

NOT FOR PUBLICATION

NO. 25345

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v.
JERRY A. GALLARDO, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 01-1-0746)

MEMORANDUM OPINION

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

Plaintiff-Appellant State of Hawai'i (State) appeals the "Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Dismiss Indictment Due to Tampering of Evidence and Rule 16 HRPP Violations" filed on August 23, 2002 in the Circuit Court of the First Circuit (circuit court).¹

On appeal, the State contends the circuit court erred by dismissing with prejudice the indictment of Defendant-Appellee Jerry A. Gallardo (Gallardo). We vacate and remand.

I. FACTS

On March 29, 2001, Gallardo was indicted on one count of Sexual Assault in the Second Degree and six counts of Sexual Assault in the Fourth Degree. All of the charges involved alleged sexual contact with the Complainant.

¹ The Honorable Wilfred K. Watanabe presided.

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On May 31, 2001, Gallardo filed "Defendant's Request for Materials and Information Pursuant to Rules 16(b) and 12(d), Hawaii Rules of Penal Procedure." On June 19, 2001, Gallardo filed a Motion to Compel Discovery (Motion to Compel), asking for specific items of discovery pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 16. On October 18, 2001, the court granted Gallardo's Motion to Compel.

On December 14, 2001, Gallardo filed a "Motion to Dismiss Due to Tampering of Evidence and Rule 16 HRPP Violations" (Motion to Dismiss), stating that on the morning of November 20, 2001 (the morning of trial), the prosecutor gave Gallardo's attorney a copy of an audiotape Complainant had made of an alleged conversation between Complainant and Gallardo. In the State's "Memorandum of Law in Opposition to Defendant's Motion to Dismiss for Tampering of Evidence and Rule 16 HRPP Violations" (State's Opposition Memo), the State contended the existence of the audiotape was not determined until the evening of November 19, 2001.

On March 4 and 7, 2002, the circuit court held hearings on Gallardo's Motion to Dismiss. Complainant testified that Gallardo sexually assaulted her on September 30, 2000. She testified that she and a friend (Friend) saw Gallardo sitting at a table outside Kammies Market three to six days after the

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alleged sexual assault incident. She asked Gallardo if she could talk with him, he said yes, and she sat down at the table with him while he finished a report. She had a tape recorder in her purse because she had taped a meeting with the Department of Education concerning her son. After Gallardo finished the report, Complainant turned on the tape recorder and said "can we talk now?" Complainant testified that she "blind-sidedly" turned on the tape recorder by reaching into her purse. She was not able to see the tape recorder. During the conversation, she put her hand into her purse several times to see if the tape recorder was on. Complainant testified that after she later played the tape, she believed the recorder had run out of tape and was not running when she got up to leave after her conversation with Gallardo. She then recanted her statement and said she believed she turned the tape off after the conversation. She next stated she was not sure if she had clicked the recorder off or had hit the pause button. Complainant testified that she listened to the tape in the privacy of her bathroom at home and the Friend did not listen to the tape.

Complainant agreed there was a break in the tape where it was silent. She testified this break was because she was fumbling in her purse, making sure she was recording Gallardo, and it was possible she pressed the pause or the stop button.

Gallardo's counsel asked Complainant if the silence began after Complainant asked Gallardo, "Do you admit you did this?" Complainant denied she asked Gallardo, "Do you admit you did this?" Gallardo's counsel asked Complainant to explain what sounded like breathing noises during the silent portion of the tape; Complainant stated she had no explanation, but it could have been a sigh. Complainant denied tampering with or editing the tape.

Complainant testified she met with an attorney referred by her family therapist two days after the September 30, 2000 incident. She told the attorney about the incident because the attorney offered his office to her so she could meet with the Department of Internal Affairs and give a statement about the incident. Complainant testified she played the tape for the therapist, but the tape was garbled because, at the time of taping, the batteries were very low. She did not tell the attorney that she had taped her conversation with Gallardo.

