

2001

## Utah v. Peterson : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff/Appellant,

vs.

DANIAL PETERSON,

Defendant/Appellee.

Case No. 20010211-CA

Priority No. 2

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**BRIEF OF APPELLEE**

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APPEAL BY THE STATE FROM AN ORDER DISMISSING  
CRIMINAL INFORMATION IN FOURTH DISTRICT JUDICIAL COURT,  
UTAH COUNTY, THE HONORABLE GUY R. BURNINGHAM PRESIDING

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DANIAL PETERSON,

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Case No. 20010211-CA

Priority No. 2

**JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether the trial court correctly dismissed the charges against Peterson when the State failed to bring the case to trial within 120 days of Peterson’s disposition request? This Court reviews “a trial court’s determination that a defendant’s charges should be dismissed pursuant to the Speedy Trial Statute for abuse of discretion.” *State v. Coleman*, 2001 UT App 281 at ¶3, 2001 WL 1149046. “An appellate court will find abuse of discretion only where there is ‘no reasonable basis in the record to support’ the trial court’s Speedy Trial Statute determination.” *Id.* However, before reviewing the trial court’s determination for abuse of discretion this Court reviews the trial court’s “legal conclusions for correctness, and its factual findings for clear error.” *Coleman*, 2001 UT App 281 at ¶4 (citing *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991)).

2. Whether the trial court committed plain error when it dismissed all charges pending in the information? This Court will only reverse a trial court under a “plain error” standard when obvious and harmful error exists. Harmful error means that absent the error there is “a reasonable likelihood of a more favorable outcome for [the State].” *Coleman*, 2001 UT App 281 at ¶5 (quoting *State v. Garcia*, 2001 UT App 19 at ¶6, 18 P.3d 1123).

### **CONTROLLING STATUTORY PROVISIONS**

The text of Utah Code Annotated § 77-29-1 is set forth in appellant’s brief at 2.

### **STATEMENT OF THE CASE<sup>1</sup>**

#### **A. Nature of the Case**

The State appeals from an order of the Fourth District Court dismissing the information against Peterson on grounds that the prosecution failed to bring the case to trial within 120 days of Peterson’s disposition request and that the prosecutor’s failure was not supported by good cause.

#### **B. Trial Court Proceedings and Disposition**

Danial Peterson was charged by information filed in Fourth District Court on or about June 8, 2000, with: Possession of a Controlled Substance in a Drug-Free Zone, a second degree felony, in violation of Utah Code Annotated § 58-37-8(2)(a)(i); Failure to Respond to Officer’s Signal to Stop, a third degree felony in violation of Utah Code Annotated § 41-6-13.5; Possession of Drug Paraphernalia in a Drug-Free Zone, a class A

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<sup>1</sup>Peterson agrees with the State that the underlying alleged facts surrounding the charges against him are not necessary to a determination of this appeal.

misdemeanor, in violation of Utah Code Annotated § 58-37a-5a; and Driving on Suspension, a class B misdemeanor, in violation of Utah Code Annotated § 53-3-227(3)(a) (R. 1-2).

On July 7, 2000, a preliminary hearing was held before the Honorable Guy R. Burningham at which time Peterson was bound-over for trial on all four counts (R. 18, 153). Peterson was also arraigned on the charges and not-guilty pleas were entered (Id.). Pre-trial motions were discussed and oral argument was scheduled for August 21, 2000 (R. 153 at 33-36).

On July 10, 2000, Peterson prepared and signed a request for disposition of a methamphetamine charge pending in Fourth District Case No. 001400283<sup>2</sup> within 120 days (R. 90). The request was delivered to Lieutenant Scott Carter of the Utah County Jail and sent it to the Fourth District Court (R. 89). The disposition was received by the trial court but was never placed in the trial court file (R. 147). The prosecutor indicated to the trial court that his file showed no receipt of a copy of the disposition request (R. 159 at 3-4).

