

DISSENTING OPINION BY FOLEY, J.

Defendant-Appellant Erik Barend Deryke (Deryke) argues that the District Court of the First Circuit, Kaneohe Division, (district court) improperly denied his March 17, 2005 Motion to Dismiss despite the State's failure to undertake any effort to serve the September 4, 2003 bench warrant at any point prior to his voluntary appearance at court on February 18, 2005. Deryke further argues that the district court adopted an improper policy of not dismissing any charges for failure to prosecute unless more than two years had elapsed between issuance and service of the bench warrant. At the March 29, 2005 hearing on the Motion to Dismiss, the district court specifically ruled:

THE COURT: (indiscernible) this Court has held in numerous instances that two years is the cutoff point for purposes of determining reasonableness of action by the State. Court further notes that other judges in similar jurisdictions held the same way. For purposes of uniformity and justice, this Court will follow that two year limitation until such time as the Courts are given further information by the appellate court (indiscernible) is going to deny the motion as not being in violation of Rule 9.

(Brackets omitted.)

Deryke relies on State v. Lei, 95 Hawai'i 278, 21 P.3d 880 (2001), in support of his contention that the State delayed unreasonably in prosecuting him. In Lei, delays of approximately 31 months occurred between the issuance and service of two bench warrants upon Lei. Id. at 279-80, 21 P.3d at 881-82. In ruling that the lower court had abused its discretion by not dismissing the charges against Lei, the Hawai'i Supreme Court weighed the

State's valid interest in punishing criminal conduct against the harms resulting from the failure to timely prosecute. Id. at 285-87, 21 P.3d at 887-89. The court agreed with the principle stated in State v. Estencion, 63 Haw. 264, 268, 625 P.2d 1040, 1043 (1981), that "[u]nreasonable delay in the determination of a criminal action subverts the public good and disgraces the administration of justice." Lei, 95 Hawai'i at 285, 21 P.3d at 887 (brackets in original omitted).

The Lei court, in analyzing the reasonableness of the State's efforts, considered a number of factors. Id. at 286, 21 P.3d at 888. The court noted that the lower court properly took judicial notice of the large volume of outstanding misdemeanor bench warrants in the district courts, describing such volume as "a relevant consideration as to what constitutes a reasonable amount of time for execution." Id. The court also considered whether Lei had been amenable to service and whether the State had acted with due diligence. Id. at 286-87, 21 P.3d at 888-89. Moreover, the court expressly did not adopt a bright-line definition of "unreasonable delay" (as adopted by the district court in the instant matter). Id. at 286 n.7, 21 P.3d at 888 n.7 ("We hold only that delays of two years and six months and two years and two months constitute unnecessary delays in the present case."). The court considered the delay as only one part of a comprehensive analysis. Id. at 287, 21 P.3d at 889. The

district court in the instant case should have engaged in a similarly multifaceted inquiry.

Deryke correctly notes that in both Lei and this case, the State offered no justification for the delays. Deryke offered uncontroverted evidence that he was available for service during the bulk of the elapsed time. As to the State's diligence, there was no evidence that the State had undertaken any efforts at service. The district court did not take judicial notice of any large volume of outstanding misdemeanor bench warrants, as did the lower court in Lei. Yet, the district court decided that because only 18 months had elapsed, Deryke was not entitled to a dismissal. The district court did not consider the other factors set forth in Lei and expressly relied on a two-year bright line rule. This was reversible error. Therefore, I respectfully dissent.

*Daniel R. Foley*