Complainant testified she told Detective Takahashi of Honolulu Police Department Internal Affairs, Criminal Investigation Section, about the tape during the interview at the attorney's office. Detective Takahashi did not ask her where the tape was located or when she had made the tape. Detective Takahashi did not ask for a copy of the tape, and she did not offer him a copy. Complainant stated she took the tape to the

prosecutor the evening before jury selection was to begin. Complainant testified that she waited a year and a half before telling the prosecutor about the tape because she was under the impression the tape was not admissible in court and it was not very audible.

Norman Nichols (Nichols) testified as an expert witness for the defense in the area of audio recording. He opined it appeared to him that the tape had been altered about halfway through the tape. He testified that a segment of the original recording had been recorded over with background sounds that were substantially different from the original recording for about eight to ten seconds and then the original recording returned.² He stated there was heavy background noise on the original segment of the tape that sounded like traffic and wind, but the altered section appeared to possibly be someone breathing and handling the recorder. He also stated the recording ended abruptly, which would not be inconsistent with shutting off the recorder. Nichols testified that the sound in the altered segment would not be consistent with someone pausing the recording because pausing would stop the tape. The interruption was a re-recording that lasted considerably longer than a pause would produce. In his declaration attached to the Motion to

² This segment of the tape is interchangeably described as "altered," "re-recorded," and "erased" and is referred to as the "re-recording" and "erasure" throughout the transcripts and pleadings.

Dismiss, Nichols had stated the erasure occurred after a female voice asked "do you admit you did that?" On cross-examination, when asked if he heard the words "do you admit you did that" before the erased segment of the tape, Nichols testified that he thought he heard "do you."

On March 7, 2002, Detective Takahashi testified that he conducted an audiotaped interview of Complainant on October 13, 2000 in an attorney's office. During the interview, Complainant told him that she had had a chance encounter with Gallardo at which she had a tape recorder. Detective Takahashi testified that after the interview, he told Complainant it was important for the case that she turn the tape over so it could be used as evidence; Complainant told him the tape recorder had malfunctioned. He testified that because the tape was not produced, he was under the impression that there was "nothing on the tape that was worthwhile for the investigation." Detective Takahashi told Complainant "to submit the tape if it was vital for the case." He did not mention the tape in the sixteen-page report he filed on the sex assault complaint nor was there any mention in Complainant's audiotaped interview that she had taped a conversation with Gallardo.

Detective Takahashi testified he told the prosecutor who initially screened the case and the current prosecutor that Complainant had tried to tape Gallardo, but the tape had

malfunctioned. He stated that if evidence or other information had been submitted, a follow-up report would have been initiated; however, he was not asked to do, and did not do, a follow-up report on the tape.

Detective Takahashi testified he also tape-recorded an interview with the Friend. After the interview was finished, the Friend told him that Complainant had tried to tape Gallardo. Detective Takahashi did not tell the prosecutor that the Friend told him Complainant had attempted to tape-record Gallardo. When asked why he did not put in his police report that Complainant alleged she had tape-recorded Gallardo, Detective Takahashi stated, "I may have overlooked it."

On March 14, 2002, the State filed a motion to continue trial so the State could submit the tape to the FBI Engineering Research Facility Forensic Program at Quantico, Virginia, for possible restoration of the erased portion of the tape. Attached to Gallardo's July 10, 2002 supplemental memorandum in support of the Motion to Dismiss was a copy of the FBI's report. The FBI concluded the tape had been erased by over-recording in six places on the tape and an over-recorded stop at the end of the tape was followed by the remnant of a previous stop.

On August 23, 2002, the circuit court issued its "Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Dismiss Indictment Due to Tampering of

Evidence and Rule 16 HRPP Violations." The circuit court dismissed the indictment with prejudice. The State timely filed this appeal.

II. STANDARDS OF REVIEW

A. Motion to Dismiss Indictment

"A trial court's ruling on a motion to dismiss an indictment is reviewed for an abuse of discretion." State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985).

B. HRPP Rule 16

"The test for determining if a lower court has abused its discretion in handling a Rule 16 problem is if after finding a violation of the rule, the court takes measures to alleviate any prejudice." State v. Dowsett, 10 Haw. App. 491, 495, 878 P.2d 739, 742 (1994) (internal quotation marks, citation, brackets, and ellipses omitted).