On August 21, 2000, Peterson filed a Motion to Suppress (R. 32-34). However, the motion was signed by appellee's counsel on August 10, 2000 (R. 32). The State's objection to the motion was filed on August 11, 2000 (R. 23-25); and Peterson's memorandum in reply was filed on August 17, 2000 (R. 27-30). On August 21, 2000, Judge Burningham denied the motion (R. 40-41).

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<sup>2</sup>The actual district court case number is 001402283. However Utah Code Annotated § 77-29-1(1) does not require that the written demand of disposition contain the case number. All that is required is specification of the nature of the charge and the court wherein it is pending.

On August 28, 2000, based on the stipulation of the parties, the trial court ordered the Utah County Jail to conduct a criminal lineup pursuant to Utah Code Annotated § 77-8-1 et seq. (R. 42). On December 20, 2000, the State filed a motion to reconsider the order for a lineup (R. 82-83).

On September 8, 2000, Peterson filed a motion to reconsider and briefed the issue of a warrantless search incident to arrest (R. 48-55). A pre-trial conference was also held on September 8, 2000 (R. 57-58, 155). The purpose for the hearing was to set a trial date (R. 155 at 3). However, the trial court instead continued the pre-trial conference reasoning that if upon reconsideration he granted Peterson's motion to suppress then a trial date would not be necessary (R. 155 at 5-6).

The trial court still had not ruled on the motion to reconsider by the time of the reschedule pre-trial conference on September 29, 2000 (R. 156 at 3). When the trial court inquired as to whether a trial date had been set, defense counsel responded, "No. We do not, Your Honor. He is doing a year commitment at the present time so we're not under, there isn't a, he's not filing a 120 day disposition..." (R. 156 at 5). Judge Burningham then scheduled another pre-trial conference for October 27, 2000 (R. 156 at 5).

At the next pre-trial conference on October 27, 2000, the trial court heard further argument on Peterson's motion to reconsider and then denied the motion (R. 157 at 3-16). A trial was scheduled for February 1-2, 2001--the next available date on Judge Burningham's calendar (R. 157 at 19). During the discussion on the trial date, Judge Burningham inquired as to Peterson's custodial status (R. 157 at 18). Defense counsel responded that Peterson was in custody on these charges and was serving a one-year sentence in another case but that Peterson "wants to get these cleared up... as quickly as



possible” (R. 157 at 18). In addition when Judge Burningham initially proposed the possibility of trial on February 1-2, 2001, defense counsel responded that “we would obviously prefer something sooner. February is a long ways off” (R. 157 at 19). Because Peterson would be appointed a new public defender prior to trial, Judge Burningham sheduled an additional pre-trial conference for December and later one was scheduled for January (R. 157 at 19, 158).

At the pre-trial conference held on January 10, 2001, Peterson’s new counsel filed a motion to dismiss claiming the State had failed to bring the case to trial within 120 days of Peterson’s request for disposition (R. 88-93, 96, 97-98, 159 at 3-6).

On January 30, 2001, oral arguments were conducted and Judge Burningham granted Peterson’s motion and ordered the matter dismissed (R. 134-36, 137-38, 140, 154). On February 21, 2001, findings of fact, conclusions of law, and a written order were filed (R. 137-38, 140). On March 19, 2001, Judge Burningham issued a more detailed written ruling (R. 145-50).

On February 27, 2001, the State filed a notice of appeal in Fourth District Court (R. 142).

