

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27902

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v. JASON B. RUMBAWA,
 ROSALINO B. RAMOS, and ANTHONY BROWN,
 Defendants-Appellees, and MICAH KANAHELE and KEVIN
 HARRIS, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
 (Cr. No. 03-1-2501)

MEMORANDUM OPINION

(By: Watanabe and Foley, JJ.;
 with Recktenwald, C.J., Dissenting)

NORMA T. YARA
 CLERK APPELLATE COURTS
 STATE OF HAWAII

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FILED

In this appeal, Plaintiff-Appellant State of Hawaii (the State) contends that the Circuit Court of the First Circuit¹ (the circuit court) abused its discretion when it dismissed with prejudice the indictments against Defendants-Appellees Jason B. Rumbawa (Rumbawa), Rosalino B. Ramos (Ramos), and Anthony Brown (Brown) (collectively, Appellees) for various offenses stemming from the shooting death of Greg Morishima on October 26, 2003. The circuit court's dismissal followed two lengthy jury trials, both of which ended in mistrials due to the inability of the jurors to reach a unanimous verdict as to Appellees.

We review a trial court's decision to dismiss an indictment for abuse of discretion. State v. Wong, 97 Hawai'i 512, 517, 40 P.3d 914, 919 (2002) (citing State v. Chong, 86 Hawai'i 282, 288 n.2, 949 P.2d 122, 128 n.2 (1997)). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Id. (citing

¹ The Honorable Michael A. Town presided.

State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000)). "The burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." Id. (citing State v. Kupihea, 80 Hawai'i 307, 312, 909 P.2d 1122, 1127 (1996)).

In State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982), the Hawai'i Supreme Court held that "the judicial power which seeks to 'administer justice' is properly invoked when a trial court *sua sponte* dismisses an indictment with prejudice following the declaration of one or more mistrials because of genuinely deadlocked juries[.]" Id. at 55, 647 P.2d at 712.

The Moriwake court also recognized that the judicial power to dismiss indictments is not unlimited and set out six factors to ensure that trial courts remained within the bounds of their discretion:

In considering whether such power and responsibility were properly exercised [by the trial court], we in turn will accord deference to the conclusion of the trial court for much the same reason that we will seldom question the propriety of a hung jury mistrial declaration. But we think that the magnitude of the respective interests of society and of criminal defendants which are implicated in this area of the law requires that we more fully delineate the parameters within which this discretion is properly exercised.

Simply put, "it is a matter of balancing the interest of the state against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system." The factors which the trial court should consider in undertaking this balance include the following: (1) the severity of the offense charged; (2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; (3) the character of prior trials in terms of length, complexity and similarity of evidence presented; (4) the likelihood of any substantial difference in a subsequent trial, if allowed; (5) the trial court's own evaluation of relative case strength; and (6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Id. at 56, 647 P.2d at 712-13 (citations and brackets omitted).

See State v. Lincoln, 72 Haw. 480, 490-91, 825 P.2d 64, 70 (1992) (internal quotation marks and brackets omitted) (citing the six

Moriwake factors as the "framework . . . to 'balance the interest of the state against fundamental fairness to a defendant' as well as the 'orderly functioning of the court system'"); see also State v. Alvey, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984) (recognizing that a judge's inherent power to "dismiss an otherwise valid indictment prior to the defendant's first trial. . . is not so broad").

In addition to the six factors, the Moriwake court stressed that after a hung-jury mistrial, the trial court should proceed cautiously:

Without suggesting that trial courts are not free, within the bounds of properly exercised discretion, to differ, we proffer that in most cases, serious consideration be given to dismissing an indictment with prejudice after a second hung jury mistrial.¹⁵

¹⁵ This guideline comports with prior statutory law and apparent prior practice in this jurisdiction. [Revised Laws of Hawaii] § 4030 (1925), first enacted in 1876 (L. 1876, c. 40, § 3), provided in relevant part that "the successive disagreement of two juries impaneled to try the cause shall operate as an acquittal of the accused, and the court shall order his discharge from custody." The requirement was deleted in 1932 for the reason that "no such provision or phrase is found in the laws of any of the States of the Union, but the practice is to dismiss after two mistrials unless evidence is obtained of jury tampering, or additional evidence obtained after the second mistrial warrants a belief on the part of the prosecution that a third trial will result in a conviction." H. Stand. Comm. Rep. No. 21, 16th Haw. Terr. Leg., 2d Special Session, *reprinted in House Journal, Second Special Session* 175 (1932).

Moriwake, 65 Haw. at 57, 647 P.2d at 713 (ellipses omitted). The supreme court concluded that the trial court did not abuse its discretion in dismissing the defendant's indictment because "two full, nearly identical trials on a serious charge were held, following which two separate juries were unable to reach a verdict despite sound judicial efforts to encourage a 'considered judgment[,]'" and "[t]here was no indication that a third trial would proceed in a manner any different than did the previous two." Id.

In this case, the circuit court applied the Moriwake factors diligently and concluded as to Appellees, in relevant part:

[1.] Under State v. Moriwake, 65 Haw. 47, 647 P.2d[] 705 (1982) the Hawai'i Supreme Court held that a trial court may dismiss an indictment with prejudice following the declaration of one or more mistrials. This court must balance the interest of the State against the fundamental fairness to a defendant with the added ingredient of the orderly functioning of the Court.

3. Undoubtedly, the charges in this case are all serious.

4. However, [Appellees] were tried twice in the year 2005, and the State was unable to secure a conviction for Ramos, Rumbawa and Brown. The juries in both trials[] deliberated for eight days in the first trial and eleven days in the second trial.

5. The length of the first trial was seven weeks, and the length of the second trial was ten weeks. While some of the evidence in the second trial was new, the overall evidence was similar.

6. There is little or no likelihood that there will be any substantial difference in a subsequent trial, if allowed. The count in the first trial was 11-1 for guilty. In the second trial, the count was 7-5 for guilty. The jury count became more favorable for the defense in the second trial, and there is little likelihood that there will be a unanimous verdict in a third trial.

7. The Court determines, having sat through both trials, that the State's case is not a strong case.

8. The professional conduct and diligence of all counsel were at the highest level.

9. The Court recognizes that in Moriwake, the Hawai'i Supreme Court noted that serious consideration should be given to dismissing an indictment with prejudice after a second hung jury mistrial.

10. Upon balancing the six (6) factors set out in State v. Moriwake, supra, this court concludes that the indictment must be dismissed with prejudice.

The circuit court's decision did not exceed the bounds of reason or disregard rules of principles of law or practice. Based on our review of the record on appeal and the case law and statutes relevant to the arguments advanced, we conclude that the circuit court did not abuse its discretion² in dismissing the

² We believe that the dissent's "separation of powers concerns" are unwarranted. In State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982), the Hawai'i Supreme Court stated:

indictments against Appellees. Therefore, we affirm the "Order Gran[t]ing [Appellees'] Motions to Dismiss Indictment with Prejudice" entered by the circuit court on March 28, 2006.

DATED: Honolulu, Hawai'i, August 30, 2007.

On the briefs:

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[W]e are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:

Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court.

Id. at 56, 647 P.2d at 712 (quoting State v. Braunsdorf, 297 N.W.2d 808, 817 (Wisc. 1980) (Day, J., dissenting)).