C. Findings of Fact/Conclusions of Law

Appellate review of a circuit court's findings of fact in a pretrial ruling is conducted according to the following standard:

Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. 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. The circuit court's conclusions of law are reviewed under the right/wrong standard.

State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002) (internal quotation marks and citations omitted) (quoting State v. Harada, 98 Hawai'i 18, 22, 41 P.3d 174, 178 (2002)). "A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (internal quotation marks and citation omitted).

Substantial evidence is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (internal quotation marks and citation omitted).

III. DISCUSSION

A. The circuit court abused its discretion by dismissing the indictment with prejudice.

The State contends the circuit court erred by granting with prejudice Gallardo's Motion to Dismiss. Pointing to the HRPP Rule 16 violation and the tampering of evidence, Gallardo contends the circuit court did not err.

The State challenges the circuit court's Conclusions of Law Nos. 3, 5, 6, 7, 8, 9, and 10, which stated:

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3. The detective and the prosecuting attorneys were negligent in not producing the tape.³

. . . .

5. It is reasonable to infer that the erased portions of the tape were exculpatory.

6. The failure of the prosecutors to obtain the tape could have affected the grand jury proceedings and determination of probable cause. State v. Wong, 97 Haw. 512 (Haw. 2002).

7. While negligence alone does not give rise to dismissal, negligence plus tampering does give rise to a due process violation. People v. Shepard, 701 P.2nd 49 (Colo. 1985); State v. Boyd, 629 P.2nd 930 (Wash. App. 1981); Stuart v. State, 907 P.2nd 783 (Id. 1995); Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okl. 1995); State v. Sherman, 801 P.2nd 274 (Wash. App. 1990).

8. Defendant has been prejudiced by the tampering of the tape recording, which cannot be cured.

9. Defendant's due process rights as guaranteed by the 5th and 14th Amendment to the U.S. Constitution and Article 1 sec. 5 and 14 of the Hawaii State Constitution have been violated due to the tampering of the tape and Rule 16 HRPP violations.

10. Based upon all of the above, there is no alternative but to dismiss this case with prejudice.

(Footnote added.)

1. The circuit court did not err by finding the tape was tampered with.

The State contends the circuit court's conclusion of law that the tape was tampered with was erroneous. Gallardo contends the conclusion that the tape was tampered with was not erroneous. The circuit court's conclusion is properly characterized as a finding of fact since the court could have

³ This finding is not required to be addressed in this opinion in reaching our decision in this case.

also found, based on the available evidence and testimony, that the tape was not tampered with.

"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) (internal quotation marks and citation omitted).

Complainant testified she listened to the tape recording of Gallardo in the privacy of her bathroom. She stated there was a break in the tape because she was fumbling around with the recorder while it was in her purse to make sure it was recording.

Nichols testified the tape was altered about halfway into the tape and the original recording had been recorded over. He stated the recorded over part had a substantially different background noise. Nichols stated the background noise changed from the sound of traffic to breathing with clicks and pops. He also testified that the recording ended abruptly, which was not inconsistent with someone shutting off the recorder.

Gallardo presented an expert witness who opined that the tape had been tampered with because of the difference in the background noise in a small segment of the recording. The expert

witness also opined that the tape had been recorded over -- not merely disrupted as Complainant claimed. There was substantial evidence to support the circuit court's finding that the tape had been tampered with; therefore, the circuit court's finding was not clearly erroneous.

2. **The circuit court erred by concluding it was reasonable to infer that the taped over portion of the tape was exculpatory and by concluding the failure to obtain the tape could have affected the grand jury proceedings and determination of probable cause.**

The State contends the erased portions of the tape were not exculpatory and the failure to produce the tape would not have affected the grand jury proceedings.

In State v. Bell, 60 Haw. 241, 589 P.2d 517 (1978), the Hawai'i Supreme Court noted:

[T]he grand jury's responsibilities include both the determination of whether there is probable cause to believe that a crime has been committed and the protection of citizens against unfounded criminal prosecutions. We do not believe, however, that the fulfillment of these responsibilities requires that the grand jury have before it any and all evidence which might tend to exculpate the defendant.

