

DISSENTING OPINION BY FOLEY, J.

I respectfully dissent.

The standard of review of a trial court's decision to dismiss an indictment is abuse of discretion. State v. Wong, 97 Hawai'i 512, 517, 40 P.3d 914, 919 (2002). "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. The burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." Id. (citations omitted).

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 (emphasis added).

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 (internal quotation marks, citations, and brackets omitted). See State v. Lincoln, 72 Haw. 480, 490-91, 825 P.2d 64, 70 (1992) (citing the six Moriwake factors as the "framework . . . to 'balanc[e] the interest of the state against fundamental fairness to a defendant' as well as the 'orderly functioning of the court system'").

In this case, the circuit court applied the Moriwake factors and concluded:

1. The trial court has the inherent discretionary ability to dismiss an indictment with prejudice after balancing the interest of the state against fundamental fairness to a defendant as well as the orderly functioning of the court system.

2. In balancing these interest[s] the court shall consider the following factors: (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.

3. As to the severity of the offense charged, character of the trial, likelihood of any substantial difference in a subsequent trial, and the professional conduct and diligence of counsel, the court finds that these factors weigh against retrial.

4. Consequently, the court finds that in balancing all of the afore-mentioned factors, the interest[s] of the state do not outweigh the fundamental fairness to a defendant as well as the orderly functioning of the court system.

The circuit court did not exceed the bounds of reason or disregard rules or principles of law or practice, and,

therefore, the circuit court did not abuse its discretion¹ in dismissing the indictment against Hinton.

Daniel R. Foley

¹ I believe that the majority's "separation of powers concerns" are unwarranted. In Moriwake, the Hawai'i Supreme Court stated:

[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, 98 Wis. 2d 569, 589, 297 N.W.2d 808, 817 (1980) (Day, J., dissenting)).