### **SUMMARY OF ARGUMENT**

One, Peterson asserts that the trial court correctly granted his motion to dismiss the charges against him due to the prosecutor’s failure to comply with the requirements of Utah Code Annotated § 77-29-1. The detainer period commenced on July 10, 2000. Peterson concedes that the trial court correctly extended the disposition 49 days from September 8--when Peterson filed his motion to reconsider--to October 27, 2000--when the trial court denied said motion. Peterson also concedes that the trial court erred in its

conclusion that the detainer period was not tolled between August 10 (date that motion to suppress was filed) and August 21 (date motion to suppress was denied)--a total of 11 days. However, Peterson asserts that the trial court did not err in refusing to toll the disposition period between July 10 (commencement of 120-day period) and August 10 (filing of motion to suppress). Accordingly, the detainer period should have been extended an additional 60 days and that the prosecution therefore had until January 6, 2001, in which to bring the case to trial pursuant to Utah Code Annotated § 77-29-1. The case was not brought to trial before the expiration of the detainer period. Additionally, the trial court did not abuse its discretion in finding that the prosecutor's failure to bring the matter to trial within the detainer period was not supported by good cause. The trial court's grant of Peterson's motion to dismiss should be affirmed.

Two, pursuant to this Court's decision in *State v. Coleman*, 2001 UT App 281, the trial court did not commit plain error in dismissing all of the charges in the information where only one charge was identified in the disposition request.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT PROPERLY GRANTED PETERSON'S MOTION TO DISMISS BECAUSE OF THE STATE'S FAILURE TO BRING THE CASE TO TRIAL WITHIN 120 DAYS AS REQUIRED BY UTAH CODE ANNOTATED § 77-29-1**

The State asserts that the trial court committed reversible error in granting Peterson's motion to dismiss the charges against him because the prosecution failed to bring the case to trial within 120 days of his request for disposition as required by Utah Code Annotated § 77-29-1. Peterson asserts that the trial court did not abuse his

discretion in granting the motion to dismiss and that this Court should accordingly affirm the dismissal.

The State in its brief has correctly pointed out that the burden of complying with Utah Code Annotated § 77-29-1 lies solely with the prosecution. The Utah Supreme Court has “consistently held that the language of the detainer statute clearly places the burden of complying with the statute on the prosecutor.” *State v. Heaton*, 958 P.2d 911, 915 (Utah 1998). *Accord Petersen*, 810 P.2d at 424. In fact, the prosecutor has “an affirmative duty to have the defendant’s matter heard within the statutory period” once a prisoner has delivered a disposition request. *Heaton*, 958 P.2d at 915. Moreover, a defendant need not even object to a trial that is set outside the time limits prescribed by the detainer statute. *Id.*

This Court engages in a two-step inquiry in determining whether the trial court properly dismissed Peterson’s charges under § 77-29-1: First, this Court “must determine when the 120-day period commenced and when it expired.” *Heaton*, 958 P.2d at 916. Second, if the trial date fell outside of the 120-day period then this Court must determine whether “good cause” excused the delay. *Id.*

**A. The Detainer Period Commenced on July 10, 2000, and Expired No Later than January 6, 2001.**

The first-step in this Court’s inquiry as to the correctness of the trial court’s dismissal is to make a determination as to when the 120-day period commenced and when it expired. *Heaton*, 958 P.2d at 916. The State has conceded that the disposition period commenced on July 10, 2000, when Peterson delivered the written notice and request for disposition to Lieutenant Carter of the Utah County Jail (Br. of Appellant at

9). The State also correctly points out that absent any extension the disposition period would expire on November 7, 2000 (Br. of Appellant at 9).

Peterson concedes that this Court's inquiry as to the date the detainer period expired is not satisfied by the counting of 120-days from Peterson's proper delivery of the disposition request; and that the disposition period must be extended/tolled during any periods of delay that were created by his actions. *Heaton*, 958 P.2d at 916. However, Peterson respectfully disagrees with the State's assessment of what actions he took that properly tolled the disposition period and the proper length of time of said extensions to the disposition period.

The State has asserted that Peterson's actions are responsible for creating two major periods of delay: First, that Peterson's motion to suppress tolled the disposition period a total of 42 days from July 10, 2000--the commencement date of the disposition period--up to and including August 21, 2000, when the trial court denied the motion (Br. of Appellant at 10-11). Essentially the State asserts that Peterson's actions created a delay from the date of the preliminary hearing (July 7, 2000) through the trial court's denial of the motion to suppress (*Id.*; R. 18, 153; R. 40-41).<sup>3</sup>

The trial court did not extend the detainer period during these 42 days (R. 146-47). The State argues that the reasoning of the trial court "is inconsistent with decisions of the Utah Supreme Court" in which delays "resulting from pretrial motions brought by the defendant have been held to toll the 120-day detainer period" (Br. of Appellant at 11).

