

NO. 22308

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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|-----------------------|---|-------------------------------|
| STATE OF HAWAI'I, |) | CR. NO. 97-190K |
| |) | |
| Plaintiff-Appellee, |) | APPEAL FROM THE CIRCUIT COURT |
| |) | OF THE THIRD CIRCUIT |
| v. |) | |
| |) | |
| KELLY YONEMURA, |) | |
| |) | |
| Defendant-Appellant.) |) | |
| _____ |) | |

MEMORANDUM OPINION

Defendant-Appellant Kelly Yonemura (Yonemura) appeals the January 25, 1999 Judgment entered by the Circuit Court of the Third Circuit (the circuit court), convicting and sentencing him for the charged offense of sexual assault in the third degree, a violation of Hawai'i Revised Statutes (HRS) § 707-732(1)(b) (1993).

Yonemura argues that the circuit court erred in denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 48 motion to dismiss (Rule 48 motion) and failing to dismiss the charge against him with prejudice. Yonemura also argues that the circuit court erred by denying his motion to dismiss due to

pre-indictment delay, thus depriving him of his right to a speedy trial under the federal and state constitutions.^{1/}

We disagree with Yonemura that the circuit court erred in denying his motion to dismiss for pre-indictment delay. However, we agree that his Rule 48 motion should have been granted. Accordingly, we vacate the January 25, 1999 Judgment and remand this case to the circuit court for a dismissal of the charge against Yonemura, with or without prejudice, at the circuit court's discretion.

BACKGROUND

The following is a time line of the events relevant to this appeal:

| <u>Time Period</u> | <u>Event</u> |
|-------------------------|---|
| October - November 1995 | Yonemura allegedly sexually assaulted a female minor (Minor). |
| October 5 - 18, 1996 | Minor reported the sexual assault to her aunt. |
| October 18 or 19, 1996 | Minor's mother (Mother) was informed of the assault on Minor. |
| The following week | Mother and Minor went to see a Child and Family Services Employee Assistance Program counselor. The counselor recommended that they make a police report. |

^{1/} Defendant-Appellant Kelly Yonemura (Yonemura) combined the Hawai'i Rules of Penal Procedure Rule 48 and pre-indictment delay arguments in the same motion filed on April 29, 1998. For purposes of clarity in deciding the issues, we will refer to them as separate motions.

October 30, 1996 Detective Springer of the Hawai'i Police Department interviewed Minor at the Children's Advocacy Center.

January 23, 1997 Edythe Maeda (Maeda), a victim witness counselor, spoke with Detective Springer, who advised Maeda that attempts to schedule an interview through Yonemura's attorney were being made.

February 24, 1997 Detective Springer informed Maeda that an interview with Yonemura had not been scheduled since the detective had been misinformed as to who Yonemura's actual attorney was.

March 5, 1997 Civil criminal meeting held.

June 20, 1997 Maeda attempted to schedule an interview with Minor through Mother; however, Mother was on vacation.

June 24, 1997 Interview appointment scheduled for June 30, 1997.

June 30, 1997 Mother called to cancel appointment and said she would reschedule.

July 7, 1997 Mother rescheduled appointment for July 11, 1997.

July 8, 1997 Deputy prosecutor's mother had a heart attack necessitating a medical evacuation to Honolulu. Deputy prosecutor did not return to work until September 1, 1997.

September 3 - 10, 1997 Deputy prosecutor was working on an appeal brief for another case.

September 10, 1997 Appointment scheduled for Minor and Mother.

September 16, 1997 Mother called to reschedule appointment.

September 19, 1997 Deputy prosecutor met with Minor and arranged for the case to be presented to the next grand jury.

October 13, 1997 Grand jury did not appear as scheduled.

October 14, 1997 Grand jury appeared. Yonemura was indicted for one count of sexual assault in the third degree.

October 16, 1997 Bench warrant for Yonemura's arrest issued. Bench warrant had a return date of November 20, 1997.

October 23, 1997 Police received warrant to serve on Yonemura.

October 24, 1997 Hawai'i County Police Officer Michael Silva (Officer Silva) tried to contact Yonemura over the telephone. The officer did not get an answer.

October 27, 1997 Officer Silva again telephoned Yonemura's residence and this time talked with Yonemura. Officer Silva informed Yonemura of the bench warrant, and Yonemura agreed to turn himself in to the police station on November 7, 1997.

