NO. 23941

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
WILLIAM A. PHILLIPS, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 97-3032)

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

On December 11, 1997, Defendant-Appellee William A. Phillips (Defendant) was indicted on two counts: Assault in the Second Degree, Hawaii Revised Statutes (HRS) § 710-711(c) (1993), for assaulting a correctional worker, and Promoting Prison Contraband in the Second Degree, HRS § 710-1023(1)(b) (1993). Both counts allegedly occurred on March 9, 1997, while Defendant was incarcerated at the Halawa Correctional Facility (HCF).

By an order entered on July 31, 2000, acting Circuit Court Judge Rhonda Nishimura (Judge Nishimura) granted, with prejudice, Defendant's Motion to Dismiss for Violation of Constitutional Right to Speedy Trial. On August 2, 2000, Plaintiff-Appellant State of Hawaiʻi (the State) filed a motion to reconsider this order. The court heard and denied this motion on August 8, 2000. The State appeals. We (1) reverse the July 31, 2000 order granting Defendant's Motion to Dismiss for

Violation of Constitutional Right to Speedy Trial, and (2) remand for further proceedings.

BACKGROUND

The chronology of relevant events occurred as follows:

March 9, 1997	Charged offenses allegedly occurred.
December 11, 1997	Indictment filed.
April 6, 1998	Defendant filed a motion to dismiss based on Hawai‘i Rules of Penal Procedure (HRPP) Rule 48 (trial must commence within six months of date of arrest).
April 15, 1998	The court entered an order of dismissal.
April 23, 1998	The State filed a notice of appeal.
May 1998	It appears that Defendant was eligible for parole on the original conviction in May 1998, but parole was denied due to the instant charges.[1]

[1] Defense counsel's declaration accompanying the July 7, 2000 motion to dismiss states, in relevant part, as follows:

> 19. [Defendant-Appellee William A. Phillips (Defendant)] was serving a sentence of incarceration at Halawa Correctional Facility for the offense of Unauthorized Control of a Propelled Vehicle; that was eligible for parole in May of 1998; and was scheduled for a parole hearing on Tuesday, March 17, 1998 to consider reducing his minimum time and parole;
>
> 20. Former counsel . . . attended that hearing, and relates in his Declaration . . . that the Parole Board denied "[Defendant's] parole for one year on the grounds that he had this matter pending, with leave to reapply sooner if this matter is dismissed[.]"

Plaintiff-Appellant State of Hawai‘i (the State), in its opening brief, states, in relevant part, as follows:

> With respect to pre-trial incarceration, it appears from this record that, following his indictment on December 11th, 1997, Defendant remained in custody for approximately four months--from December 16th, 1997 (execution of grand jury bench warrant), until April of 1998 (trial court granted his motion to dismiss for

(continued...)

September 17, 1999	The appellate court vacated the dismissal order and remanded.[2]
June 22, 2000	Defense counsel stated to the circuit court that Defendant was ready for trial.
July 7, 2000	Defendant filed a motion to extend pretrial motions deadline and the court granted it. Defendant filed a motion to dismiss for violation of constitutional right to speedy trial. Defendant alleged as prejudice the fact that Defendant could no longer locate

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[1](...continued)

> violation of his rights under **Rule 48**, **H.R.P.P.**). . . . He was not in custody between April of 1998 and November of 1999--the period of time during which the State's appeal was decided and bail was reset. . . . Thereafter, Defendant remained in custody until July 31st, 2000 when his bail was set aside and he was released--a period of time of approximately eight months. . . . Thus, Defendant remained in pre-trial custody for about one year, not an oppressively long period of time considering the primary reason for such was because he constantly continued trial.

(Emphasis in original.)

The memorandum in support of Defendant's Motion for Release on Recognizance or, in the Alternative, Reduction of Bail, filed on November 16, 1999, states, in relevant part, as follows:

> In October, 1999, [Defendant] was finally paroled on the other charges. Unfortunately, just when he was about to be released, this case was decided and remanded.
>
> Had the prosecutor chosen to reindict after the dismissal, it is quite likely this matter would have been resolved by now. If found guilty, [Defendant] would have received credit for all of this time that he has been in prison while the appeal was pending. By now, it is very likely that he would be eligible for parole on this charge as well.

In making this argument, Defendant ignores all the actions taken/not taken by him that prevented "this matter" from having "been resolved by now."

