NO. 23031

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
DANILO S. PILLOS, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(Cr. No. 99-0225(1))

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Plaintiff-Appellant State of Hawaiʻi (the State) appeals from the "Findings of Fact, Conclusions of Law, and Order Granting [Defendant-Appellee Danilo S. Pillos's (Defendant) Motion to Dismiss Pursuant to Rule 48(b), [Hawaiʻi Rules of Penal Procedure (HRPP)]" (HRPP Rule 48 Order), entered by the Circuit Court of the Second Circuit (the circuit court), Judge Artemio Baxa presiding, on November 23, 1999.

We affirm.

BACKGROUND

The record on appeal indicates that in January 1998, Defendant was the agricultural engineering supervisor for Hawaii Commercial and Sugar Company (HC&S) on the island of Maui, "essentially in charge of the entire irrigation system for HC&S." On January 22, 1998, Defendant encountered two cows in a sugar cane field owned by HC&S. Because the cows had been "damaging

crops and damaging irrigation equipment for several days," Defendant discussed with his supervisor what to do with the cows. Contact was made with "Wilfred Jacintho" (Wilfred), who was affiliated with the "closest area where cattle [were] kept," but Wilfred denied "missing any cows[.]" Defendant's supervisor then advised Defendant that he could either drive the cows away or, if they had no brands, shoot them. Defendant went home to retrieve a personal firearm, returned to the HC&S field, and shot and killed the cows. He then went home, returned to the field with some friends who helped him butcher the cows, and took some of the meat home. The cows, it turns out, did have brands which identified them as belonging to a particular ranch.

As a result of the foregoing incident, Defendant was indicted on September 21, 1998 in Cr. No. 98-0537 and charged with two counts of Theft of Livestock, in violation of HRS § 708-835.5(1) (1993).[1] Defendant was arraigned on October 7,

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[1/] Hawaii Revised Statutes (HRS) § 708-835.5 (1993) provides as follows:

> **Theft of livestock.** (1) A person commits the offense of theft of livestock if the person commits theft by having in the person's possession a live animal of the bovine, equine, swine, or sheep species, or its carcass or meat, while in or upon premises which the person knowingly entered or remained unlawfully in or upon, and which are fenced or enclosed in a manner designed to exclude intruders, or by having in the person's possession such live animal, carcass, or meat in any other location.
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> (2) Theft of livestock is a class C felony.
>
> (3) A person convicted of committing the offense of theft of livestock shall be sentenced in accordance with

(continued...)

1998, waived public reading of the indictment, entered pleas of not guilty to each of the counts, and requested that the case be set for trial by jury.

On December 21, 1998, in Cr. No. 98-0742, a new indictment was filed against Defendant as a result of the January 22, 1998 incident. This indictment charged Defendant with two counts of Theft of Livestock, in violation of HRS § 708-835.5(1), and two counts of Carrying or Using a Firearm in the Commission of a Separate Felony, in violation of HRS § 134-6(a) (1993).[2]

[1/](...continued)

chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of at least $1,000 or restitution, whichever is greater.

[2/] At the time that Defendant-Appellee Danilo S. Pillos (Defendant) was indicted on December 21, 1998, HRS § 134-6 (1993) provided, in relevant part, as follows:

> **Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:
>
> (1) A felony offense otherwise defined by this chapter;
>
> (2) The felony offense of reckless endangering in the first degree under section 707-713;
>
> (3) The felony offense of terroristic threatening in the first degree under section [707-716(1)(a)], [707-716(1)(b)], and [707-716(1)(d)]; or;
>
> (4) The felony offenses of criminal property damage in the first degree under section 708-820 and

(continued...)

On January 15, 1999, the State filed a motion to dismiss Cr. No. 98-0537 "without prejudice for the reason that Defendant was reindicted under Cr. No. 98-0742(10)." The record on appeal does not include the record in Cr. No. 98-0537 and we are therefore unable to confirm exactly when the circuit court granted the State's motion to dismiss. However, the State has not contested the circuit court's finding that the circuit court granted the State's motion to dismiss the charges in Cr. No. 98-0537 on January 15, 1999.

On March 31, 1999, Defendant filed a motion to extend the time to file pre-trial motions in Cr. No. 98-0742.[3] On April 26, 1999, Defendant filed a motion to dismiss Counts Two and Four of the indictment in Cr. No. 98-0742, and on May 10, 1999, the circuit court, "having found that the evidence presented to the grand jury fails to establish probable cause for the offenses charged in Count Two and Count Four of the Indictment herein[,]" entered an order granting Defendant's motion.

[2/](...continued)

> criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

[3/] Because the record in Cr. No. 98-0742 is not part of the record in this appeal, we are unable to confirm that Defendant filed a motion to extend the time to file pre-trial motions in Cr. No. 98-0742. However, Defendant concedes that he filed such a motion, and the State has not challenged such concession.

