258 P.3d 387, 2011 WL 3795481 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition
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Court of Appeals of Kansas.
STATE of Kansas, Appellant,
v.
Donnie TAYLOR, Appellee.

No. 104,455.
Aug. 26, 2011.

Appeal from Reno District Court; Richard J. Rome, Judge.
Stephen D. Maxwell, senior assistant district attorney, Keith E. Schroeder, district attorney, and Steve Six, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before PIERRON, P.J., ATCHESON, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** The State appeals a ruling of the Reno County District Court dismissing various felony charges against Defendant Donnie Taylor because his statutory right to a speedy trial was violated. We find no error and affirm.

In October 2008, Taylor was charged with possession of marijuana with intent to sell, a felony under K.S.A.2008 Supp. 65–4163, and with failing to procure tax stamps for the marijuana in violation of K.S.A. 79–5204. He was later charged with additional felonies of kidnapping in violation of K.S.A. 21–3420 and aggravated intimidation of a witness in violation of K.S.A. 21–3833. Because the issue here has nothing directly to do with the underlying charges, the parties understandably do not detail the circumstances giving rise to them. We, likewise, dispense with that legally extraneous information.

Taylor apparently missed a number of court appearances in the early stages of the case. The district court issued and set aside several bench warrants for Taylor. But the district court's patience wore thin. Taylor was arrested on a new bench warrant on April 28, 2009, and remained in jail from then on awaiting trial. As provided in K.S.A. 22–3402(1), the State has a statutory obligation to bring a pretrial detainee, such as Taylor, to trial within 90 days after arraignment. In computing the 90–day deadline, continuances or other delays attributable to a defendant do not count. This is not a speedy trial case in which we must review a detailed chronology of motions, continuances, and other delays in an effort to attribute days here and days there to one side or the other to figure out if the deadline had been observed.

After his arrest, Taylor changed lawyers, and his preliminary hearing was set over several times. Taylor was arraigned on September 8, 2009. That started the 90–day speedy trial calendar. Later that month, the district court scheduled Taylor's jury trial for December 1, 2009—approaching the statutory limit but with a week or so to spare.

On December 1, 2009, Taylor's lawyer appeared in court and requested a continuance of the trial. Taylor, however, was not present for the hearing. The district court granted the continuance and attributed the time to Taylor, meaning it didn't count as part of the 90–day speedy trial period. The State filed a motion requesting the trial be scheduled within 90 days in conformity with K.S.A. 22–3402(3). The district court set March 1, 2010, as the new trial date.

Based on the record on appeal, Taylor's lawyer did not file a written motion for the continuance.

There is no hearing transcript. The order granting the continuance indicates that only counsel were present on December 1 and attributes the time to the defense for speedy trial purposes. Nothing in the contemporaneous records indicates the reason for the continuance or even that Taylor personally had been consulted about the request, let alone had assented to it.

Less than a week before the March 1 trial, Taylor again requested a change in counsel, and the district court appointed another lawyer. The new lawyer (Taylor's third) requested the trial be continued. It was. Shortly before the next trial date, Taylor filed a motion to dismiss the charges based on a violation of the statutory speedy trial requirement. Taylor argued that the time from December 1, 2009, to March 1, 2010, should not have been charged against him because he was not personally in court and, thus, was denied the opportunity to object to his lawyer's request for a continuance. In an affidavit in support of the motion, Taylor asserted he would have objected to the requested continuance. The parties argued the motion to dismiss to the district court on May 28, 2010. Neither side presented any witnesses or other evidence at the hearing. Without making any detailed findings or legal conclusions, the district court granted the motion, ordered the charges dismissed, and discharged Taylor. The State has timely appealed.

***2** The issue is this: Did Taylor's absence from the December 1, 2009, hearing in which his lawyer requested and received a continuance require that the resulting delay be charged against the State? If so, the 90–day deadline expired during that time, requiring Taylor's discharge based on a violation of K.S.A. 22–3402. If not, the district court erred. The material facts are undisputed. Our task is to review those facts and apply them to the relevant statutory and case law. The issue we determine in performing that task is one of law. Accordingly, we owe no deference to the trial court's conclusion. Our review is plenary. See *State v. Jefferson,* 287 Kan. 28, 33, 194 P.3d 557 (2008).