[2] Answering the State's appeal of the circuit court's order granting Defendant's motion to dismiss for violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48, this court determined that Defendant was not formally "arrested" for HRPP Rule 48 purposes at the time of the alleged offenses. Although probable cause existed to arrest Defendant on March 9, 1997, no steps were taken to effectuate an arrest under HRS § 803-6(a). Defendant was already in prison at the time and, though Defendant was "restrained" immediately after the March 9, 1997 incident, he was not "arrested" for the incident until his indictment on December 16, 1997. Therefore, there was no HRPP Rule 48 violation.

	four of five witnesses, and the fifth was unsuitable due to recent drug use.
July 13, 2000	Trial call and hearing on Defendant's motion to dismiss. The court continued the motion and approved funds for Defendant to hire an investigator to locate witnesses. Defense counsel blamed police for not conducting an investigation.
July 17, 2000	At Defendant's request, a subpoena duces tecum was issued to HCF for visitor logs and for Defendant's medical records.
July 20, 2000	The return on subpoena duces tecum included medical records, but visitor logs were not yet available. The court set trial call for July 27, 2000. Defense counsel informed the court that, based on information from the Custodian of Records at HCF, Defendant would not be able to comply with the subpoena by that morning. He asked for additional time and said that he could accomplish the task within a week.
July 27, 2000	Trial call and continued return on subpoena duces tecum -- visitor logs still not available. The court denied, without prejudice, Defendant's motion to dismiss for violation of right to speedy trial. The prosecutor volunteered to assist in locating the records, and the court requested that he do so.
July 31, 2000	Jury selection and trial. Defendant orally renewed his motion to dismiss for violation of right to speedy trial. Judge Nishimura entered an order granting the motion.
August 8, 2000	Judge Nishimura entered an order denying the motion to reconsider.

The Findings of Fact (FsOF) and Conclusions of Law (CsOL) was filed on November 27, 2000. The State challenges the following FsOF and CsOL:

FINDINGS OF FACT

. . . .

4. . . . .

. . . .

x. 7/13/00 Trial Call and hearing on Defendant's Motion To Dismiss For Violation Of Constitutional Right To Speedy Trial. The Court noted that even though it may not appear on the record, the Court was aware that Defendant had continually asserted his right to a speedy trial. The Court continued the motion and approved funds for Defendant to hire an investigator to attempt to locate witnesses.

. . . .

5. Between July 27, 2000 and the date finally set for commencement of trial, although the State was directed to assist the Defendant in getting any records that would disclose the whereabouts of potential defense witnesses,[3] that did not turn up any positive leads in permitting the Defendant to locate potential defense witnesses which would be critical to the defense case.

6. While the defense is partly to blame for the delay, the State's delay in bringing this case to trial and assisting the Defendant in getting any records that would disclose the whereabouts of potential defense witnesses in a timely fashion has unduly and substantially prejudiced the Defendant.

CONCLUSIONS OF LAW

. . . .

3. The prejudice to Defendant resulting from the State's delay in bringing this case to trial and assisting the Defendant in getting any records that would disclose the whereabouts of potential defense witnesses in a timely fashion warrants dismissal of the charges against Defendant under the holding of *Almeida* and

[3] The State was not "directed to assist." At the July 27, 2000 hearing, defense counsel advised the court that he did not have the social security number, address, and telephone number of five visitors to the prison. The prosecutor responded, "If the Court wants to get me involved in trying to see what's there, I'd be -- although, we have no duty to do that, I'd be happy to do that." The prosecutor further advised the court that "[Defendant] has subpoena power. He's now doing things that should have been done in the case when he was first indicted." The court denied "Defendant's Motion to Dismiss for Violation of Constitutional Right to Speedy Trial[,]" set the date for the trial, and stated, "And, [Mr. Prosecutor], if you can assist in getting any records that will disclose the whereabouts of potential defense witnesses, that would be appreciated."

> *Barker, supra*. [State v. Almeida, 54 Haw. 443, 448, 509 P.2d 549, 552 (1973), quoting Barker v. Wingo, 407 U.S. 514, 530 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).]

(Footnote added.)

The State contends, "The trial court erred in granting Defendant's motion to dismiss the indictment for violation of his constitutional right to a speedy trial."

> Whether the government has violated an accused's right to a speedy trial is determined by applying the four-part test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972) and adopted by this court in *State v. Almeida*, 54 Haw. 443, 509 P.2d 549 (1973), to the particular facts of each case. The four factors to be considered in determining whether dismissal is warranted are: (1) length of the delay; (2) reasons for the delay; (3) defendant's assertion of his right to speedy trial; and (4) prejudice to the defendant. *Barker, supra.*
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> **State v. Wasson**, 76 Hawai‘i 415, 419, 879 P.2d 520, 524 (Sup. 1994) (citation omitted).

