

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28635

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
GARDNER SMITH, aka GARDINER SMITH, III, Defendant-Appellant

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(Cr. No. 06-1-0588)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe, and Fujise, JJ.)

Defendant-Appellant Gardner Smith, aka Gardiner Smith, III, (Appellant) appeals from the Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit<sup>1</sup> (circuit court) on June 20, 2007, convicting and sentencing him for one count of Terroristic Threatening in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 707-717 (1993), and one count of Abuse of Family and Household Member, in violation of HRS § 709-906 (Supp. 2005).

Appellant raises four points of error on appeal:

(1) He was provided constitutionally deficient assistance of trial counsel because his counsel (a) refused to file a motion for dismissal based on pretrial delay, calling the motion "frivolous"; (b) failed to file a motion to suppress evidence of a knife seized from his apartment; and (c) elicited prejudicial testimony that he "uses drugs, has been in jail and needed to be restrained by court order" "for no apparent strategic reason and in derogation of an agreement between the parties, only to ask later that the court strike the evidence";

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<sup>1</sup> The Honorable Dexter D. Del Rosario presided.

(2) The circuit court erred by denying his oral motion to dismiss for violation of his speedy-trial right under Hawai'i Rules of Penal Procedure (HRPP) Rule 48 and the U.S. Constitution;

(3) The circuit court erred by denying his motion to dismiss due to the unavailability of the transcript of his preliminary hearing, in violation of his rights under the Due Process and Confrontation Clauses of the U.S. Constitution; and

(4) The circuit court erred by imposing an illegal consecutive sentence that "violates the right to trial by jury and is cruel and unusual."

Upon a thorough review of the record and the briefs submitted by the parties, and having duly considered the issues and arguments raised on appeal, as well as the statutory and case law relevant thereto, we resolve Appellant's claims as follows:

(1) The Hawai'i Supreme Court has held that

where the record on appeal is insufficient to demonstrate ineffective assistance of counsel, but where: (1) the defendant alleges facts that if proven would entitle him or her to relief, and (2) the claim is not patently frivolous and without trace of support in the record, the appellate court may affirm defendant's conviction without prejudice to a subsequent [HRPP] Rule 40 petition on the ineffective assistance of counsel claim.

State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993) (footnote omitted); see also Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 976-77 (1993). In this case, the record on appeal is not adequate to assess Appellant's claim of ineffective assistance of counsel. Thus, we do not rule on Appellant's ineffective-assistance-of-trial-counsel claim.

(2) The record indicates that at a hearing prior to trial, Appellant attempted to submit to the circuit court a self-generated motion for relief under HRPP Rule 48. The circuit court refused to entertain the motion, ruling that all motions had to be submitted through Appellant's counsel, but Appellant's

counsel, explaining that he believed the motion to be "frivolous" and without a basis, refused to file Appellant's motion. Under these circumstances, the circuit court did not err in not ruling on an unfiled motion. See State v. Hirano, 8 Haw. App. 330, 333-36, 802 P.2d 482, 484-85 (1990) (a criminal defendant does not have a constitutional right to "hybrid representation").

(3) Appellant's constitutional claims regarding the unavailable preliminary hearing transcript are without merit. Appellant claims that his rights to due process of law and confrontation were violated because there could be "no fair trial" without the ability to cross-examine the complaining witness with the transcript.

As Appellant himself pointed out, however, there are several ways that this problem could have been remedied. For instance, Appellant could have taken a deposition of those at the preliminary hearing or secured an "agreed statement" of the recollection of those at the preliminary hearing. State v. Ferguson, 64 Ohio App. 2d 165, 166 n.3, 411 N.E.2d 831, 832 n.3 (Ohio App. 1979). Appellant could also have called his former attorney, Mr. Arthur Indiola, who was discharged specifically so that he could be called as a witness at trial concerning what was said at the preliminary hearing. Appellant took advantage of none of these curative procedures. It is also notable that Appellant has failed to point out or even suggest what inconsistencies in the complaining witness's testimony he was unable to highlight at trial due to the lack of the transcript. As such, Appellant cannot rightfully complain that his rights to due process or confrontation were violated in this regard. Nor has he provided any support for his suggestion that there may have been inadequate support for the district court's determination of probable cause.

(4) Finally, Appellant is mistaken that the circuit court erred by sentencing him to two consecutive one-year terms of imprisonment. Appellant argues that his sentence exceeded the "statutory maximum" sentence because sentences are presumed to run concurrently pursuant to HRS § 706-668.5 (2006). However, in State v. Kahapea, 111 Hawai'i 267, 141 P.3d 440 (2006), which is directly on point, the Hawai'i Supreme Court held that "[p]ursuant to HRS §§ 706-660 and 706-668.5, five ten-year terms running consecutively is the statutory maximum; hence, Kahapea's sentence did not deprive him of his right to a jury trial as interpreted by the United States Supreme Court in Apprendi and Blakely." Id. at 280, 141 P.3d at 453 (emphasis in original). Because Kahapea is controlling authority, Appellant's argument is without merit.

Accordingly, we affirm the circuit court's June 20, 2007 Judgment of Conviction and Sentence, without prejudice to Appellant raising his ineffective-assistance-of-counsel and speedy-trial claims in an HRPP Rule 40 proceeding.

DATED: Honolulu, Hawai'i, July 11, 2008.

On the briefs:

Stuart N. Fujioka  
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for defendant-appellant.

Stephen K. Tsushima,  
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City and County of Honolulu,  
for plaintiff-appellee.