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<sup>3</sup> The file-stamp of the district court indicates that Peterson's motion to suppress was filed on August 21, 2000 (R. 32). However, the motion was signed by appellee's counsel on August 10, 2000 (R. 34). In addition, the State filed an objection to the motion on August 11, 2000 (R. 23-25), and Peterson filed a memorandum in reply on August 17, 2000 (27-30). Accordingly, Peterson concedes that the motion to suppress was probably filed on August 10, 2000.

The only case cited by the State in support of this proposition is *State v. Banner*, 717 P.2d 1325, 1329-30 (Utah 1986).

However, in affirming the trial court's denial of Banner's motion to dismiss for lack of a speedy trial, the Utah Supreme Court relied on acts taken by the defendant that far exceed the filing of motions. The list of defendant's actions which the *Banner* court cited to as constituting a temporary waiver of his right to a speedy trial includes a change of plea, motions to continue in order to research a new sentencing statute, a motion to withdraw guilty plea, a failure to retain counsel for trial or inform the trial court of the need for court-appointed counsel, and a motion to continue the trial date. *Banner*, 717 P.2d at 1329-30. Only after citing these numerous requests for continuances and attempts by the defendant to change or withdraw his plea does the *Banner* court even mention any delay caused "to hear defendant's motion to dismiss for lack of speedy trial and to exclude evidence of prior convictions." *Banner*, 717 P.2d at 1330. Furthermore, the Utah Supreme Court did not decide *Banner* under the requirements set forth in the 120-day detainer statute. *Banner* was decided on constitutional grounds. See *Petersen*, 810 P.2d at 425 (*Banner* is a case which deals with the constitutional right to a speedy trial).

Moreover, none of the other cases cited by the State in relation to actions by the defendant that would appropriately toll/extend the disposition period deal with pre-trial motions. For example, both *State v. Velasquez*, 641 P.2d 115, 116 (Utah 1982), and *State v. Phathammavong*, 860 P.2d 1001, 1004-05 (Utah App. 1993), involve situations where the defendant had requested continuances of court proceedings.

Nevertheless, on September 27, 2001, this Court held in *State v. Coleman*, 2001 UT App 281, 2001 WL 1149046, that defendant's filing of motions to suppress and dismiss tolled the disposition period under Utah Code Annotated § 77-29-1. Peterson

questions this Court's reliance on *Banner* and *Heaton* in reaching this holding. *Coleman*, 2001 UT App 281 at ¶11. One, *Banner* was decided on constitutional and not statutory grounds. Two, the Supreme Court in *Banner* relied on extensive acts taken by the defendant which delayed the trial proceedings as discussed *supra* and not simply the filing of motions by the defendant. Three, *Heaton* does not really address delays caused by the filing of motions but delays caused by defendant's request for a preliminary hearing and conflicts in the schedules of defense counsel and the prosecutor. *Heaton*, 958 P.2d at 916. However, Peterson recognizes that this Court's holding in *Coleman* is relevant to this Court's decision in this case.

The State asserts that the 42 days between July 10 and August 21 constitute one consecutive period of delay caused by Peterson (Br. of Appellant at 10-11).

Peterson, however, asserts that there are really two distinct periods in this timeframe which must be considered by this Court. One, the period between the July 7, 2000, preliminary hearing and the August 10, 2000, filing of the motion to suppress; and two, the period between the filing of the motion on August 10, 2000, and the trial court's denial on August 21, 2000.