. . . .

To require the prosecutor to present any and all information which may have a tendency to exculpate the accused would, in our view, confer upon grand jury proceedings the adversary nature which is more properly reserved for the actual trial phase of prosecution.

Id. at 243-44, 589 P.2d at 519 (citations omitted).

[W]here evidence of a clearly exculpatory nature is known to the prosecution, such evidence must be presented to the grand jury. Clearly exculpatory evidence may be manifested, for example, by a witness whose testimony is not directly contradicted by any other witness and who maintains that the

accused was nowhere near the scene of the crime when it occurred. Also, where it has become apparent to the prosecution, for example, that a sole eyewitness testifying as to the perpetration of the crime has perjured himself before the grand jury, that perjury must be revealed to the grand jury. The failure of the prosecutor to present such clearly exculpatory evidence to the grand jury would justify dismissal of the indictment.

Id. at 245, 589 P.2d at 520 (citation omitted).

In State v. Chong, 86 Hawai'i 282, 949 P.2d 122 (1997), the Hawai'i Supreme Court adopted Justice Kidwell's holding in his concurring opinion in Bell:

The function of a grand jury to protect against unwarranted prosecution does not entail a duty to weigh the prosecution's case against that of the defense, or even to determine that the prosecution's case is supported by competent evidence.

On the other hand, an indictment that is the result of prosecutorial misconduct or other circumstances which prevent the exercise of fairness and impartiality by the grand jury may be successfully attacked.

Chong, 86 Hawai'i at 289, 949 P.2d at 129 (citation omitted) (quoting Bell, 60 Haw. at 256-57, 589 P.2d at 526 (Kidwell, J., concurring)).

Gallardo cites to State v. Moriwaki, 71 Haw. 347, 791 P.2d 392 (1990), to support his contention that

"suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196 . . . (1963)[.] Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 . . . (1985).

71 Haw. at 356, 791 P.d at 397 (brackets and some citations omitted).

The State cites to State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990), to support its contention that the evidence was not clearly exculpatory and the State must have acted in bad faith when it suppressed the evidence. The Matafeo court stated that "[w]here the state destroys evidence that has only a potential exculpatory value, due process is not offended unless the defendant can demonstrate that the state acted in bad faith[.]" Id. at 187, 787 P.2d at 673 (citing to Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988)).

In State v. Okumura, supra, the Hawai'i Supreme Court stated that "[h]owever, in order to establish a Brady violation, an appellant must make a showing that the suppressed evidence would create a reasonable doubt about the Appellant's guilt that would not otherwise exist." 78 Haw. at 402, 894 P.2d at 99 (brackets in original omitted) (quoting United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402 (1976)).

Gallardo erroneously relies on Moriwaki in claiming that any discovery violation automatically violates his right to due process. Moriwaki simply reiterates the standard pronounced in Bell: the State must present clearly exculpatory evidence to the grand jury. The State oversimplifies the holding in Matafeo by claiming that a defendant must show the State acted in bad

faith in order to show a violation of a defendant's right to due process. The standard gleaned from the relevant case law is that the State must present clearly exculpatory evidence to the grand jury. However, if the evidence is only potentially exculpatory, a defendant must demonstrate bad faith on the part of the State in its suppression of the evidence to show the defendant's right to due process was violated. The questions in this case are whether the tape was clearly exculpatory and should have been presented to the grand jury or whether Gallardo's right to due process was violated because he demonstrated bad faith on the part of the State in withholding potentially exculpatory evidence.

In State v. O'Daniel, 62 Haw. 518, 616 P.2d 1383 (1980), the Hawai'i Supreme Court held that police testimony that a defendant accidentally shot someone was not required to be presented to the grand jury. The court stated:

Evidence of an accidental shooting arguably tends to negate guilt. However, we are of the opinion that such evidence before the grand jury within the context of the facts herein, was not clearly exculpatory within the standard enunciated in Bell. Although Detective Au testified as to appellant's statements concerning the accidental nature of the incident, there was contradictory circumstantial evidence which could support the charge of murder. Under these circumstance, we find that the prosecutor was not required to present evidence of the accidental shooting to the grand jury.