In analyzing this issue, we look at the intersection of two obligations owed criminal defendants. First, obviously, is the defendant's right to a speedy trial under K.S.A. 22–3402. That is a statutory right and differs in some significant ways from the constitutional right to a speedy trial embodied in the Sixth Amendment to the United States Constitution as applied to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment. See *Baker v. McCollan,* 443 U.S. 137, 144–45, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (noting incorporation of constitutional speedy trial right). Most notably, perhaps, the statutory right provides a clear measure in days of the acceptable delay in bringing a criminal defendant to trial. Violation of the constitutional right depends upon the weighing of four factors: length of delay, the reason for the delay, defendant's assertion of the right, and prejudice. *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2186, 33 L.Ed.2d 101 (1972). In this case, Taylor relies exclusively on his statutory right to a speedy trial.

Second, a criminal defendant has the right to be present at all critical stages in the case against him or her. The Fourteenth Amendment guarantees a criminal defendant a due process right to appear at all "critical stages" in a prosecution. *Rushen v. Spain,* 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267(1983) (noting fundamental right); see *State v. McGinnes,* 266 Kan. 121, Syl. ¶ 1, 967 P.2d 763 (1998) (The right to be present effectuates, in turn, confrontation rights and due process rights.). The United States Supreme Court has not offered a comprehensive definition of a "critical stage" for constitutional purposes, but it entails "proceedings between an individual and agents of the State"—whether formal or informal or in court or in some other setting—with a " 'trial-like' " confrontation "at which counsel would help the accused 'in coping with legal problems or ... meeting his adversary.' " *Rothgery v. Gillespie County,* 554 U.S. 191, 212 n. 16, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) (quoting *United States v. Ash,* 413 U.S. 300, 312–13, 93 S.Ct. 2568, 37 L.Ed.2d 619 [1973]). In addition to that constitutional protection, a

criminal defendant in the Kansas courts has a statutory right to be present at and participate in a hearing on any motion. K.S.A. 22–3208(7). Participation of the defendant by audio-video connection is satisfactory so long as the "defendant shall be informed of the defendant's right to be personally present in the courtroom during such hearing if the defendant so requests." K.S.A. 22–3208(7). Plainly, Kansas statutory law requires that a defendant must be permitted to participate in a motion hearing in a way that allows him or her to be heard at the proceeding.

***3** With respect to speedy trial rights, the Kansas Supreme Court has recognized that if a criminal defendant and his or her lawyer disagree on a motion for a continuance, the defendant's position takes precedence. *State v. Hines,* 269 Kan. 698, 703–04, 7 P.3d 1237 (2000). In that case, the lawyer sought a continuance because of a death in his immediate family, but his client, who was in custody and present at the hearing, lodged a respectful though "strenuous objection." 269 Kan. at 703. The district court granted the continuance and set the case beyond what would have been the speedy trial deadline. On defendant's later motion, the district court dismissed the charges based on a violation of the speedy trial statute. The Supreme Court affirmed. 269 Kan. at 704. More recently, the Kansas Supreme Court has recognized: "Actions of defense counsel are attributable to the defendant in computing speedy trial violations *unless* the defendant timely voices his or her disagreement with those actions." (Emphasis added.) *State v. Vaughn,* 288 Kan. 140, Syl. ¶ 3, 200 P.3d 446 (2009). That includes not only defense counsel's response to the State's request for a continuance, but his or her own actions in seeking a delay ostensibly on behalf of the defendant. See 288 Kan. 140, Syl. ¶ 3.