November 7, 1997 Yonemura failed to turn himself in to the Kona police station. Officer Silva did not call Yonemura to find out why he did not show up at the station.

November 21, 1997 Officer Silva returned the bench warrant to the circuit court since the return date (November 20, 1997) had expired. The circuit court issued a second bench warrant on November 20, 1997 with a return date of "forthwith".

December 1, 1997 Officer Silva received the second bench warrant.

December 5, 1997 Officer Silva called Yonemura's residence, Yonemura's father brought Yonemura to the police station that same

day, and the bench warrant was served on Yonemura.

December 8, 1997 Yonemura was arraigned for one count of sexual assault in the third degree. Trial date was set for May 5, 1998.

April 29, 1998 Yonemura filed his Rule 48 motion to dismiss.

May 5, 1998 The circuit court heard argument on the Rule 48 motion and denied the motion. Jury selection began for the trial. Twelve jurors and one alternate were selected.

May 6, 1998 The jurors and alternate juror were put under oath.

May 7, 1998 The jury entered verdict of guilty as charged.

On June 9, 1998, the circuit court entered its Order Denying [Yonemura's] Motion to Dismiss Pursuant to HRPP Rule 48 and made the following findings of fact and conclusions of law in regards to the Rule 48 motion:

2. A Bench Warrant on the Indictment was timely issued which was received by [Officer Silva] on October 23, 1997, for service upon [Yonemura]. The Hawaii [Hawai'i] County Police Department has two officers who are primarily [sic] assigned to the service of warrants. There are hundred[s] of warrants to be served each week. The officers have determined that it is more effective to contact defendants by [tele]phone and ask them to voluntarily come to the police station rather than to spend hours conducting surveillance in an attempt to serve the warrants.

3. On October 24, 1997, [Officer Silva] unsuccessfully attempted to contact [Yonemura] by telephone at 7:00 a.m. Because no one answered the telephone, Officer Silva marked "not home" on his "service control form".

4. On October 27, 1997, [Officer Silva] made a second and successful attempt to contact [Yonemura] by telephone. In that October 27 telephone conversation, Officer Silva requested [Yonemura] to come to the Kailua-Kona main police station. [Yonemura] agreed that he would meet Officer Silva at Kailua-Kona's main police

station(Kealakehe) on November 7, 1997 at 8:00 a.m. [Yonemura] requested the delay so that he could obtain the bail requested in the warrant.

5. [Yonemura] did not appear at the police station on November 7, 1997 at 8:00 a.m. as agreed.

6. Officer Silva made no further attempts to contact [Yonemura] or serve the original bench warrant on [Yonemura]. At no time did Officer Silva physically go to [Yonemura's] family residence in Kailua-Kona with the original bench warrant prior to its expiration on November 20, 1997. [Yonemura's] residence is located a distance of under five miles from the main police station in Kailua-Kona.

7. On November 21, 1997, Officer Silva returned the original bench warrant unserved to the Third Circuit Court because the court appearance date thereon (November 20, 1997) had expired.

8. On December 1, 1997, a second bench warrant on the Indictment against [Yonemura] was received by Officer Silva, with a "forthwith" appearance date.

9. On December 5, 1997, at 7:35 a.m., Officer Siva [sic] made his first attempt to contact [Yonemura] by telephone respecting this second bench warrant. Officer Silva successfully contacted, by telephone, [Yonemura's] father, who agreed to bring [Yonemura] to the police station. On Friday, December 5, 1997, at or about 8:00 a.m., [Yonemura] appeared at the police station and was served with the bench warrant by Officer Silva. [Yonemura] remained in custody in the police station holding cell until his arraignment before the Third Circuit Court on December 8, 1997.

. . . .

CONCLUSIONS OF LAW

1. The Court concludes that Hawaii [Hawai'i] County Police Officer made a good faith effort to serve the original bench warrant.

2. The Court concludes that the time between October 16, 1997 and December 5, 1997, when [Yonemura] was served with the second bench warrant was excludable time for purposes of Rule 48, HRPP time calculation. Thus, [Yonemura's] right to a speedy trial under the United States Constitution and the Constitution of the State of Hawaii [Hawai'i] and Rule 48 was not denied.

