for absolute discharge almost immediately after pleading not guilty to the charges contained in the second information and before any further proceedings. Thus, it is clear that jeopardy has not attached. Because jeopardy did not attach, the case is remanded to the district court for further proceedings pursuant to § 29-2316.

VI. CONCLUSION

The district court's order sustaining Florea's motion to discharge based upon a violation of his statutory right to a speedy trial was clearly erroneous. Accordingly, we sustain the State's exception and, because jeopardy did not attach, we remand the case to the district court for further proceedings.

EXCEPTION SUSTAINED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.