(Emphasis in original.) This is the applicable rule in Hawai‘i but "none of the four factors . . . [is] either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." Almeida, 54 Haw. at 447, 509 P.2d at 552.

A.

LENGTH OF THE DELAY

The State concedes the delay of approximately thirty-one months necessitates an analysis of the remaining Barker factors.

B.

DEFENDANT'S ASSERTION OF THE RIGHT TO A SPEEDY TRIAL

The State contends the following:

> At the July 13th, 2000 hearing, the trial court stated, "Even though it may not be in the written motion, I know [Defendant] has asked for trial as soon as possible even when there has been a request for continuance or anything along those lines." Both the trial court's statement and its FOF 4x in this regard are clearly erroneous.

(Bracket in original; record citation omitted.)

We agree with the State. Defendant did not "continually" assert his right to a speedy trial as indicated by FOF no. 4x. Such a demand did not occur in the record until January 13, 2000, when Defendant stated, "I want to get this done as soon as possible." On the same date, however, Defendant moved for a continuance, to which the State objected. Also on this date, Defendant agreed to waive the right to a speedy trial until the week of May 1, 2000. Thus, even his January 13, 2000 statement is, at best, an ambiguous assertion of the right to a speedy trial. See State v. Mata, 1 Haw. App. 31, 39-40, 613 P.2d 919, 925 (1980) ("The defendant's assertion of his right to a speedy trial is, on this record, somewhat ambiguous. . . . We do not deem this a waiver of defendant's right but consider it along with all other pertinent factors.")

The State argues, "Where a defendant raises the constitutional right to speedy trial only as a ground for dismissal of a charge, but fails to **demand** a speedy trial, he has

not fully asserted the right to a speedy trial "under **Barker**." (Emphases in original.) The State is correct that Defendant's motion to dismiss did not amount to an assertion of the right to a speedy trial.

> [U]nless the motion to dismiss is accompanied in some way by an alternative demand, even if made implicitly, for a speedy trial, it does not necessarily indicate that the defendant actually wants to be tried immediately. Because Appellant fails to identify any other conduct evidencing a desire to be brought to trial immediately, we are not convinced that his motion to dismiss on speedy trial grounds was the equivalent of a demand for a speedy trial.

State v. Dwyer, 78 Hawai‘i 367, 371-72, 893 P.2d 799-800 (1995)(internal citation omitted). See also State v. Lau, 78 Hawai‘i 54, 64, 890 P.2d 291, 301 (1995) ("in the absence of some other indication that a defendant making a motion to dismiss actually desires a speedy trial, the motion, standing alone, does not weigh in his or her favor.") (Internal quotation and citation omitted.)

Although Defendant's memorandum in support of the motion to dismiss states that "Defendant in this case has repeatedly sought and asserted his right to a speedy trial[,]" there is no reference to anything in the record evidencing these alleged assertions. The court's finding "that even though it may not appear on the record, the Court was aware that Defendant had continually asserted his right to a speedy trial" admits that these assertions do not "appear on the record." These alleged assertions not being a part of the record on appeal cannot be

referred to in this appeal. Orso v. City & County of Honolulu, 55 Haw. 37, 514 P.2d 859 (1973).

Furthermore, Defendant waived his right to a speedy trial and HRPP Rule 48 on at least three occasions: January 13, 2000, June 26, 2000, and implicitly on April 27, 2000. This factor also weighs in favor of the State.

C.

REASONS FOR THE DELAY

The reasons for the delay are important because the fourth factor is prejudice and, as noted in the following quotes, the only prejudice that is relevant is prejudice not caused by delay caused or consented to by Defendant.

> In this case, the prosecution's motions to continue trial based on the unavailability of material witnesses do not reflect a deliberate attempt to delay the trial, and are, thus, "weighted less heavy" against the prosecution. Conversely, "[w]here the filing of defense motions and the delay inherent therein are principally responsible for lapse of time, . . . [there is] little sympathy for the defendant who then claims his right to speedy trial has been violated thereby."

State v. White, 92 Hawai‘i 192, 203, 990 P.2d 90, 101 (1999) (brackets in original; citation omitted).