In regards to the second period of August 10-21, 2000, Peterson recognizes that this Court's holding in *Coleman* likely dictates that his filing of the motion to suppress on August 10, 2000, tolled the disposition period from that date until the trial court's denial of the motion on August 21, 2000. In *Coleman*, the State argued that the statutory period tolled from the date defendant's motion was filed. 2001 UT App 281 at ¶9. Accordingly, Peterson concedes that the trial court abused its discretion under *Coleman* in failing to toll the disposition period between August 10 and August 21, 2000--a total of 11 days. Similarly, Peterson concedes that the trial court correctly tolled the period between

September 8, 2001, when Peterson filed a motion to reconsider, and October 27, 2000, when the trial court denied that motion--a total of 49 days (even though arguably the trial court is responsible for a portion of this delay because of the lengthy time it took to rule on this motion).

However, Peterson asserts that the trial court correctly refused to extend or toll the disposition period between July 10, 2000, and August 10, 2000. Peterson further asserts that the State has failed to establish that the trial court committed clear error or an abuse of discretion in determining that the disposition period was not tolled during these dates.

The State argues that Peterson's notification to the trial court his intention to file a motion to suppress at the close of preliminary hearing is alone sufficient to toll the period between the preliminary hearing (July 10) and the actual filing of the motion to suppress (August 10). However, the State cites no real authority for this proposition that the disposition period should be tolled before the actual filing of a motion. The State's argument in regards to this point consists of one paragraph with little developed analysis (Br. of Appellant at 11). Moreover, neither of the two cases cited to by the State--*Banner* and *Heaton*--stand for the proposition that the disposition period should be tolled for a period prior to the filing of a motion when the motion is only anticipated. Peterson asserts that the State has failed to adequately brief this claim. Under Rule 24 of the Utah Rules of Appellate Procedure "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). *See also State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). Issues inadequately briefed will not be addressed by this Court. *See Thomas*, 961 P.2d at 304-05; *States v. Yates*, 973 P.2d 941, 947-49 (Utah 1998). Accordingly, because the State's argument contains no supporting authority, or any reasoned and developed

analysis of cited authority, this Court should decline to consider the State's claim that the trial court erred in failing to toll the period between July 10 and August 10.

Nonetheless, Peterson asserts that this issue almost parallels an issue addressed by the Utah Supreme Court in *Heaton*. The defendant in *Heaton* requested a preliminary hearing at a pretrial hearing on August 30 after initially waiving his right to such a hearing. *Heaton*, 958 P.2d at 913. The prosecution did not object to this request and a preliminary hearing was held on the original trial date-- September 9--at which time the trial court found that probable cause existed. *Id.* Heaton was then arraigned for a second time on September 27. *Id.* The Utah Supreme Court found that Heaton caused a trial delay of 18 days between September 9 (preliminary hearing) and September 27 (arraignment):

When the court changed Heaton's trial date to the preliminary hearing date, in effect it continued Heaton's trial pending outcome of the preliminary hearing. Had the court not found probable cause at the hearing, it would have had to dismiss the charges. However, the court did find probable cause and therefore scheduled a second arraignment for September 27. The court could not set a new trial date until Heaton entered his pleas at the second arraignment. Thus, because Heaton's trial date was continued for the purpose of accomodating his request for a preliminary hearing, and because a new trial date could not even have been considered until the second arraignment, Heaton may not include the 18 days between September 9 and September 27 as part of the 120-day disposition period. *Heaton*, 958 P.2d at 916.

The Utah Supreme Court, however, did not toll the period between Heaton's request for a preliminary hearing on August 30 and the actual date of the preliminary



hearing on September 9. Likewise, this Court should find that the trial court did not commit clear error or abuse his discretion in refusing to toll the disposition period between the preliminary hearing (July 7)--when Peterson upon inquiry from the trial court indicated an intent to file a motion to suppress--and August 10, 2000--when the motion to suppress was actually filed.