STANDARDS OF REVIEW

Both the clearly erroneous and right/wrong standards of review are utilized in reviewing a trial court's denial of an HRPP Rule 48 motion to dismiss. State v. Hoey, 77 Hawai'i 17, 28, 881 P.2d 504, 515 (1994). A trial court's findings of fact in deciding a Rule 48 motion are subject to the clearly erroneous standard of review. Id. "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995). A trial court's decision that certain facts fall within one of the excludable periods under HRPP Rule 48 is a question of law that is freely reviewable by this court under the right/wrong standard. Hoey, 77 Hawai'i at 28, 881 P.2d at 515.

DISCUSSION

A. The Rule 48 Motion

1.

HRPP Rule 48 states, in relevant part, as follows:

(b) By Court. Except in the case of traffic offenses, 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 from:

(1) the date of arrest or of 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; . . .

.

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

(1) periods that delay the commencement of trial and are caused by collateral or other proceedings concerning the defendant, including but not limited to penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges;

.

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

.

(8) other periods of delay for good cause.

(d) Per Se Excludable and Includable Periods of Time for Purposes of Subsection (c)(1) of This Rule.

(1) For purposes of subsection (c)(1) of this rule, the period of time, from the filing through the prompt disposition of the following motions filed by a defendant, shall be deemed to be periods of delay resulting from collateral or other proceedings concerning the defendant: motions to dismiss, to suppress, for voluntariness hearing heard before trial, to sever counts or defendants, for withdrawal of counsel, for mental examination, to continue trial, for transfer to the circuit court, for remand from the circuit court, for change of venue, to secure the attendance of a witness by a material witness order, and to secure the attendance of a witness from without the state.

HRPP Rule 48(b) requires that, absent any excludable time periods, trial must commence within six months, construed as 180 days, from the "filing of the charge[.]" HRPP Rule 48(b) was derived from the American Bar Association Standards Relating to Speedy Trial 2.1 - 2.3. Proposed Hawai'i Rules of Penal Procedure, Note to Rule 48, June 1975. ABA Standard 2.2(a), which relates to speedy trials, defines a charge as a "written statement filed with a court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an

indictment, information, complaint, or affidavit, depending on the circumstances and the law of the particular jurisdiction." 2 Standards for Criminal Justice Standard 12-2.2(a) at 12•19, n.10 (2d ed. 1986) (hereinafter ABA Standards). This standard further explains that

in those cases where the defendant was indicted prior to arrest, . . . the time runs from the date the charge [indictment] was filed. . . . The standard reflects the majority view on the ground that delay following charge can operate to the disadvantage of the defendant even if the defendant is not under arrest or otherwise restrained in his or her freedom. If the defendant is not arrested or otherwise notified of the charge, the defendant is not prompted to seek out witnesses on his or her behalf when they might be available. Even though not arrested, if the defendant is notified of the charge, the defendant's period of anxiety over the pending prosecution has begun. In addition, if the public is notified of the charge, the defendant is from that time forward an object of public suspicion.

Id. at 12•20 (footnote omitted).

Yonemura was indicted on October 14, 1997 and arrested on December 5, 1997. Since October 14, 1997 is the earlier of the two dates, time began to run for HRPP Rule 48 purposes on October 14, 1997, the date the indictment against Yonemura was filed. Absent any excludable time periods, the latest date that Yonemura could be tried under HRPP Rule 48 was April 12, 1998. However, at an arraignment hearing on December 8, 1997, Yonemura's trial date was set for May 5, 1998, 203 days after the indictment date. Therefore, in order to comply with the time constraints of HRPP Rule 48, Plaintiff-Appellee State of Hawai'i (the State) would need to show that at least twenty-three of the

total elapsed days were excludable in determining Yonemura's speedy trial right under the rule.

2.

The record indicates that although the grand jury indicted Yonemura on October 14, 1997, a bench warrant for Yonemura's arrest was not issued until October 16, 1997. Moreover, the police did not receive the bench warrant until October 23, 1997. The State argues that since the police were unable to arrest Yonemura and procure his attendance at arraignment or trial until they received the bench warrant on October 23, 1997, the nine-day period from October 14 to 23, 1997 should be excludable for Rule 48 purposes.