"[A]n exceedingly long delay in bringing an accused to trial, which is not caused or consented to by the accused, may create such a strong presumption of prejudice, that, if not persuasively rebutted by the prosecution, will entitle the accused to relief, even absent specifically demonstrable prejudice." Lau, 78 Hawai‘i at 65, 890 P.2d at 302 (citations and internal quotation marks omitted).

When Defendant's motion to dismiss was granted on July 31, 2000, Defendant was being represented by his third defense counsel. The first withdrew on February 24, 1998, because of Defendant's lack of cooperation with discovery. The second withdrew on November 30, 1999, for medical reasons.

The State asserts that FOF no. 2 is clearly erroneous because "the defense was responsible for every proceeding that caused a delay of trial, with the exception of a single motion for continuance to [sic] where both parties moved to continue trial because the prosecutor and defense counsel were in trial on different cases." (Emphasis in original.) See State v. Nihipali, 64 Haw. 65, 69, 637 P.2d 407, 411 (1981) (defendant would "not be heard because the delays were a direct result of his own act or were the result of a benefit granted to him.")

FOF no. 2 states as follows: "The time period between the date of the alleged offenses and the date of indictment is 277 days, for which delay the State offered no reasonable excuse." We note that the State did not need to offer a reasonable excuse, because the delays were attributable to Defendant, not to the State. FOF no. 2, although not clearly erroneous, is not relevant to the assignment of weight to "reasons for delay."

Although part of the reason for the lengthy delay was the first appeal, this is a neutral reason for delay, not attributable to the State or Defendant.

Although the State did request a continuance on April 27, 2000, defense counsel also requested a continuance, and Defendant agreed to the continuance. All other continuances were granted solely at the request of the defense. Thus, even if the April 27, 2000 continuance is attributed solely to the State, a far greater portion of the delay is attributable to Defendant and his counsel, and this factor, therefore, weighs in favor of the State.

D.

PREJUDICE TO DEFENDANT

Prejudice to Defendant is the most important factor.

> Prejudice . . . should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.

Lau, 78 Hawai‘i at 64, 890 P.2d at 301.

With regard to pretrial incarceration, the State contends that "Defendant remained in pre-trial custody for about one year, not an oppressively long period of time considering the primary reason for such was because he constantly continued trial."

In Nihipali, recognizing that "pre-trial incarceration can produce detrimental consequences for the defendant in his ability to proceed with his case," the court "note[d] that appellant's incarceration prior to trial was largely of his own making[,]" and, therefore, did not amount to prejudice against the defendant. Nihipali, 64 Haw. at 71, 637 P.2d at 413. In the instant case, Defendant committed the alleged offense while already imprisoned.

Regarding anxiety and concern, the State cites to State v. Ferraro, 8 Haw. App. 284, 300, 800 P.2d 623, 632 (1990). "[T]he government will prevail unless the defendant offers objective, contemporaneous evidence of anxiety, such as prompt and persistent assertion of the desire for a speedy trial coupled with a demonstrable basis for the court's believing the delay is traumatic." Id. (Citations omitted.)

The first two factors weigh in favor of the State. Thus, in his memorandum in support of the motion to dismiss, Defendant limited his arguments for prejudice to the third prong of the prejudice test when he stated as follows:

> [Defendant's] prejudice lies in the fact that because of the passage of time and a shoddy investigation, at best, by HPD and Halawa, no potentially exculpatory witnesses were identified. Those defense witnesses who were identified can no longer be found, save one-a drug-using felon whose credibility the State will have little trouble in successfully attacking.

Defense counsel's accompanying affidavit states, in relevant part, that there were approximately ten to fifteen prisoners present during the alleged incident, and:

> 4. Of those ten to fifteen prisoners, [Defendant] is aware of the names of but four-Vincent Burdette, Manuel Silva, Robert Kupahu, and Nelson Abiley;
>
> 5. Of those four, declarant was able to locate but one-Nelson Abiley-who, when interviewed, confirmed [Defendant's] version of the events of March 9, 1997, to wit, that there was no contraband, that ACO Hamlow assaulted [Defendant], and that [Defendant] did nothing but try to shield himself from Hamlow's blows;
>
> 6. At the time of the interview, Mr. Abiley informed declarant he was not due for release until September, and that he would contact declarant should his situation change;
>
> 7. Mr. Abiley has not contacted declarant;
>
> 8. Presently, Halawa Correctional institution has no current record of the whereabouts of Nelson Abiley, Vincent Burdette, or Manuel Silva;
>
> 9. This leaves only Robert Kupahu who is presently in Module A, high security at Halawa, reportedly due to a drug violation which occurred while he was confined in the Medium Security facility;
>
> 10. Officer John Haraway was assigned to investigate the complaint which forms the basis of this charge against [Defendant] made by ACO Patrick Hamlow;
>
> 11. To declarant's knowledge, Officer Haraway neither interviewed any of the other prisoners present that day, nor did he list their names;
>
> 12. To declarant's knowledge, no one ever identified or interviewed the person with whom [Defendant] was visiting on the day of March 9, 1997-the person who would have been the presumptive source of any contraband which might have been found in [Defendant's] possession[.]

