

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27411

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DANIEL R. MILLER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 04-1-2224)

K. HAMAKAHOE
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Daniel R. Miller (Miller) appeals from the June 29, 2005 Judgment of Conviction and Probation Sentence (Judgment) entered in the Circuit Court of the First Circuit. The Judgment found Miller guilty of Assault in the Second Degree, Hawaii Revised Statutes § 707-711(1)(d), and sentenced him to (1) probation for five years, with the special condition that he serve a term of imprisonment of four months, (2) pay restitution in the amount of \$201.11, (3) pay \$100.00 to the crime victim compensation fund, and (4) pay a probation services fee in the amount of \$150.00.

Trial call was held on January 19, 2005 before the Honorable Karl K. Sakamoto, at which both Miller and Plaintiff-Appellee State of Hawai'i (the State), indicated that they were ready for trial. Judge Sakamoto inquired as to the Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2006) date¹ and the deputy

¹ Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2006) states, in relevant part:

Rule 48. Dismissal.

. . . .

(b) **By court.** Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the

prosecuting attorney for the State replied, "I have February 11th, Your Honor." Judge Sakamoto thereupon placed the case "on a five-day standby for the trial week commencing . . . January 24, 2005."

On January 24, 2005, the parties appeared before Judge Michael D. Wilson and were informed by Judge Wilson that "we do have another case that takes priority, and I'm sorry, Mr. Miller, we're not going to get to your case." Judge Wilson orally continued the case to March 28, 2005. Miller objected and asserted his right to a speedy trial. Judge Wilson's Order of Continuance was filed on February 4, 2005, and stated:

This matter came on for jury trial on January 24, 2005, before the Honorable Michael D. Wilson. . . . Both parties were ready for trial. Defendant objected to any continuance of the trial.

It is hereby ordered that because of court congestion, trial is continued to March 28, 2005. The time period from January 24, 2005, until March 28, 2005, shall not be excludable time under HRPP 48. The new pre-trial motion date is February 28, 2005.

On January 25, 2005, after Judge Wilson orally continued the case to March 28, 2005, Miller filed a Demand for Speedy Trial "under Article I, Section 14, of the Hawaii Constitution, and the Sixth Amendment to the United States Constitution and Rule 48 of the Hawaii Rules of Penal Procedure."

On February 1, 2005, the State filed a Motion to Advance Jury Trial (Motion to Advance). The attached Declaration

defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:

(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[.]

of Counsel stated, in part:

d. I have since reviewed the Rule 48 calculations for this matter, and found that Rule 48 expires on March 3, 2005.

e. The State requests to advance the trial date in this matter in order to have the trial in this matter commence prior to expiration of Rule 48.

The State's Motion to Advance was heard on February 9, 2005, by Judge Derrick H.M. Chan, the Administrative Judge of the Criminal Division. At the hearing, counsel for Miller asserted that the only time she was available for trial was on March 28, 2005, that Judge Wilson's order was law of the case or res judicata, and that Judge Chan was not authorized to change Judge Wilson's order that scheduled the trial to happen on March 28, 2005. Counsel for Miller stated:

[W]hat I had expected to happen here . . . is that this would've gone on and close to March 28th I would've filed, as anticipated, a motion to dismiss based upon Rule 48. And the government would've filed their objection, and there would've been argument about, you know, is it court congestion sufficient to, is it not, whatever, and that the judge, whoever the judge would've been, would then have made a ruling in favor or against me. And that at that point whether it was in favor and dismissed without prejudice, I would do certain things, or if it was dismissed with prejudice, the Government might do certain things.

So . . . I think the better course is to let this run its course and let a court rule on the motion to dismiss which the Government has known all along was gonna be coming down the pike because I've put them on notice repeatedly that I intended to file . . . such a motion, uh, once the time ran.

The State conceded that it had not objected to Judge Wilson's order. However, after realizing that the continuance would place the commencement of trial outside the Rule 48 period, the State filed the Motion to Advance. Judge Chan orally granted the Motion to Advance.