After *Hines,* this court acknowledged that if the defense fails to affirmatively consent to a State's requested continuance and simply stands silent or the defendant and his or her counsel disagree on a continuance, neither the State nor the trial judge may assume the time will be excluded from the speedy trial calendar. *State v. Arrocha,* 30 Kan.App.2d 120, 127, 39 P.3d 101, *rev. denied* 273 Kan. 1037 (2002). In that case, defense counsel—in the presence of his client—sought a trial date beyond the statutory speedy trial deadline. This court reversed the district judge's dismissal of the case for a speedy trial violation and held that the defendant "was bound by his counsel's action [in requesting the continuance] when he failed to speak out against it." 30 Kan.App.2d at 127. The *Arrocha* court restated its holding as a positive rule: "A criminal defendant is bound by his or her counsel's suggestion of or acquiescence in a trial date set beyond the time limit of the speedy trial statute, unless the defendant personally objects." 30 Kan.App.2d 120, Syl. ¶ 2.

The *Arrocha* holding fits the material facts here in that Taylor's counsel sought a continuance that pushed the trial date past the speedy trial deadline. But—and this is a crucial but—in that case Arrocha was present by his counsel's side and did not personally object. Here, Taylor was not to be found physically in the courtroom or electronically present through an audio-visual connection from a remote location. In short, Taylor could not have lodged a personal objection because he had no opportunity to do so despite the statutory requirement of K.S.A. 22–3208(7) that he be present at the motion hearing and, thus, be afforded that opportunity. We need not determine if the hearing on the motion to continue was a critical stage of the case in a constitutional sense, thought it might have been. Taylor's statutory right to be present is of sufficient magnitude to direct the outcome here.

***4** There was, of course, no mystery about Taylor's whereabouts. He was an involuntary resident of the Reno County jail and presumably could have been produced for the December 1 hearing. This is not a situation in which a defendant voluntarily failed to appear and, thus, reasonably might be viewed as having waived any personal objection to the proceedings.

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Taylor had a right to voice an objection to his counsel's motion for a continuance, particularly one pushing the trial past what would have been the speedy trial deadline. And he had a right to be present at the motion hearing. Neither of those rights was observed except in the breach. The combined effect was to deprive Taylor of the opportunity to assert his speedy trial right. And, in turn, he cannot be said to have agreed to or acquiesced in the compromise of that right. The lesson, if there be one, is that a criminal defendant needs to be present at a hearing on a motion for a continuance and should affirmatively state on the record his or her personal assent to the request before the judge rules.

During argument to the district court on the motion to dismiss, the State intimated that no hearing was held on the December 1 motion to continue the trial. Rather, counsel for each side spoke outside of court and then simply submitted an order to the district judge. The State does not premise its position on appeal on that circumstance. The record before this court is otherwise. The district court order recites appearances. And there is no *evidence* in the record contradicting the order.

Even if there had been no hearing, we would affirm. A criminal defendant must be afforded a reasonable opportunity to object to a continuance affecting his or her speedy trial rights. That is the obvious corollary to the holding in *Arrocha.* An office meeting between a prosecutor and defense counsel followed by an order submitted to the district court doesn't measure up. We do not venture into the possibility that a written waiver of some sort from a defendant might be satisfactory in that situation. The better practice points toward holding a hearing with the defendant present.

The State does argue that Taylor should have made some objection of his own to the December 1 continuance after it was granted. According to the State, because Taylor did not do so, he acquiesced in the continuance by his silence. We presume the State would add, though it hasn't said so explicitly, that Taylor should have made that objection in the week or so remaining before the speedy trial time expired. But the State's solution depends upon contingencies too far removed from the open, orderly process that should attend judicial handling of criminal cases. It supposes full, timely discussion between counsel and client and would intrude upon that relationship to test a speedy trial claim. It also would disadvantage a defendant without the intellectual or educational skills to press his or her own objection. More to the point, perhaps, it would necessarily encourage a defendant to engage in communication directly with the assigned district judge rather than speaking through his or her counsel. None of that reflects a good idea from either a practical or a policy standpoint.

***5** In this case, the trial court correctly ruled that Taylor had been denied his statutory right to a speedy trial and properly dismissed the charges against him.

Affirmed.

Kan.App.,2011.
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