

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

LINFORD M. KANAMU, JR., Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0331(1))

SUMMARY DISPOSITION ORDER

(By: Levinson, Ramil, and Acoba, JJ., and Nakayama, J., dissenting, with whom Moon, C.J., joins)

Defendant-appellant Linford Kanamu, Jr. appeals from the January 31, 2001 judgment of conviction and sentence of the circuit court of the second circuit, the Honorable Artemio C. Baxa presiding, adjudging him guilty of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243(1) (1993).¹ On appeal, Kanamu challenges the circuit court's denial of his Hawai'i Rules of Penal Procedure (HRPP) Rule 48 motion to dismiss.²

¹ HRS § 712-1243(1) provides, "A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."

² HRPP Rule 48 provides in pertinent part,

(b) **By Court.** Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:

- (1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made; or
- (2) from the date of re-arrest or re-filing of the charge, in cases where an initial charge was dismissed upon motion of the defendant; or

(continued...)

Upon carefully reviewing the record and the briefs submitted by both parties and having given due consideration to the arguments advanced and the issues raised,³ we hold as follows:

First, we conclude that the doctrine of judicial estoppel operates to preclude the prosecution from arguing that Kanamu's no-contest plea failed to meet the writing requirement to be a conditional plea pursuant to HRPP Rule 11(a)(2).⁴ This court has stated:

Pursuant to the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action. Judicial estoppel partakes of positive rules of procedure based on manifest justice and, to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation. This doctrine prevents parties from playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation.

Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (citations, brackets, ellipses, block quote signals and some internal quotation signals omitted); see also Rosa v. CWJ

² (...continued)

(3) from the date of mistrial, order granting a new trial or remand, in cases where such events require a new trial.

³ Oral argument in this case was held on July 3, 2002.

⁴ HRPP Rule 11(a)(2) provides in pertinent part, "With the approval of the court and the consent of the State, a defendant may enter a conditional pleas of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specified pretrial motion."

Contractors, Ltd., 4 Haw. App. 210, 218-19, 664 P.2d 745, 751 (1983). In the present case, the record indicates that the parties and the circuit court understood that Kanamu was entering or had entered a conditional plea. See Roxas, 89 Hawai'i at 124, 969 P.2d at 1242; Rosa, 4 Haw. App. at 218-19, 664 P.2d at 751; see also State v. Lei, 95 Hawai'i 278, 283, 21 P.3d 880, 885 (2001) (holding that "the HRPP Rule 11(a)(2) writing requirement is not jurisdictional in nature and may be waived where the purposes of the writing requirement can be satisfied through other means."). Accordingly, Kanamu did not waive his right to appeal the circuit court's denial of his HRPP Rule 48 motion to dismiss.

Second, the circuit court abused its discretion in failing to dismiss the charges for lack of prosecution pursuant to HRPP Rule 48(b)(1). The circuit court erroneously excluded the period from July 30, 1999, to June 12, 2000, a total of 318 days, pursuant to HRPP Rule 48(c)(5).⁵ Although Kanamu was absent from the jurisdiction of the Maui Police Department, he was nonetheless present in the jurisdiction of State of Hawai'i.

⁵ HRPP Rule 48(c) provides in relevant part:

(c) **Excluded periods.** The following periods shall be excluded in computing the time for trial commencement:

. . . .
(5) periods that delay the commencement of trial and are caused by the absence or unavailability of the defendant;"
. . . .

Accordingly, the 426 days that elapsed from the filing of the Indictment to the commencement of trial exceeded the 6 month period of HRPP Rule 48. Therefore,

IT IS HEREBY ORDERED that the January 31, 2001 judgment of conviction and sentence from which this appeal is taken is reversed.

DATED: Honolulu, Hawai'i, August 19, 2002.

James S. Gifford, Deputy
Public Defender,
(Cindy A. L. Goodness
on the briefs) for
defendant-appellant

Arleen Y. Watanabe,
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