On February 17, 2005, Judge Chan entered "Findings of Fact, Conclusions of Law, and Order Granting State's Motion to

Advance Jury Trial" and set the trial for the week of February 22, 2005. Therein, the court made the following findings of fact (FsOF) and conclusions of law (CsOL):

FINDINGS OF FACT

1. Jury trial in the above entitled matter was scheduled to commence the week of January 24, 2005.
2. At trial call on January 19, 2005, both the State and the Defendant declared ready for trial, and the Honorable Karl Sakamoto referred this matter to the Master Calendar for trial setting.
3. On January 24, 2005, this matter was continued to the week of March 28, 2005 by the Honorable Michael Wilson for court congestion.
4. Per review of the Transcripts of Proceedings held before the Honorable Michael Wilson on January 24, 2005, the Court, in its ruling, did not state the exceptional circumstances for the continuance for court congestion.
5. The Court's failure to state the exceptional circumstances for the continuance for court congestion was an apparent oversight.
6. Per review of the Transcripts of Proceedings held before the Honorable Michael Wilson on January 24, 2005, the Honorable Michael Wilson merely stated that he didn't think the period of the continuance would be excludable for purposes of Rule 48.

CONCLUSIONS OF LAW

1. For purposes of calculating excludable periods pursuant to Hawaii Rules of Penal Procedure Rule 48, the Court is required to state the exceptional circumstances when continuing a case for court congestion, according to State v. Kahawai, 9 Haw.App. 205, 831 P.2d 936 and State v. Mata, 1 Haw.App. 31, 613 P.2d 919.
2. The previous ruling by the Honorable Michael Wilson regarding the excludability of the period of the continuance should not stand because of the Court's apparent oversight and failure to state the exceptional circumstances for the continuance due to court congestion.
3. Although reversing another Judge's decision should be taken seriously, based upon the totality of the circumstances, this Court finds that there are clear and cogent reasons not to let the previous court order stand, pursuant to State v. Oughterson, 99 Haw. 244, 54 P.3d 415.

On February 14, 2005, the parties appeared before Judge Chan for trial call. The State declared that it was ready for trial. Miller moved to continue the trial date to the previous

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trial date which was March 28, 2005. The following colloquy took place:

THE COURT: Well, the State is ready to proceed. Okay.

MS. TOWER: I -- as I told Your Honor last week, I cannot be ready. I am not ready.

THE COURT: Okay.

MS. TOWER: But it's through circumstances that have nothing to do with the defense or the defendant.

THE COURT: well, that's been already argued.

Mr. Miller, you understand that under the State and Federal Constitution you have a right to a speedy trial? If this matter is now moved back to March 23th, you'll be waiving those rights for the period of the continuance. Do you understand that?

[MILLER]: Yes.

MS. TOWER: Well, I just want it to be clear that those rights would be waived over his objection, Your Honor.

THE COURT: Well, your objections are well noted for the record, Ms. Tower. So this matter is continued to the trial week ok March 28, 2005.

Judge Wilson conducted the jury-waived trial on March 28, 29, and 31, 2005. Miller filed a notice of appeal on July 18, 2005. This appeal was assigned to this court on May 25, 2006.

On appeal, Miller relies upon State v. Oughterson, 99 Haw. 244, 54 P.3d 415 (2002) wherein the Hawai'i Supreme Court decided that the trial judge is not authorized to reverse the pretrial judge's order denying the defendant's motion to dismiss on the ground that the infraction was de minimus. Miller's sole point of error is that "THE CRIMINAL ADMINISTRATIVE JUDGE ABUSED [HIS] DISCRETION WHEN, WITHOUT COGENT REASON, [HE] MODIFIED THE PRIOR ORDER OF ANOTHER JUDGE OF EQUAL AND CONCURRENT JURISDICTION TO DEFENDANT'S DETRIMENT."

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We conclude that the following are two cogent reasons:

(1) Miller's January 25, 2005 Demand for Speedy Trial "under Article I, Section 14, of the Hawaii Constitution, and the Sixth Amendment to the United States Constitution and Rule 48 of the Hawaii Rules of Penal Procedure"; and (2) the circuit court's duty to comply with the speedy trial requirements of HRPP Rule 48. See, State v. Kahawai, 9 Haw. App. 205, 831 P.2d 936 (1992).

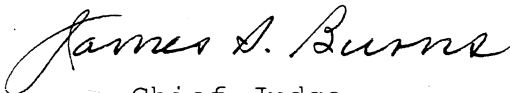
Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35,

IT IS HEREBY ORDERED that the June 29, 2005 Judgment of Conviction and Probation Sentence is affirmed.

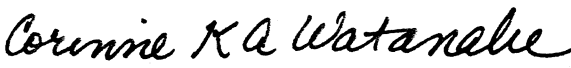

DATED: Honolulu, Hawai'i, August 8, 2006.

On the briefs:

Pamela O'Leary Tower
for Defendant-Appellant.


Chief Judge

Daniel Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge

Associate Judge