Accordingly, Peterson concedes that based on this Court's holding in *Coleman*, the trial court correctly extended the disposition 49 days from September 8--when Peterson filed his motion to reconsider--to October 27, 2000--when the trial court denied said motion (R. 146). Peterson also concedes that the trial court abused its discretion in refusing to toll the disposition period between August 10 (filing of motion to suppress) and August 21 (denial of motion to suppress)--a total of 11 days. However, Peterson asserts that the trial court did not abuse its discretion in refusing to toll the disposition period between July 10 (commencement of 120-day period) and August 10 (filing of motion to suppress). Therefore, this Court should hold that the disposition period was properly extended a total of 60 days and that the prosecution had until January 6, 2001, in which to bring the case to trial pursuant to Utah Code Annotated § 77-29-1.

**B. The Trial Court did not Abuse his Discretion in Determining that the State's Failure to Bring the Case to Trial within 120 days is Not Supported by Good Cause**

Because the trial date of February 1-2, 2001, fell outside the 120-day disposition period, this Court must determine whether "good cause" excused the prosecutor's failure to have the matter heard within the disposition period. *Heaton*, 958 P.2d at 916; Utah Code Ann. § 77-29-1(4).

On appeal the State argues that “defendant led the prosecution, as well as the court, to believe that no disposition request had been filed” and that “this misrepresentation” which was “compounded by the court’s apparent failure to enter the request in the court file and the prosecutor’s lack of any notice of a disposition request” constituted a showing of good cause which excused the prosecution’s failure to have the matter heard within the detainer/disposition period (Br. of Appellant at 13). Therefore, the trial court abused its discretion in determining that the delay was not supported by good cause.

**1. The State waived this claim by not raising it in the trial court.**

Peterson asserts, however, that the State waived this claim by failing to raise this issue in the trial court. “A general rule of appellate review in criminal cases in Utah is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal.” *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987) (citation omitted). Moreover, “the objection must be specific enough to give the trial court notice of the very error which counsel complains.” *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998). Otherwise, “that issue is not properly preserved for appeal.” *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993). *See also Bryant*, 965 P.2d at 546.

The State filed a memorandum in opposition to Peterson’s motion to dismiss (R. 99-104). In the memorandum the State argued that there was “good cause for the delay” because the defendant’s actions which caused the trial to be delayed justified a tolling in the disposition period from July 10-August 21 (42 days) and from September 8-October 27 (49 days) (R. 101-03). The State did not, however, make any assertion that Peterson

had led the prosecution to believe that no disposition request had been filed and that this “misrepresentation” constituted good cause for the failure to bring the matter to trial with the disposition period. Moreover, the State conceded that “the fact that the notice in this case was not even served on the state appears to be irrelevant” (R. 103). Finally, the State did not raise before the trial court--as they have on appeal--the claim that the comment of Peterson’s counsel at the September 29, 2000, pretrial that “[Peterson]’s not filing a 120 day disposition...” effectively abandoned any prior disposition request (Br. of Appellant at 14).

Therefore, because the State failed to specifically preserve this claim of error by raising the issue in the trial court and making this claim a part of the trial court record, this Court should hold that the State has waived any claim of error they might have had in regards to this issue. Moreover, the State cannot claim on appeal that a lack of notice constituted good cause when the prosecutor conceded before the trial court that “the fact that the notice in this case was not even served on the state appears to be irrelevant” (R. 103).

**2. The State has failed to establish that the trial court abused its discretion.**

Even should this Court address the State’s claim of error in regards to the question of good cause, the State has failed to establish any abuse of discretion by the trial court which would warrant reversal of his conclusion that the prosecutor’s failure to bring this matter to trial within the detainer period was not supported by good cause. The State’s argument in regards to the “good cause” inquiry is that the trial court abused its discretion in concluding that no good cause existed which excused the prosecutor’s failure to have the case tried within the detainer period because the “defendant led the prosecution, as

well as the court, to believe that no disposition request had been filed” and that “this misrepresentation” was “compounded by the court’s apparent failure to enter the request in the court file and the prosecutor’s lack of any notice of a disposition request”(Br. of Appellant at 13).