(Emphasis in original.)

With regard to the third and final prong of the prejudice test, the State challenges FsOF nos. 5 and 6 and COL no. 3.

The State argues as follows:

> Regarding F[s]OF 5 and 6, these findings seem to suggest that it was the State's responsibility to provide Defendant with his witnesses, which would also be "critical" to his defense. . . .
>
> As far as the State's information not turning up "positive leads", it was not the State's duty to actually provide the defense with such. . . . On the other hand, defense counsel engaged in excuses, blaming prior defense counsel for not ensuring the information was received earlier, blaming Mr. Kaplan [of Halawa] for not responding to his subpoena in a timely manner, and indicating he needed more time to find the witnesses. . . . [T]he record shows that two of those potential witnesses, Mr. Kupahu and Mr. Silva -- pursuant to defense counsel's own investigation -- were currently in Kulani Prison, but counsel had not even interviewed those "critical" witnesses.
>
> Finally, as far as the witnesses being "critical", other than defense counsel's representation that Mr. Abiley would "corroborate" Defendant's version of the incident -- he did not provide any affidavit from Mr. Abiley as to what Mr. Abiley would testify -- the defense made no offer of proof or provided no evidence as to what his "critical" witnesses would have testified. Indeed, he failed to subpoena Mr. Abiley at all at the time he had contact with that witness, and instead relied upon Mr. Abiley's word that he would remain in touch with counsel after his release from prison. Moreover, Defendant's contention that the witnesses were "critical" is belied by his refusal to continue trial for five days, which counsel represented would make a "significant" difference in the case.
>
> As such, Defendant has failed to show he was actually prejudiced by the delay in bringing him to trial. **Lau**, 78 Hawai‘i at 66, 890 P.2d at 303.

(Emphases in original.) These contentions are supported by the record and are undisputed by Defendant in this appeal.

Of the three prongs involved in this test, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious." Lau, 78 Hawai‘i at 64, 890 P.2d at 301 (citation omitted).

In the instant case, however, Defendant, himself, was negligent in identifying and locating his alleged "critical witnesses," and made no offers of proof as to what, if anything, they would testify. Defendant's allegation that the delay is the cause of his lack of witnesses is merely a claim of possible, not actual prejudice. "The possibility of prejudice is not sufficient to support defendants' position that their speedy trial rights were violated." Lau, 78 Hawai‘i at 65, 890 P.2d at 302 (emphasis, internal brackets, and citations omitted). See also State v. Mitchell, 1 Haw. App. 121, 128, 615 P.2d 109, 114 (1980) ("[Defendant's] claim that the lapse of time prevented him from calling three former co-workers, whose names and genders he could not recall, as character witnesses is unpersuasive, especially in view of the fact that he apparently made no effort to determine their identities or whereabouts").

Finally, and most importantly, we consider White, 92 Hawai‘i at 204, 990 P.2d at 102. In White, the defendant argued that "imprisonment impaired his ability to confer with his late girlfriend, who was a potential defense witness." The girlfriend supposedly died prior to trial, so could not testify, although it was unclear from the record whether the girlfriend died during the delay. The court stated that "[a]ssuming that his late girlfriend did pass away during the delay, the fourth Barker factor would weigh in favor of White[,]" but "[o]n balance, even

assuming that White's late girlfriend died during the delay, such prejudice is substantially outweighed by White's substantial responsibility for the pre-trial delay and his failure to assert his right to a speedy trial."

CONCLUSION

We conclude that all Barker factors weigh in favor of the State. Accordingly, we (1) reverse the circuit court's July 31, 2000 order granting, with prejudice, Defendant's Motion to Dismiss for Violation of Constitutional Right to Speedy Trial, filed on July 7, 2000, and (2) remand for further proceedings.

DATED: Honolulu, Hawai‘i, June 4, 2002.

On the briefs:

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellant.

Chief Judge

Associate Judge

Associate Judge