On May 10, 1999, a new indictment was filed in Cr. No. 99-0225, charging Defendant with the identical four counts alleged in the Cr. No. 98-0742 indictment. The next day, the State filed a motion to dismiss Cr. No. 98-0742 "without prejudice for the reason that Defendant was reindicted under Cr. No. 99-0225(1)." Trial in Cr. No. 99-0225 was set for August 30, 1999. On the scheduled trial date, Defendant filed a motion to dismiss the charges against him in Cr. No. 99-0225, contending that his HRPP Rule 48 right to a speedy trial had been violated. On November 23, 1999, the circuit court agreed with Defendant and entered an order, granting Defendant's motion to dismiss. The circuit court concluded, in relevant part, as follows:

> 1. The six-month period provided by [HRPP Rule 48(b)] began to run on September 21, 1998, the date of the filing of the indictment in CR. No. 98-0537(1), pursuant to Rule 48(b)(1).
>
> 2. Defendant's motion to dismiss pursuant to [HRPP Rule 48(b)] was filed 343 days after the six-month period provided by Rule 48(b) began to run.
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> 3. The period of March 31, 1999, through April 28, 1999, which amounts to 28 days, is excluded pursuant to [HRPP Rule 48(c)(1)], as the time from the date of the filing of Defendant's motion to extend time for the filing of pretrial motions, until the date of the hearing on Defendant's motion to dismiss the two counts of Carrying or Use of a Firearm in Commission of a Separate Felony in CR No. [98-0742(1)].
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> 4. The period of February 17, 1999, through March 31, 1999, which amounts to 42 days, is excluded pursuant to an agreement of the parties not to advance the trial date in CR No. 98-0742(1).
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> 5. There are no other excludable periods pursuant to the provisions of [HRPP Rule 48(c)].
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> 6. After subtraction of all excludable periods, the six-month period provided by [HRPP Rule 48(b)], has been

> exceeded in this case by 93 days, and the case must therefore be dismissed.
>
> 7. Upon consideration [of] all relevant factors, including the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a reprosecution on the administration of justice, the dismissal shall be with prejudice. State v. Estencion, 63 Haw. 264, 625 P.2d 1040 (1981).

This timely appeal by the State followed.

STANDARD OF REVIEW

The granting of an HRPP Rule 48 motion to dismiss is reviewed under both the "clearly erroneous" and "right/wrong" standards:

> A trial court's [findings of fact (FOFs)] in deciding an HRPP [Rule] 48(b) motion to dismiss are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed. However, whether these facts fall within one of HRPP 48(b)'s exclusionary provisions is a question of law, the determination of which is freely reviewable pursuant to the "right/wrong" test.

State v. Hoey, 77 Hawai‘i 17, 28, 881 P.2d 504, 515 (1994) (quoting State v. Hutch, 75 Haw. 307, 328-29, 861 P.2d 11, 22 (1993) (original brackets omitted).

DISCUSSION

The Hawai‘i Supreme Court has held that "HRPP [Rule] 48(b)(1) requires criminal charges 'to be dismissed if a trial on those charges does not commence within six months [*i.e.*, one hundred eighty days] from the time of the arrest or of filing of the charges, whichever is sooner.'" State v. Hoey, 77 Hawai‘i at 28, 881 P.2d at 515 (citing State v. Ikezawa, 75 Haw. 210, 214, 857 P.2d 593, 595 (1993)). There are, however, certain

periods that are excludable from the calculation. See HRPP Rule 48(c).

In this appeal, the State does not challenge the periods of time excluded by the circuit court in calculating the speedy trial provisions of HRPP Rule 48. The State's sole contention is that the six-month period for calculating Defendant's right to a speedy trial under HRPP Rule 48 must be measured from May 10, 1999, when Defendant was reindicted in Cr. No. 99-0255, and not September 21, 1998, when Defendant was first indicted. Stated otherwise, the State contends that the circuit court clearly erred when it applied HRPP Rule 48(b)(1), rather than HRPP Rule 48(b)(2), to this case.

We disagree.

A.

HRPP Rule 48, entitled "Dismissal," provides, in relevant part, as follows:

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

. . .

> (6) the period between a dismissal of the charge by the prosecutor to the time of arrest or filing of a new charge, whichever is sooner, for the same offense, or an offense required to be joined with that offense[.]

(Emphases added.)

The foregoing provisions, when construed according to their plain and literal reading, yield the following interpretation for those cases in which charges are dismissed and the defendant is later recharged. When the charges against a defendant are dismissed "upon motion of the defendant," HRPP Rule 48(b)(2) provides that the HRPP Rule 48 speedy trial period begins running on the date the defendant is rearrested or recharged, whichever date is earlier. However, subsection (b)(2) only applies to those situations in which the original charges are dismissed "upon motion of the defendant[.]" It plainly does not apply to those situations in which the original charges are dismissed by motion of the prosecutor.