“A finding of ‘good cause’ that will excuse failure of the prosecution to bring a defendant to trial within the time required means (1) delay caused by the defendant--such as asking for a continuance; or (2) ‘a relatively short delay cause by unforeseen problems arising immediately prior to trial.’” *Coleman*, 2001 UT App 281 at ¶6 (quoting *Petersen*, 810 P.2d at 426). Peterson asserts that the State’s claims do not fall into either of these categories for the following reasons:

One, the comments by defense counsel that the State takes issue with must be examined in their full context:

On September 8, 2000, Peterson filed a motion to reconsider (R. 48-55). On that same day a pretrial conference was held (R. 57-58, 155). The purpose of the hearing was to set a trial date (R. 155 at 3). However, the trial court instead continued the pretrial conference reasoning that if upon reconsideration he granted Peterson’s motion to suppress then a trial date would not be necessary (R. 155 at 5-6).

The trial court still had not ruled on the motion to reconsider by the time of the rescheduled pretrial conference on September 29, 2000 (R. 156 at 3). At this time, Judge Burningham--and not the State--expressed concern that a trial date had not yet been set:

Well, since the motion is pending I suppose I had better do a ruling on it. And I would like to really consider it so that I, realizing that either side may have a right to appeal I’d better make sure I’ve done what I need to do. So since that’s under advisement...We don’t yet have a trial date in this case though, do we?

(R. 156 at 4-5). In response to this inquiry and the trial court's concern that the motion be adequately considered, defense counsel responded "No. We do not, Your Honor. He is doing a year commitment at the present time so we're not under, there isn't a, he's not filing a 120 day disposition..." (R. 156 at 5). Judge Burningham, having heard no objection from either party as to the lack of a trial date, then scheduled another pretrial conference for October 27, 2000, in order to give himself more time in which to rule on Peterson's motion (R. 156 at 5).

On October 27, 2000, another pretrial conference was held. During this hearing the trial court heard further argument from counsel on the motion to reconsider and then denied the motion (R. 157 at 3-16). After the denial of the motion, the parties addressed the issue of a trial date. During this discussion, Judge Burningham again inquired as to Peterson's custodial status (R. 157 at 18). Defense counsel responded that Peterson was in-custody on these charges and was serving a one-year sentence in another case but that Peterson "wants to get these cleared up... as quickly as possible" (R. 157 at 18).

Moreover, when Judge Burningham suggested that the next available trial date on his calendar was for February 1-2, 2001, defense counsel responded that "we would obviously prefer something sooner. February is a long ways off" (R. 157 at 19).

Likewise, when the parties were discussing the logistics of the lineup later in the hearing, defense counsel indicated that "We don't want to disturb the trial date or anything... We already think its too far off" (R. 157 at 26).

Peterson asserts that the comments of defense counsel when viewed in their totality at best only establish an agreement on September 8<sup>th</sup> to a temporary waiver of his right to a speedy trial while the trial court considered his motion to reconsider. *Accord Heaton*, 958 P.2d at 916. When a defendant temporarily waives his speedy trial right by

requesting or agreeing to a delay in the trial setting, “the disposition must be extended by the amount of time during which the prisoner himself creates the delay.” *Heaton*, 958 P.2d at 916 (citing *Velasquez*, 641 P.2d at 116 (grant of defendant’s request for continuance warranted extension of disposition period for period that trial was delayed because of request)). Therefore, any “good cause” excuse for delay afforded the prosecutor because of defense counsel’s comment should not exceed the 49 days between September 8-October 27, 2000. The trial court already ruled that good cause warranted that the detainer period be extended during this period; and Peterson has already excluded this time period in calculating the expiration date under the detainer statute. Accordingly, the trial court already addressed--and properly decided--the issue that the State argues here and already gave the State.