We disagree. As noted previously, the basis for HRPP Rule 48(b) is ABA Speedy Trial Standard 12-2.2(a), which

reflects the majority view . . . that delay following charge can operate to the disadvantage of the defendant even if the defendant is not under arrest or otherwise restrained in his or her freedom. If the defendant is not arrested or otherwise notified of the charge, the defendant is not prompted to seek out witnesses on his or her behalf when they might be available. Even though not arrested, if the defendant is notified of the charge, the defendant's period of anxiety over the pending prosecution has begun. In addition, if the public is notified of the charge, the defendant is from that time forward an object of public suspicion.

ABA Standards 12-2.2(a) at 12•20. Consequently, the period between Yonemura's indictment and his subsequent arrest are included in calculating Yonemura's speedy trial right under Rule 48, unless portions of that period are otherwise excludable under Rule 48(c).

The State asserts that the time period from October 24, 1997 to December 5, 1997 (forty-two days) should be excludable because Yonemura was unavailable for trial during that period. The State observes that on October 24, 1997, the police "made efforts to contact and locate [Yonemura] but were unsuccessful. Once they did locate [Yonemura] by [tele]phone on October 27, 1997 he still did not make himself available for service even after agreeing to do so, until December 5, 1997."

In support of its position, the State cites State v. Jackson, 8 Haw. App. 624, 817 P.2d 130 (1991), where this court held that a defendant should be considered unavailable whenever his or her whereabouts are known but the defendant's presence for trial cannot be obtained "by due diligence." 8 Haw. App. at 630, 817 P.2d at 135 (brackets omitted). We also explained that "[d]ue diligence is a fluid concept that must be determined on a case by case basis," id. (citation omitted), and that other courts have held that to establish due diligence, the prosecution is required to show either "reasonable efforts to procure the defendant for trial" or a "good faith attempt to secure defendant's presence for trial by (1) commencing formal proceedings, or (2) making a sincere request from the sister state authorities." Id. at 631, 817 P.2d at 135 (internal quotation marks omitted).

In Jackson, the defendant was in federal custody when the prosecution sought to arraign him on state charges. The arraignment was continued numerous times due to the defendant's being in federal custody. Id. at 628, 817 P.2d at 133. The prosecutor's office made numerous contacts with the United States Marshal's office in order to try and secure the defendant's presence for arraignment. Id. at 632, 817 P.2d at 135. However, the attempts of the prosecutor's office were unsuccessful, as the United States Marshal would not accept service of a subpoena ad prosequendam nor give up custody of the defendant. Id. The defendant was eventually arraigned approximately nine months after he was indicted, id. at 628, 817 P.2d at 134, and his trial was held nineteen months after being indicted. Id. at 629, 817 P.2d at 134.

This court, in determining that the State had used due diligence to procure the defendant's presence for trial, focused on what the State did and the reasonableness of the State's efforts, rather than on what the State did not do or what alternatives might have been available. Id. at 632, 817 P.2d at 135. This court also decided that since the authorities had followed "the procedure suggested by the custodian jurisdiction, justifiably relying on its assertions, then due diligence [was] established" in bringing the defendant to trial. Id., 817 P.2d at 136.

Applying the rule from Jackson, we conclude that during the period from October 23, 1997 to November 7, 1997, the State used due diligence in attempting to procure Yonemura's presence for trial and Yonemura's failure to turn himself in to the police station on November 7, 1997 rendered him unavailable for trial during that period.

Officer Silva testified that he made a total of three telephone calls over the period from October 23, 1997 to December 5, 1997 and offered Yonemura the opportunity to surrender himself to police custody. At the time, Yonemura was not in the custody of another jurisdiction, and no evidence was presented that he was deliberately avoiding service of the bench warrant by absconding or using aliases. Furthermore, Yonemura did not live in a remote area, but rather lived within five miles from the police station. According to Officer Silva, there was no answer to his telephone call on October 24, 1997. However, on October 27, 1997, Officer Silva did contact and notify Yonemura of the indictment; Yonemura requested that he be given until November 7, 1997 to turn himself in to the police station so that he could raise the bail money to be released upon arrest. Since Yonemura himself requested that he be allowed until November 7, 1997 to turn himself in (rather than be publicly arrested, handcuffed, and taken by police vehicle to the police station), we conclude that the eleven-day period between October 27 and

November 7, 1997 was excludable for Rule 48 purposes. We also conclude, however, that when Yonemura failed to show on the scheduled date to turn himself in and Officer Silva failed to follow up on Yonemura's no-show, Officer Silva did not use due diligence in procuring Yonemura's presence at trial during that period of time. Therefore, the twenty-eight-day period from November 7, 1997 to December 5, 1997, when Yonemura was finally served with the bench warrant, was not excludable in determining Yonemura's unavailability for purposes of HRPP Rule 48.