When a charge is dismissed upon motion of the prosecutor, HRPP Rule 48(b)(1) and HRPP Rule 48(c)(6) apply. Under subsection (b)(1), the HRPP Rule 48 speedy trial period commences on the date of the defendant's original arrest or charge, whichever is earlier, and "[c]riminal charges are to be dismissed if a trial on those charges does not commence within six months from the time of the arrest or of filing of the charges, whichever is sooner." State v. Ikezawa, 75 Haw. at 214,

857 P.2d at 595. Pursuant to subsection (c)(6), however, the period between the dismissal of the charge and the initiation of a new arrest or charge "for the same offense, or an offense required to be joined with that offense" is excludable from the HRPP Rule 48 calculation.

> Accordingly, HRPP [Rule] 48(c)(6) provides two instances where the time period between the dismissal of the original charge and the institution of a new charge is excluded from the critical six-month calculation: 1) where the prosecution recharges the same offense it dismissed earlier; and 2) where the prosecution recharges a different offense which nevertheless was required to be joined with the original charge.
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> . . . .
>
> . . . . Thus, if an initial charge is dismissed without prejudice and the defendant is later charged with a different offense, albeit one based upon the same conduct or arising from the same criminal episode, then the later offense is one that was "required to be joined" with the original offense, and the time period between dismissal of the original charge and the filing of a new charge is tolled, pursuant to HRPP [Rule] 48(c)(6).

State v. Ikezawa, 75 Haw. at 214-15, 857 P.2d at 595-96.

The foregoing construction is consistent with the American Bar Association (ABA) Standards for Criminal Justice Relating to Speedy Trial. See II *ABA Standards for Criminal Justice*, ch. 12 (2d ed. 1986 Supp.) (hereafter, *ABA Speedy Trial Standards*), from which HRPP Rule 48 is derived. State v. Jackson, 81 Hawai‘i 39, 53, 912 P.2d 71, 85 (1996).

Section 12-2.3(f) of the *ABA Speedy Trial Standards*[4] is substantially the same as HRPP Rule 48(c)(6). The Commentary to § 12-2.3(f) of the *ABA Speedy Trial Standards* states, in pertinent part, as follows:

> This paragraph must be considered as it relates to certain other standards. If a case is terminated prior to charging, then, as provided in standard 12-2.2(a), the speedy trial time limitations would commence running only from the date the defendant is subsequently charged or held to answer. If the case is terminated after charging on motion of the defendant, then, as provided in standard 12-2.2(b), the speedy trial time limitations would . . . commence running only from a subsequent charge or holding to answer. By contrast, the present subsection provides that dismissal of the charge on motion of the prosecutor only tolls the running of the time until the date the time limitations would commence running as to the subsequent charge had there been no previous charge. If dismissal by the prosecutor were to operate so as to begin the time running anew upon a subsequent charge of the same offense, this "would open a way for the complete evasion" of the speedy trial guarantee.

ABA Speedy Trial Standards, Commentary to § 12-2.3(f) (footnotes omitted).

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[4] Section 12-2.3 of the American Bar Association (ABA) Standards for Criminal Justice Relating to Speedy Trial provides, in relevant part, as follows:

> **Standard 12-2.3. Excluded periods**
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> The following periods should be excluded in computing the time for trial:
>
> . . . .
>
> (f) if the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or any offense required to be joined with that offense, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge[.]

B.

In this case, it was the State deputy prosecutor who requested dismissal of the September 21, 1998 indictment against Defendant in Cr. No. 98-0537. Therefore, pursuant to HRPP Rule 48(b)(1), the speedy trial commencement date for HRPP Rule 48 purposes remained at September 21, 1998. Since Defendant did not move to dismiss the charges in Cr. No. 98-0537, HRPP Rule 48(b)(2) did not apply to alter the speedy trial commencement date to December 21, 1998, the filing date for the indictment in Cr. No. 98-0742.

Defendant did successfully move to dismiss Counts II and IV of the indictment in Cr. No. 98-0742. However, Defendant did not move to dismiss Counts I and III of the indictment in Cr. No. 98-0742 and those charges remained outstanding. Although the State could have appealed the order dismissing Counts II and IV, it chose to reindict Defendant in Cr. No. 99-0255, recharging him with four counts identical to the counts in Cr. No. 98-0742, and then moved to dismiss the indictment in Cr. No. 98-0742. Since it was the State's, and not Defendant's, motion which resulted in the dismissal of Counts I and III of Cr. No. 98-0742, the time for calculating Defendant's HRPP Rule 48 speedy trial right did not begin anew with the reindictment of Defendant in Cr. No. 99-0225 but remained at September 21, 1998.