Two, the State has failed to establish any reliance by the prosecutor in regards to defense counsel’s comments. In appellant’s brief the State argues that “The prosecutor’s implicit reliance on these representations was reasonable because he had no notice of the disposition request” (Br. of Appellant at 14). However, the State cites to no portion of the record which establishes that the prosecutor relied in any fashion whatsoever on the representation of defense counsel that “he’s not filing a 120 day disposition.”

While the prosecutor may not have had notice that Peterson had filed a disposition request at the time defense counsel made his representation, the prosecutor certainly had notice that the disposition request had been filed at the time Peterson made his motion to dismiss. However, the prosecutor failed to inform the trial court--either orally at the January 30, 2001, hearing on Peterson’s motion to dismiss (R. 194) or in writing in his opposition to the motion (R. 99-104)--of any reliance (explicit or implicit) on these comments; and he, likewise, failed to argue to the trial court that the comments

constituted a “delay caused by the defendant” which would warrant a finding of good cause by the trial court and which would excuse for his failure to bring the matter to trial within the detainer period. *Coleman*, 2001 UT App 281 at ¶6.

Three, the State cannot rely on any failure of the trial court to place the detainer request in the court file as establishing “good cause” which excuses the prosecutor’s failure to bring the matter to trial within the disposition period. This situation is not “an unforeseen problem” which would justify a finding of good cause. *Coleman*, 2001 UT App 281 at ¶6. The prosecutor did not assert below that the trial court’s failure to file the request and its failure to set the trial date within 120 days constituted “good cause” which would relieve the prosecution from its affirmative duties under the detainer statute. In addition, the Supreme Court in *Heaton* indicated that while the State “is not responsible for the administrative mistakes of the court.... it *is* responsible for complying with § 77-29-1” because “the statute places on the prosecutor *alone* the burden of bringing the case to trial within the 120-day period....” 958 P.2d at 915 (emphasis in original).

Peterson asserts that this Court should decline from addressing this issue because the State failed to preserve its claim in the trial court. Alternatively, Peterson asserts that this Court should affirm the trial court’s dismissal of the charges on grounds that the State has failed to establish any abuse of discretion by the trial court in regards to his “good cause” finding which would warrant reversal of his conclusion that the prosecutor’s failure to bring this matter to trial within the detainer period was not supported by good cause.

## **POINT II**

### **THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN DISMISSING CHARGES WHICH WERE NOT INCLUDED IN PETERSON'S DISPOSITION REQUEST**

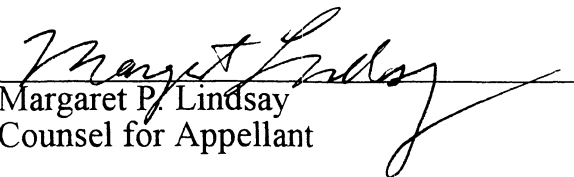
The State asserts that should this court determine that the trial court's grant of Peterson's motion to dismiss based on the prosecutor's violation of Utah Code Annotated § 77-29-1 was proper, this Court should find that the trial court committed "plain error" in "dismissing all four of the charges... [when] [d]efendant invoked the statute only as to the methamphetamine charge" (Br. of Appellant at 16).

Peterson asserts, however, that this Court recently addressed this issue in *State v. Coleman*, 2001 UT App 281 at n.5, 2001 WL 1149046, and concluded that the State's argument fails under a plain error analysis. Peterson asserts that *Coleman* is controlling authority on this issue and this Court should find "the State's plain error argument is flawed" as any error on the part of the trial court was not obvious. *Id.*

## **CONCLUSION AND PRECISE RELIEF SOUGHT**

For the foregoing reasons, Peterson asks that this Court affirm the trial court's dismissal of the charges against him on grounds that the prosecutor failed to comply with the speedy trial requirements set forth in Utah Code Annotated § 77-29-1.

RESPECTFULLY SUBMITTED this 11 day of October, 2001.

  
Margaret P. Lindsay  
Counsel for Appellant



**CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to Jeff Gray, Assistant Attorney General, Appeals Division, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 11 day of October, 2001.