4.

Yonemura filed his Rule 48 motion to dismiss on April 29, 1998, and the circuit court denied the motion on May 5, 1998; therefore, it was pending for a total of six days. Pursuant to HRPP Rule 48(d)(1), the "period of time, from the filing through the prompt disposition of" motions to dismiss "shall be deemed to be periods of delay resulting from collateral or other proceedings concerning the defendant" that are excludable in determining a defendant's speedy trial rights under Rule 48. The supreme court held in State v. Hanawahine, 69 Haw. 624, 628, 755 P.2d 466, 470 (1988), that the time needed by a trial court to decide an HRPP Rule 48 motion is excludable under HRPP Rule 48(c). Therefore, the six-day period during which Yonemura's Rule 48 motion was pending was excludable.

5.

Adding the excludable periods together, a total of eighteen days were excludable in determining Yonemura's speedy trial right under HRPP Rule 48. Excluding the eighteen days from the 203-day period between the date of indictment to May 5, 1998, the first day of trial, a total of 185 non-excludable days had elapsed for HRPP Rule 48 purposes. Therefore, Yonemura's speedy trial right under HRPP Rule 48 was violated.

6.

Yonemura contends that his Rule 48 motion should have been granted and the charge against him dismissed with prejudice. Because we are vacating the judgment against Yonemura and remanding the case to the circuit court for dismissal of the indictment against Yonemura, we leave the decision to dismiss with or without prejudice to the discretion of the circuit court. See State v. Jackson, 81 Hawai'i 39, 55, 912 P.2d 71, 87 (1996).

B. Pre-Indictment Delay

Yonemura asserts that his constitutional right to a speedy and fair trial was denied. In arguing this point, he states that the circuit court's findings "fail to establish reasonably sufficient facts to justify a prosecutorial delay of a full year from October, 1996, when the incident was tardily reported, to its presentation to the grand jury for indictment in October, 1997."

In order to determine whether criminal charges should be dismissed due to pre-indictment delay, the court must weigh any substantial prejudice to the defendant's right to a fair trial against the reasons for the delay. State v. Carvalho, 79 Hawai'i 165, 167, 880 P.2d 217, 219 (App. 1994). On appeal, Yonemura has not presented any grounds of substantial prejudice that he has suffered as a result of the delay. In his motion presented to the circuit court, Yonemura alleged that the passage of time "handicapped" his ability to mount a defense. He further argued that his "task of proving the negative is exacerbated by his faded memory relative to the broad period of October, through December, 1995, alleged in the indictment." Yonemura also suggested in his motion that Mother and Minor's grandmother used the time before indictment to influence and shape Minor's recall of the alleged sexual assault incident. However, prejudice is not established merely by claiming memory loss coupled with the lapse of time. Carvalho, 79 Hawai'i at 168, 880 P.2d at 220. Furthermore, Yonemura's testimony at trial suggests that any claim of faded memory of the October through December 1995 time period was not valid, since Yonemura testified that Minor never came to Yonemura's house where Minor alleged that the sexual assault occurred.

The circuit court incorporated the deputy prosecuting attorney's declaration regarding the reasons for pre-indictment

delay into its findings of fact. The reasons for the delay, as outlined in the declaration^{2/} certainly outweigh any supposed prejudice to Yonemura. Therefore, the pre-indictment delay did not deny Yonemura his constitutional right to a fair and speedy trial.

CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's January 25, 1999 Judgment, convicting Yonemura of sexual assault in the third degree and sentencing him to five years of probation, and remand this case to the circuit court with instructions that it dismiss the indictment against Yonemura with or without prejudice, in its discretion.

DATED: Honolulu, Hawai'i, June 29, 2000.

On the briefs:

Michael S. Zola for
defendant-appellant.

JAMES S. BURNS
Chief Judge

Linda L. Walton,
Deputy Prosecuting Attorney,
County of Hawai'i, for
plaintiff-appellee.

CORINNE K. A. WATANABE
Associate Judge

JOHN S. W. LIM
Associate Judge

^{2/} According to the declaration, part of the delay was due to Yonemura incorrectly informing Detective Springer as to the name of his attorney.