Therefore, the circuit court was correct in concluding that 343 days had elapsed between September 21, 1998, the date of the filing of the indictment in Cr. No. 98-0537, and August 30, 1999, the date when Defendant filed his HRPP Rule 48 motion to dismiss.

C.

The State has not challenged the circuit court's conclusion that the 28-day period from March 31, 1999 (when Defendant filed a motion to extend the time for filing pre-trial motions until the date of the hearing on Defendant's motion to dismiss the two counts of Carrying or Use of a Firearm in Commission of a Separate Felony in Cr. No. 98-742) through April 28, 1999 (the date of the hearing on Defendant's motion to dismiss) was properly excluded in calculating Defendant's HRPP Rule 48 speedy trial. Additionally, the State has not challenged the circuit court's conclusion that the 42-day period from February 17, 1999 through March 31, 1999 was excludable pursuant to an agreement of the parties not to advance the trial date in Cr. No. 98-0742.

As discussed earlier, however, HRPP Rule 48(c)(6) provides an exclusion for "the period between a dismissal of the charge by the prosecutor to the time of arrest or filing of a new charge, whichever is sooner, for the same offense, or an offense required to be joined with that offense[.]" We examine,

therefore, whether the following periods were excludable in calculating Defendant's speedy trial right under HRPP Rule 48: (1) the 25-day period of time between January 15, 1999, the date the deputy prosecutor requested dismissal of the first indictment in Cr. No. 98-0537, and December 21, 1998, the date the second indictment in Cr. No. 98-0742 was filed; and (2) the one-day period of time between May 11, 1999, when the deputy prosecutor requested dismissal without prejudice of all charges under Cr. No. 98-0742, and May 10, 1999, when a new indictment was filed against Defendant in Cr. No. 99-0225. Based on a literal and plain reading of HRPP Rule 48(c)(6), we conclude that the foregoing periods were not excludable.

Pursuant to HRPP Rule 48(c)(6), only a period "between a dismissal of the charge by the prosecutor *to* the time of arrest or filing of a new charge" is excludable. (Emphasis added.) Therefore, the rule allows exclusion only when the prosecutor dismisses a charge prior to the filing of a new charge. Where, as in this case, the deputy prosecutor waited until he secured a new indictment before dismissing the prior indictment, HRPP Rule 48(c)(6) is not applicable.

In summary, only 70 days were excludable from the 343 days that had elapsed between the September 21, 1998 indictment date and the August 30, 1999 date of Defendant's HRPP Rule 48 motion to dismiss. Therefore, 273 non-excludable days

had elapsed for purposes of calculating Defendant's speedy trial right under HRPP Rule 48, 93 days more than the authorized six months or 180 days. The circuit court correctly ruled that the case against Defendant had to be dismissed.

D.

> The Hawai'i Supreme Court has stated that
> [t]he purpose of [HRPP] Rule 48 is to ensure an accused a speedy trial, which is separate and distinct from his [or her] constitutional protection to a speedy trial. And, its purpose is also in furtherance of policy considerations to relieve congestion in the trial court, to promptly process all cases reaching the courts, and to advance the efficiency of the criminal justice process.
>
> Unreasonable delay in the determination of criminal action subverts the public good and disgraces the administration of justice, and the power of a court to dismiss a case on its own motion for failure to prosecute with due diligence is inherent and exists independently of statute.

State v. Estencion, 63 Haw. 264, 268, 625 P.2d 1040, 1043 (1981) (footnote and citations omitted). The supreme court has also embraced the following guidelines, set forth in the Federal Speedy Trial Act, for determining whether a dismissal under HRPP Rule 48 should be with or without prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and the circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

Id. at 269, 625 P.2d at 1044 (quoting 18 U.S.C.A. § 3162(a)(1) (West 1969 & Supp. 1980).[5]

[5/] We note that the portion of 18 U.S.C.A. § 3162(a)(1) (West 1969 & Supp. 1980) that the Hawai'i Supreme Court quoted in State v. Estencion, 63

(continued...)

Our review of the record reveals that the circuit court considered all of the foregoing factors in ordering Defendant's case dismissed with prejudice. We cannot conclude that the circuit court abused its discretion in so ordering.

Affirmed.

DATED: Honolulu, Hawai'i, September 14, 2001.

J. Kevin Jenkins,
Deputy Prosecuting Attorney,
County of Maui, on the brief
for plaintiff-appellant.

Richard E. Icenogle, Jr.
for defendant-appellee.

[5/](...continued)
Haw. 264, 268, 625 P.2d 1040, 1043 (1981), is now codified in 18 U.S.C.A. § 3162(a)(2) (1993).