

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27478

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 JAN 29 AM 11:02

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STATE OF HAWAII, Plaintiff-Appellee, v.
QUANG T. PHAM, aka THANH QUANG PHAM, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-0299)

MEMORANDUM OPINION

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

Defendant-Appellant Quang T. Pham, also known as Thanh Quang Pham, (Pham) appeals from the Judgment of Conviction and Probation filed on August 26, 2005 in the Circuit Court of the First Circuit (circuit court).^{1/} On appeal, Pham argues that the circuit court erred in (1) denying "Defendant's Motion to Dismiss Charges for Violation of Right to Speedy Trial With Prejudice" (Motion to Dismiss), filed pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 48, and (2) admitting testimony that Pham had used drugs in the past.

I. BACKGROUND

On February 19, 2004, the State of Hawai'i (the State) charged Pham via a Complaint with one count of Promoting a

^{1/} The Honorable Karl K. Sakamoto presided.

Dangerous Drug in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (Supp. 2003).

On January 25, 2005, Pham filed his Motion to Dismiss. Judge Marcia J. Waldorf presided over the hearing on the motion and, on May 2, 2005, issued "Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Dismiss Charges for Violation of Right to Speedy Trial With Prejudice" (Order Denying Motion to Dismiss). A jury found Pham guilty of the charged offense. The circuit court entered the judgment on August 26, 2005, and Pham timely appealed on September 1, 2005.

II. STANDARD OF REVIEW

We review a trial court's denial of a Hawai'i Rules of Penal Procedure (HRPP) Rule 48 motion to dismiss under both the "clearly erroneous" and "right/wrong" tests:

A trial court's findings of fact (FOFs) in deciding an HRPP 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 those facts fall within 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. Samonte, 83 Hawai'i 507, 514, 928 P.2d 1, 8 (1996) (quoting State v. Hutch, 75 Haw. 307, 328-29, 861 P.2d 11, 22 (1993)).

III. DISCUSSION

The circuit court erred in denying Pham's Motion to Dismiss.

In the Order Denying Motion to Dismiss, the circuit court attributed 170 days of delay to the State. Pham argues on appeal that an additional 15 days should have been attributed to the State as well, bringing the State five days beyond the legal limit proscribed by HRPP Rule 48, and thus, his Motion to Dismiss should have been granted. Rule 48(b)(1) requires the court, on motion of the defendant, to dismiss the charges against the defendant if trial on those charges has not commenced within six months from the date of defendant's arrest or the filing of the charge. HRPP Rule 48(b)(1); State v. Ikezawa, 75 Haw. 210, 214, 857 P.2d 593, 595 (1993) ("The language of HRPP 48 is clear and unambiguous. Criminal 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.") However, HRPP Rule 48(c) provides exceptions when periods of time are excluded in computing the elapsed time for trial commencement.

Pham cites the period from October 25, 2004 to November 8, 2004 as the 15-day period that should have been attributed to the State. He affirms his argument by citing to

the State's January 12, 2005 memorandum in opposition to the Motion to Dismiss, in which the State conceded that the 15 days between October 25, 2004 and November 9, 2004 were attributable to it. On October 25, 2004, Pham and the State appeared before Judge Karl K. Sakamoto, and both stated to the court that they were ready for trial. Judge Sakamoto informed both parties of the following:

THE COURT: Okay. This case is ready. This case is placed on a five-day standby for trial week commencing next week -- or this week, October 25, 2004.

So, basically, Mr. Pham, you're on a one-hour on-call status this week.

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THE COURT: And what that means is, if there's an open courtroom this week, you should be contacted by your attorney, and you should be able to get to that open courtroom this week, within one hour.

In the afternoon session on that same day, both parties appeared before a different presiding judge, Judge Michael D. Wilson. Judge Wilson delivered a similar message to the one they had heard that morning:

[THE COURT:] Well, as you're aware, Counsel, we are in trial at this point, and there isn't a courtroom available for you. So you're going to be on-call for the next week subject to call within an hour. So please make sure that master calendar has a telephone number to contact you.

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THE COURT: You're waiting with master calendar along with a number of other cases. And you are welcome to call master calendar maybe Thursday just to see what the status is. Your status is a fairly significant one though I think you are the next in priority given the Rule 48 situation you have. So it is possible that you'll be called this week even though there are another I think three cases that are on call for this week.

Pham and the State did not appear again before the circuit court until 15 days later on November 9, 2004. At the November 9, 2004 trial call, Judge Sakamoto granted the State a continuance due to the unavailability of one of its witness.

The circuit court erred in finding and concluding in the Order Denying Motion to Dismiss that "a total of fifteen (15) days is excluded because the case was referred to Master Calendar and taken off the trial course due to representations of Defense counsel [sic] indicating he intended to file a Rule 48 Motion." Judge Sakamoto and Judge Wilson did not so find and conclude. Judge Sakamoto and Judge Wilson did not continue the case, refer it to the Master Calendar, or take it off the trial course due to representations of Defense Counsel that he intended to file an HRPP Rule 48 motion. The relevant circuit court record before Judge Wilson on this point is as follows:

[Defense Counsel]: . . . So when we went to court this morning, the judge said I could file my motion to dismiss based on the problems with the speedy trial. So I'm asking for a continuance --

THE COURT: Sure.

[Defense Counsel]: -- to file my motion to dismiss.

THE COURT: Well, your motion to dismiss, of course, can be brought at any time based on Rule 48 if the time is running as a result of a continuance. But the need to actually continue this case is still not clear to me in order to continue for your Rule 48 motion. But what's your position, [Mr. Prosecutor].

[Prosecutor]: Uh, State's ready to go. State's ready to go, so.

THE COURT: All right. In other words, [Defense Counsel], you can prepare the motion in the event that -- the unlikely event that you are assigned to go to trial this week, then you can address the issue at that time. But you're not foreclosed from filing your motion because you're on call this week.

[Defense Counsel]: I understand, Your Honor.

THE COURT: In the event that you don't make it to trial this week, then you'll be rescheduled for trial, and you'll have ample time to file your Rule 48 motion.

[Defense Counsel]: Thank you, Your Honor.

THE COURT: So anything further, [Mr. Prosecutor].

[Prosecutor]: So we're just waiting with master calendar for this week?

THE COURT: You're waiting with master calendar along with a number of other cases. And you are welcome to call master calendar maybe Thursday just to see what the status is. Your status is a fairly significant one though I think you are the next in priority given the Rule 48 situation that you have. So it is possible that you'll be called this week even though there are another I think three cases that are on call for this week.

[Prosecutor]: Okay. Thank you.

[Defense Counsel]: Thank you, Your Honor.

THE COURT: Very well. Thank you.

Furthermore, the 15-day period from October 25 to November 8, 2004 was not excludable under HRPP Rule 48(c)(2) (court congestion) because the circuit court did not note any "exceptional circumstances" as required by HRPP Rule 48(c)(2). State v. Caspino, 73 Haw. 256, 257, 831 P.2d 1334, 1335 (1992).

IV. CONCLUSION

Based on the foregoing, the Judgment of Conviction and Probation filed on August 26, 2005 in Circuit Court of the First

Circuit is vacated, and this case is remanded for further proceedings consistent with this opinion.

Because we vacate and remand, Pham's second point of error on appeal is moot.

DATED: Honolulu, Hawai'i, January 29, 2007.

On the briefs:

Samuel P. King, Jr.
for Defendant-Appellant.

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge