

NO. 29205

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.
JAMES COTTEN, Defendant-Appellee

EM RIMANDO
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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 04-1-2398)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting Chief Judge, Foley and Leonard, JJ.)

Plaintiff-Appellant State of Hawaii (**State**) appeals the Findings of Fact, Conclusions of Law and Order Dismissing Indictment, filed on May 20, 2008 in the Circuit Court of the First Circuit (**Circuit Court**).^{1/}

On appeal, the State contends the Circuit Court erred by granting Defendant-Appellee James Cotten's (**Cotten**) oral motion to dismiss the felony indictment against Cotten and denying the State's motion for reconsideration. The State argues that the Circuit Court erred when it dismissed the indictment against Cotten without appointing a panel of three qualified examiners to report to the court on whether Cotten presents a substantial likelihood of becoming fit to proceed to trial in the future, pursuant to Hawaii Revised Statutes (**HRS**) § 704-406(4).

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced, the issues raised by the parties, and applicable statutes, rules and other authorities, we resolve the State's point of error as follows:

At the February 29, 2008 hearing, based on records and files in this case, including the reports of three qualified experts, the Circuit Court did not abuse its discretion when it

^{1/} The Honorable Virginia Lea Crandall presided.

determined that Cotten was unfit to proceed to trial at that time and currently presented no danger to himself or the community if released. However, the Circuit Court erred when it found Cotten unlikely to regain fitness and dismissed the charges against Cotten without appointing a panel of three qualified examiners to report to the court on whether Cotten presents a substantial likelihood of becoming fit to proceed to trial in the future, as required by HRS § 704-406(4).^{2/} The original panel appointed by the court was not asked to report on

whether Cotten presents a substantial likelihood of becoming fit to proceed in the future. Under HRS § 704-406(4), a trial court

^{2/} HRS § 704-406 (Supp. 2007) provides in relevant part (emphasis added):

§ 704-406 Effect of finding of unfitness to proceed.

(1) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, except as provided in section 704-407, and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. If the court is satisfied that the defendant may be released on condition without danger to the defendant or to the person or property of others, the court shall order the defendant's release, which shall continue at the discretion of the court on conditions the court determines necessary. A copy of the report filed pursuant to section 704-404 shall be attached to the order of commitment or order of release on conditions. . . .

(4) Within a reasonable time following any release under subsection (1), the court shall appoint a panel of three qualified examiners in felony cases or one qualified examiner in nonfelony cases to report to the court on whether the defendant presents a substantial likelihood of becoming fit to proceed in the future. If, following the report, the court determines that the defendant probably will remain unfit to proceed, the court **may dismiss** the charge and:

- (a) Release the defendant; or
- (b) Subject to the law governing involuntary civil commitment, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment.

may dismiss felony charges only after considering the reports required under this provision. See, e.g., State v. Shannon, 118 Hawai'i 15, 25, 185 P.3d 200, 210 (2008) ("[I]t is a well-established tenet of our statutory interpretation that the use of the word 'shall' generally indicates the legislature's intention to make a provision mandatory, as opposed to discretionary.") (citation omitted); see also Matter of Fasi, 63 Haw. 624, 626, 634 P.2d 98, 101 (1981) ("Where both mandatory and directory verbs are used in the same statute, especially where 'shall' and 'may' are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings.")

Accordingly, the Circuit Court's May 20, 2008 Findings of Fact, Conclusions of Law and Order Dismissing Indictment are vacated in part, as to the dismissal of the indictment, and the case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, June 15, 2009.

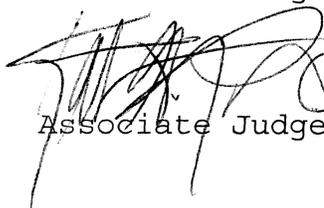
On the briefs:

Loren J. Thomas
Delanie D. Prescott-Tate
for Plaintiff-Appellant

Keith S. Shigetomi
for Defendant-Appellee


Acting Chief Judge


Associate Judge


Associate Judge