Id. at 522, 616 P.2d at 1387.

In State v. Lincoln, 3 Haw. App. 107, 643 P.2d 807 (1982), this court held that the failure of the prosecutor to

tell the grand jury of a co-defendant's attempt to cause Lincoln to provide inculpatory information did not require the court to quash the indictment because such information was not clearly exculpatory. Id. at 112, 643 P.2d at 812.

In Okumura, during a videotaped police interview, Okumura offered to implicate a police officer in the burglaries with which Okumura was being charged. 78 Hawai'i at 390, 894 P.2d at 87. The videotape was not turned over to Okumura, and a detective said the videotape was inaudible and had been thrown away. Id. at 390-91, 894 P.2d at 87-88. The court stated that "[b]ecause the videotape is no longer available, whether the evidence would be exculpatory cannot be conclusively established." Id. at 402, 894 P.2d at 99. The court went on to state that Okumura could still show his right to due process was violated if he could establish the State acted in bad faith; however, Okumura failed to do so. Id.

There was conflicting testimony as to whether the question before the erased portion of the tape was Complainant asking Gallardo, "Do you admit you did that?" However, assuming that was the question before the silence on the tape, any response made by Gallardo would not be clearly exculpatory. If Gallardo admitted sexually assaulting Complainant, then it would be inculpatory, not exculpatory. If Gallardo denied sexually assaulting Complainant, then it would not create a reasonable

doubt about his guilt that would not otherwise exist. Gallardo did not admit before trial that he sexually assaulted Complainant. Another denial by Gallardo that he sexually assaulted Complainant would not create a reasonable doubt about his guilt that did not otherwise exist. The tape cannot be shown to be clearly exculpatory under Bell and Brady. Assuming Gallardo's contention that the tape had potentially exculpatory value is true, then he was required to establish the State acted in bad faith to show a violation of his right to due process under Youngblood.

The circuit court found the State negligent in not producing the tape. There was no finding that the State acted in bad faith. The circuit court erred by concluding that the State's failure to obtain the tape could have affected the grand jury proceedings and determination of probable cause because the State did not erroneously withhold information from the grand jury that should have been presented.

3. The circuit court erred by concluding Gallardo's right to due process was violated due to the HRPP Rule 16 violation.

The State contends Gallardo's right to due process was not violated because the State was not negligent in not obtaining the tape and because fault for tampering with the tape did not lie with the State. The circuit court stated in its Conclusion of Law No. 7: "While negligence alone does not rise to

dismissal, negligence plus tampering does give rise to a due process violation." The circuit court applied the incorrect standard to determine whether there was a violation of Gallardo's right to due process. As stated above, the standard is whether the evidence withheld was clearly exculpatory, or, if the evidence was not clearly exculpatory, whether the defendant can establish that the potentially exculpatory evidence was withheld because the State acted in bad faith. Gallardo proved neither; therefore, the circuit court erred by concluding Gallardo's right to due process was violated.

- 4. The circuit court erred by concluding the HRPP Rule 16 violation could not be cured and there was no alternative but to dismiss the indictment with prejudice.**

The State contends the circuit court erred by dismissing the indictment because the court failed to follow the steps set forth in State v. Kaiu, 5 Haw. App. 350, 692 P.2d 1166 (1984).

"[B]efore the court orders dismissal of a case because of the State's violation of HRPP 16, it must consider whether less severe measures would rectify prejudice caused to the defendant by the violation." Dowsett, 10 Haw. App. at 495, 878 P.2d at 742.

The circuit court did not consider less severe measures that would rectify any prejudice caused by the State's HRPP Rule

16 violation, including exclusion of the tape and conversation of Complainant and Gallardo or dismissal of the indictment without prejudice. The circuit court abused its discretion by dismissing the indictment with prejudice without considering less severe sanctions.

IV. CONCLUSION

The "Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Dismiss Indictment Due to Tampering of Evidence and Rule 16 HRPP Violations" filed on August 23, 2002 in the Circuit Court of the First Circuit is vacated, and this case is remanded for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, March 10, 2005.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge