

NOT FOR PUBLICATION

NO. 24675

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
THADD R. CAMARA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(Cr. No. 99-0405(1))

MEMORANDUM OPINION

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

Defendant-Appellant Thadd R. Camara (Camara) appeals from the October 31, 2001 Judgment (the judgment) entered by the Circuit Court of the Second Circuit (the circuit court),¹ convicting and sentencing him upon a jury verdict for Welfare Fraud, in violation of Hawaii Revised Statutes (HRS) § 346-34,²

^{1/} Judge Artemio C. Baxa (Judge Baxa) presided over all proceedings in the Circuit Court of the Second Circuit (the circuit court) that are relevant to this appeal.

^{2/} From June 16, 1995 to June 17, 1997, Hawaii Revised Statutes (HRS) § 346-34 (Supp. 1996) stated, in relevant part:

Frauds, penalties. . . .

(b) If, at any time while the recipient of public assistance is receiving public assistance, the recipient's living requirements are reduced and the recipient wilfully fails to report the reduction within thirty days from the date of the reduction to the department, or the recipient acquires from any source real property, funds, income, or other resources and wilfully fails to report the amount acquired together with the source of the resources to the department within thirty days of receipt of the resources, or prior to spending or otherwise disposing of all or any portion of the resources, the recipient shall be guilty of fraud and shall be subject to the penalties provided by this section.

. . . .

(continued...)

and Theft in the First Degree, in violation of HRS § 708-830.5 (1993).³

^{2/}(...continued)

(h) Any person convicted under this section shall be guilty of a misdemeanor[.]

As amended by Act 198, 1997 Haw. Sess. L. 376, which became effective on June 16, 1997, HRS § 346-34 (Supp. 2002) now reads, in relevant part, as follows:

Frauds, penalties. . . .

(b) If, at any time while the recipient of public assistance is receiving public assistance, the recipient's living requirements are reduced and the recipient wilfully fails to report the reduction within thirty days from the date of the reduction to the department, or the recipient acquires from any source real property, funds, income, or other resources and wilfully fails to report the amount acquired together with the source of the resources to the department within thirty days of receipt of the resources, or prior to spending or otherwise disposing of all or any portion of the resources, the recipient shall be guilty of a petty misdemeanor.

(Emphasis added.) It is unclear from the record whether Defendant-Appellant Thadd R. Camara (Camara) was charged with Welfare Fraud, in violation of HRS § 346-34(b) (Supp. 1996) or HRS § 346-34(b) (Supp. 2002). Additionally, the judgment convicting Camara of, and sentencing him for, Welfare Fraud does not indicate whether Camara was convicted of a petty misdemeanor or misdemeanor, and the judgment appears to have imposed one sentence (incarceration for ten years and payment of \$56,749 in restitution) for both counts. Since the earlier version of the statutory offense constituted a misdemeanor, the current version constitutes a petty misdemeanor, and the offense charged related to actions or inactions by Camara that spanned a period from August 1996 to November 1998, this issue should be clarified on remand, in the event that the indictment is dismissed without prejudice.

^{3/} HRS § 708-830.5 (1993) states, in relevant part:

Theft in the first degree. (1) A person commits the offense of theft in the first degree if the person commits theft:

(a) Of property or services, the value of which exceeds \$20,000[.]

HRS § 708-830 (1993 & Supp. 2002) defines "theft[,]" in relevant part, as follows:

Theft. A person commits theft if the person does any of the following:

. . . .

(2) Property obtained or control exerted through
(continued...)

Although Camara raises a number of arguments on appeal, one is dispositive of this appeal. We agree with Camara that the circuit court erred in denying his motions to dismiss the charges against him for violation of his Hawai'i Rules of Penal Procedure (HRPP) Rule 48 right to a speedy trial. Accordingly, we vacate the judgment and remand for entry of an order dismissing the indictment against Camara, with or without prejudice, in the discretion of the circuit court.

BACKGROUND

Camara and his ex-wife, co-defendant Scarlett Ritte-Camara (Scarlett), (collectively, Defendants) met in 1970, married in 1986, had nine children together, and lived on the island of Moloka'i. It is uncontested that: (1) from August 1, 1996 through April 30, 1998, Defendants received and redeemed financial assistance benefits from the Department of Human Services, State of Hawai'i (DHS) totaling \$25,837; (2) from August 1, 1996 through April 30, 1998, Defendants received and redeemed food stamps from DHS totaling \$19,533 in value; (3) from May 1, 1998 through November 30, 1998, Defendants received and redeemed financial assistance benefits from DHS in the form of Electronic Benefit Transfers (EBTs) totaling \$7,514; and (4) from May 1, 1998 through November 30, 1998, Defendants received and redeemed food stamps from DHS in the form of EBTs totaling

^{2/}(...continued)

deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property.

NOT FOR PUBLICATION

\$7,194. (Stipulation between Plaintiff-Appellee State of Hawai'i (the State) and Camara filed on August 14, 2001.) The amount of financial assistance and food stamp benefits that Defendants received during the period in question totaled \$60,078.

PROCEDURAL HISTORY

On August 16, 1999, Defendants were indicted by a grand jury and charged as follows:

COUNT ONE:

That during or about the period of August 1, 1996, through November 30, 1998, inclusive, in the County of Maui, State of Hawaii, [Defendants], as principals and/or accomplices, while receiving public assistance, did acquire real property, funds, income, or other resources and did wilfully fail to report the amount of same together with the source to [DHS] within thirty days of receipt of same, or prior to spending or otherwise disposing of all or any portion of the same, thereby committing the offense of Welfare Fraud in violation of Section 346-34 of the Hawaii Revised Statutes.

COUNT TWO:

That during or about the period of August 1, 1996, through November 30, 1998, inclusive, in the County of Maui, State of Hawaii, [Defendants], as principals and/or accomplices, did, with intent to deprive, obtain or exert control over the property of the State of Hawaii, to wit, public assistance benefits, the value of which exceeded Twenty Thousand Dollars (\$20,000.00), by deception, thereby committing the offense of Theft in the First Degree in violation of Section 708-830.5(1)(a) of the Hawaii Revised Statutes.

The evidence presented to the grand jury on August 13, 1999 indicated that from August 1996 to December 1998, Defendants, while receiving public assistance, failed to report \$73,623 in gross income from Molokai Style Services (MSS), a tire repair, auto repair, and rent-a-car business they allegedly operated in the name of Camara's mother. In 1995, Camara's

mother had been diagnosed with Alzheimer's disease and moved to Hilo to live with her daughter.

On August 23, 1999, Camara was arrested on a bench warrant that set his bail at \$6,000. Pursuant to a Temporary Mittimus signed by a circuit court clerk and filed on August 23, 1999, Camara was committed to the Maui Community Correctional Center and ordered to appear before the circuit court for arraignment and plea on August 25, 1999. On August 23, 1999, Camara was released from jail after posting a \$6,000 bail bond.

At the scheduled arraignment and plea hearing on August 25, 1999, a deputy public defender entered a special appearance on Camara's behalf. However, Camara⁴ failed to appear, and the circuit court issued a bench warrant, directing that Camara be arrested and brought before the court

as soon as possible after his arrest as is reasonable, then and there to show cause why he should not be adjudged guilty of contempt of this [c]ourt for having:

failed to obey an order of the [c]ourt by failing to appear on AUGUST 25, 1999 at 8:15 a.m. for Arraignment and Plea.

(Emphasis in original.) Bail for the contempt of court offense was set by the circuit court at \$5,000.

On September 1, 1999, Camara appeared before the circuit court for arraignment and plea. A deputy public defender appeared specially on behalf of Camara and informed the court

^{4/} Throughout the proceedings below, whenever Camara missed a trial date, his ex-wife, co-defendant Scarlett Ritte-Camara, did as well.

that since the Public Defender's Office was defending Scarlett, it was conflicted from representing Camara. The deputy public defender also notified the circuit court that Camara wished to enter a plea of not guilty and set the matter for a jury trial. The deputy public defender then requested that a private attorney, Anthony Ranken (Ranken), be substituted as Camara's counsel.

The circuit court granted the deputy public defender's motion, told Camara to remember the dates that had been set for his trial and pretrial conference, and informed Camara to be present on September 8, 1999 for an appearance with his new counsel. The circuit court thereafter entered a written order that formally appointed Ranken as Camara's attorney and specified numerous dates relevant to Camara's case, including the following:

Trial Date, or each week thereafter unless notified by [c]ourt	<u>December 13, 1999</u>
Pretrial conference, 1:30 p.m., [Camara] must be present if not in custody	<u>December 2, 1999</u>

After learning from the deputy prosecutor that Camara's failure to appear at the August 25, 1999 arraignment and plea hearing was the result of "some kind of miscommunication with the Molokai police station[,]" the circuit court recalled its prior bench warrant for Camara's arrest.

Camara did not appear at the September 8, 1999 hearing. At the outset of the hearing, Ranken explained why Camara had not shown up:

NOT FOR PUBLICATION

[Camara] is not here this morning and let me explain a little.

First of all, he called me yesterday and said that he could not come because he didn't have the money. He is working, but he had not been paid that time and just didn't have any funds. He was trying to borrow funds, but had not be [sic] successful. He said he would still try last night to borrow funds to come over here, but apparently he's not succeeded, so he's not here.

I would ask the [c]ourt to waive his presence. This is non-evidentiary and there's no new dates being set. He's aware that I represent him. He's content with that. In fact, I represented him in a prior case and he made the request I be appointed.

So I don't see any problem with just going ahead with the schedule that we have and it's very expensive, as the [c]ourt knows, for someone to fly over. He's working for relatively low wages, and unless the [c]ourt is willing to authorize state funds to pay his ticket, I don't see how we can force him.

The alternative is a continuance of a week and I would request if the [c]ourt wants him to show up, I would request [s]tate funds to be paid for his ticket.

The following colloquy then ensued:

THE COURT: When is the next hearing?

THE CLERK: His trial.

[RANKEN]: The pretrial.

THE COURT: His pretrial. When is that?

[RANKEN]: I don't know.

THE CLERK: You have to look at the file.

THE COURT: Oh, I see.

[DEPUTY PROSECUTOR]: Your Honor, the State would ask that a bench warrant be issued.

[RANKEN]: I don't know why, your Honor.

[DEPUTY PROSECUTOR]: Because he's not here. He's supposed to be here for appearance of new counsel. He was ordered to be here by the [c]ourt.

THE COURT: He was told.

[RANKEN]: I understand he was here a week ago or so, your Honor, at the last hearing, so I'm told. It's just impossible for him to keep coming every week. He is working and he doesn't have the funds.

NOT FOR PUBLICATION

THE COURT: This is what I will do, [deputy prosecutor]. I am going to issue a bench warrant, but it's stayed until the date of the first pretrial. Based on the professional representation of [Ranken], that [Camara] called him up and that he could not defray -- could not get the costs to come to Maui, but he was still supposed to appear here.

Nevertheless, he is required to appear at his first pretrial conference, [Ranken], and I place it upon you to let him know that he be present at that date, although I know that I always tell the defendants to be present at the date of the first pretrial conference.

. . . .

[DEPUTY PROSECUTOR]: His next appearance is not until December 2nd, so he doesn't have to make an appearance until then, and the trial's set for nine days later.

On December 2, 1999, Camara did not appear at the scheduled pretrial conference.⁵ The deputy prosecutor and Ranken agreed to continue the trial to February 7, 2000 and the pretrial conference to January 20, 2000, and the parties filed a written stipulation documenting this agreement on December 10, 1999. Additionally, on December 9, 1999, Camara filed a Limited Waiver of Speedy Trial & Acknowledgment of Notice of Trial Date, agreeing to waive his right to a speedy trial under the federal and state constitutions and under HRPP Rule 48 "for the time period from December 13, 1999 to and including February 7, 2000."

Subsequently, the parties stipulated to continue the trial from February 7, 2000 to April 24, 2000 (with the pretrial conference to be held on April 6, 2000), from April 24, 2000 to July 17, 2000,⁶ and from July 17, 2000 to September 5, 2000 (with

^{5/} This hearing was not recorded, and the record does not indicate why Camara was absent.

^{6/} The record does not contain any written stipulation to continue the trial from April 24, 2000 to July 17, 2000.

NOT FOR PUBLICATION

the pretrial conference to be held on August 17, 2000, at 1:30 p.m.).

On September 5, 2000, Defendants were not present in court. Ranken explained that they

couldn't get on the early flight from Molokai this morning. It was all booked up.

They are standing by and have offered to get on the 9:15 flight if the [c]ourt wants to demand that they be here today and postpone this, you know, an hour and a half or so.

However, I have another alternative that I think makes more sense which is we have pretrials in just two days from now.

With the [c]ourt's permission, I'd like to when -- I understand we're going to roll this case. We're going to get a new trial date.

I'd like the [c]ourt to allow [Camara], and [Scarlett], as well to sign a written acknowledgment of the new trial date and also to appear at the pretrial Thursday, if the [c]ourt wishes to show face basically, show that we're not trying to avoid a court date or anything.

But it is difficult for them getting from Molokai. My first preference actually, your Honor, would be just to allow them to sign a written acknowledgment of the trial date.

I can tell the [c]ourt I am in you [sic] touch with [Camara] almost daily now, and he is taking this very seriously. And also as in the past, I would ask that he not have to actually come to Maui for pretrials.

But in the alternative, I would ask that he be allowed to appear on Thursday at 1:30 at the time of the pretrials if the [c]ourt wants him to be here in person.

It was thereafter agreed that the trial would be continued until September 18, 2000 and the pretrial conference would be set for September 7, 2000. An "Acknowledgment of Notice of [September 18, 2000] Trial Date[," signed by Camara and Scarlett was filed on September 8, 2000, pursuant to which Camara acknowledged that the

trial in the above-entitled matter will commence at 8:30 a.m. on September 18, 2000. If trial is not held on

NOT FOR PUBLICATION

that date we understand that it will be reset for the following Monday and will thereafter be set for successive Mondays until the case is taken to trial. We are further informed and understand that the pretrial conference will be held on September 7, 2000, at 1:30 p.m., and that we must be available by telephone.

On September 18, 2000, Camara's trial was preempted by another case and continued to October 2, 2000 (with the pretrial conference set for September 27, 2000). On October 2, 2000, Camara's trial was "rolled" to October 9, 2000 (with the pretrial conference set for October 5, 2000) because Judge Baxa was "still in trial" on another case. On October 9, 2000, Camara's trial was "rolled" to October 16, 2000 because Judge Baxa was "not yet through with the trial" in another case. On October 16, 2000, Camara's trial was "rolled" to October 23, 2000 (with the pretrial conference set for October 16, 2000) because the circuit court was still conducting the trial in another case. On October 23, 2000, pursuant to a filed written acknowledgment by Camara and Scarlett that they had been "informed and understand that trial in the above-entitled matter will commence at 8:30 a.m. on October 30, 2000[,] " the trial was rescheduled to October 30, 2000.

On October 30, 2000, Camara's trial was rescheduled to November 13, 2000 (with the pretrial conference set for November 1, 2000) because Judge Baxa was scheduled to undergo surgery. Informed of the continuance, Ranken informed the circuit court: "I'd like to put on the record that we would have no objection to one of the district court judges filling in and trying this case as has been happening in courtroom two if the

[c]ourt is unable to." Noting that Defendants were not present, Judge Baxa issued a bench warrant for Camara's and Scarlett's arrest, with bail set at \$5,000 for each, "pending the receipt of [an] acknowledgment [of notice] for the next trial date."

On November 13, 2000, Camara's trial was rolled to November 20, 2000 because Judge Baxa was trying another case. On November 20, 2000, Camara's trial was preempted by another trial and rescheduled for November 27, 2000 (with the pretrial conference set for November 22, 2000). On November 27, 2000, Camara's trial was preempted by another trial and rolled to Monday, December 4, 2000 (with a pretrial conference date of November 30, 2000).

On November 30, 2000, Camara filed his first Motion to Dismiss Charges for Violation of Defendant's Right to Speedy Trial (First Motion to Dismiss), claiming, in part, that his HRPP Rule 48(b)(1) right to be tried within six months from "the date of arrest if bail is set or from the filing of the charge, whichever is sooner," had been violated. Camara claimed that 472 days had elapsed from the date of his indictment (August 16, 1999) to the date he filed his First Motion to Dismiss (November 30, 2000). Camara acknowledged that 183⁷ of the 472 elapsed days were excludable in calculating his HRPP

⁷ Camara calculated that the following periods were excludable in determining his right to be tried within six months under Hawai'i Rules of Penal Procedure (HRPP) Rule 48: (1) the period from December 13, 1999 to April 24, 2000 (133 days); and (2) the period from July 17, 2000 to September 5, 2000 (50 days).

Rule 48(b)(1) speedy trial right but stated that even with those exclusions, 289 days had elapsed from the date of his indictment, 109 days in excess of the 180-day period required by HRPP Rule 48.

At a January 31, 2001 hearing, the circuit court orally denied Camara's First Motion to Dismiss. In announcing its decision, the circuit court explained:

The Rule 48 period started on that date on August 25, 1999.^{8/} After two days had elapsed, [Camara] was not present for his arraignment and plea.

A bench warrant for [Camara] was issued on that date. Seven days should be excluded from August 25th, 1999 to September 1, 1999.

On September 1, 1999, [Camara] was present in court. And the bench warrant was lifted. The [c]ourt ordered [Camara] to be present in court on September 8, 1999.

Defendants argue that the period from September 8, 1999 to December 2nd, 1999 should not be excluded from the 180 day limit because [D]efendants were available to the [c]ourt and did not cause any delay.

This argument fails because on September 8, 1999, [Camara] failed to show up for his court appearance -- new appearance for counsel, new appearance of counsel. A bench warrant was issued on that date, but it was stayed until December 2nd, 1999.

On December 2nd, 1999, both [D]efendants were not present at their first pretrial conference. The period from September 8, 1999 to December 2nd, 1999 [(85 days)] should be excluded because [D]efendants were unavailable during this period.

[Camara] failed to appear in court on September 8, 1999 and failed again to appear in court on December 2nd, 1999.

Although the [c]ourt did not act upon the bench warrant, the [c]ourt's action was in the best interest of

^{8/} Pursuant to HRPP Rule 48(b)(1), the commencement of Camara's HRPP Rule 48 speedy trial right should have been measured from August 16, 1999, the date the indictment against him was filed, since that date was earlier than the date of his arrest on August 23, 2001. The circuit court corrected this error when it entered its written order denying Camara's First Motion to Dismiss.

NOT FOR PUBLICATION

[Camara]. And, nonetheless, [Camara] was unavailable for the [c]ourt to proceed to trial.

The period from December 2nd, 1999 to December 13th, 1999 [(11 days)] should, therefore, be excluded because [Camara] failed to appear in court, and the parties stipulated to a trial continuance.

Two: April 24, 2000 to July 17, 2000 [(84 days)]. This period should be excluded because the record -- and the [c]ourt clerk's minutes -- indicate that the cases were continued by stipulation to July 17, 2000. No written stipulation was ever filed; [n]evertheless, there was a stipulation.

Three: September 5, 2000 to November 30. [sic] 2000. The period between September 5, 2000 to September 7, 2000 is excludable because [D]efendants were not present. And the defense counsel requested a continuance to September 18, 2000.⁹

In addition [Ranken] stated that [D]efendants missed their flight from Molokai to Maui. The period from September 18, 2000, to November 30 [sic] 2000 should be counted towards the 180 day limitation.¹⁰

Although [D]efendants were not present at their scheduled court appearances, the [c]ourt was unable to proceed with trial for various unrelated reasons.

In the computation of the [c]ourt, only 82¹¹ days had been expended [sic] from the 180 day limit. As such, the [c]ourt is going to deny the motion.

(Bracketed calculations and footnotes added.)

On February 13, 2001, the circuit court entered written "Findings of Fact [(FsOF)], Conclusions of Law [(CsOL)], and

⁹ The period from September 5 to September 18, 2000, which the circuit court excluded in calculating Camara's HRPP Rule 48 right to a speedy trial encompasses 13 days.

¹⁰ The period from September 18, 2000 to November 30, 2000 encompasses 73 days. Although the circuit court's oral ruling indicates that these days were to be counted toward the 180-day limitation, it appears that the circuit court excluded these 73 days in calculating Camara's HRPP Rule 48 right to a speedy trial.

¹¹ It is unclear how the circuit court came up with this figure of 82. The circuit court determined that Camara's HRPP Rule 48 speedy trial period commenced on August 25, 1999 (the date of Camara's arraignment) and ended on January 31, 2001, a period of 525 days. Subtracting the periods which the circuit court excluded in determining Camara's HRPP Rule 48 speedy trial right (7 + 85 + 11 + 84 + 13 + 73 = 273 days), 259 days (525 - 273 = 252) would have elapsed for HRPP Rule 48 purposes.

Order Denying Defendants' Motion to Dismiss Charges for Violation of HRPP Rule 48 and Defendants' Right to a Speedy Trial" (the February 13, 2001 Order). The February 13, 2001 Order determined that 107 days (instead of the 82 days that the circuit court had previously determined) had elapsed for Rule 48 purposes, based on the following pertinent FsOF and CsOL:

FsOF

1. That [Defendants] were indicted on August 16, 1999.
2. That the parties agree that the periods from December 13, 1999, to April 24, 2000 [(56 days)], and from July 17, 2000, to September 5, 2000 [(50 days)], are excluded periods for the purpose of Rule 48, along with the period from November 30, 2000, when this motion was filed, to the ruling on the motion on January 31, 2001 [(62 days)].
3. That [Defendants] are charged in the same indictment for the same criminal acts that occurred while they were husband and wife; the Public Defender's Office withdrew from the representation of [Camara] due to the fact that it represented [Scarlett], the co-defendant; and that [Defendants] will be tried together in the same trial.
4. That [Camara] was arrested on August 23, 1999, and failed to show up for his Arraignment and Plea on August 25, 1999, and a Bench Warrant was issued. [Camara] appeared on September 1, 1999, and the warrant was recalled.
5. That on September 1, 1999, [Camara] was ordered to return to court on September 8, 1999, and appear with his new counsel. On September 8, 1999, [Camara] failed to appear at court and a bench warrant was issued. The bench warrant was stayed until December 2, 1999.
6. That neither [Camara] nor [Scarlett] appeared in court for their pre-trial conference on December 2, 1999. Neither party was excused by the court. Bench Warrants were issued for both Defendant's [sic] but stayed until December 17, 1999.
7. That neither [Scarlett] nor [Camara] appeared at [c]ourt on the original trial date of December 13, 1999, or December 17, 1999, however, because they agreed to continue the trial to February 2, 2000, no warrant was issued.
8. That [Scarlett] stipulation [sic] to continue this joint trial from April 24, 2000, to July 17, 2000.
9. That neither [Camara nor Scarlett] was present for trial on September 5, 2000. Bench Warrants were issued but stayed until September 7, 2000. Both Defense counsel

NOT FOR PUBLICATION

requested that the trial be continued for two weeks. The trial was reset for September 18, 2000.

10. That the co-defendants did not object to any of the delays caused by the co-defendant nor was a severance requested.

CsOL

.

4. That due to the nature of this case, there is good cause to not severe [sic] the trials.

5. That where the exclusion of time as to one defendant is permitted under other paragraphs of Rule 48(c), the same exclusion applies to co-defendants. State v. Faalafua, 67 Haw. 335, 339 (1984).

6. That the period from August 25, 1999 to September 1, 1999 [(7 days)] is excluded under HRPP Rule 48(c)(5).

7. That the period from September 8, 1999, to December 13, 1999 [(90 days)] is excluded pursuant to HRPP [Rule] 48(c)(5).

8. That the period from December 2, 1999, to December 17, 1999 [(15 days)] is excluded pursuant to HRPP [Rule] 48(c)(5).^[12]

9. That the period from April 24, 2000, to July 17, 2000 [(84 days)], is excluded pursuant to HRPP [Rule] 48(c)(5).

10. That the [c]ourt finds, and all parties agree, that the periods from December 13, 1999, to April 24, 2000 [(133 days)], and from July 17, 2000, to September 5, 2000 [(50 days)], are excluded periods for the purpose of Rule 48, along with the period from November 30, 2000, when this motion was filed, to the ruling on the motion on January 31, 2001 [(62 days)].

.

12. That a total of one hundred and seven (107) days have elapsed for the purposes of Rule 48.

(Bracketed calculations and footnote added.)

On January 31, 2001, when the circuit court heard Camara's First Motion to Dismiss, the trial had been set for February 5, 2001.

^{12/} The period excluded by Conclusion of Law (COL) No. 8 overlaps the period excluded by COL No. 7. However, it does not appear that the circuit court double counted said period.

NOT FOR PUBLICATION

On February 5, 2001, Camara was not present in court. Judge Baxa announced that he was still in the midst of another criminal trial and the other two courtrooms also had ongoing trials. Having already anticipated that the trial would not proceed that day, Ranken submitted a written statement signed by Camara, acknowledging that the trial would be continued to February 12, 2001. Ranken also requested that Camara's presence be excused, but the deputy prosecutor objected, complained that Camara was getting special treatment, and requested that a bench warrant be issued for Camara's arrest. The following colloquy then occurred:

THE COURT: The question that I have is, [Ranken] . . . you have been arguing to the [c]ourt and demanding that should not be counted in terms of the Rule 48. If you're going -- if you are willing to waive the Rule 48, I'm going to grant you that. Otherwise, I will not do it.

[RANKEN]: Your Honor, the continuances had nothing to do with the question of whether or not [Defendants] are present for their call to rolls. They'll come any time the [c]ourt says.

If they can possibly scrape together the money or we'll submit a request for [c]ourt approval. They have one ticket on Paragon Air they haven't yet used.

Other than that, it's just -- it's a financial matter. They are qualified -- obviously I am court appointed counsel.

So I don't know how the [c]ourt expects them to fly over week after week if they have to pay their own way.

But it really has nothing do [sic] with the speedy trial, and I would ask the [c]ourt not -- you know not tell them to have to waive a constitutional right because they can't afford to come here.

[DEPUTY PROSECUTOR]: Your Honor, I'm reading the clerk's minutes from January 12th, which is the last time [Defendants] appeared in court. The State would also note that the last time prior to 1999 that [Defendants] showed up at court -- and court minutes says [Defendants'] presence waived on January 31st, 2001, which was the [c]ourt ruling on Rule 48.

NOT FOR PUBLICATION

"Defendants required to be present on 2-5-01, 8:30 a.m. for trial." There's no mention of an acknowledgment of waiver being accepted for [Defendants]. No mention that they were going to get special treatment.

THE COURT: The question that [Ranken] raises is about the inability of [Defendants] to come because they are on welfare.

[DEPUTY PROSECUTOR]: Well, first of all, your Honor, when the [c]ourt finds out what this trial is all about, you'll find out that's totally bogus.

THE COURT: What is that?

[DEPUTY PROSECUTOR]: That's bogus. [Defendants] have tons of money. They probably have more money than you and I.

[RANKEN]: Good grief.

[DEPUTY PROSECUTOR]: Your Honor, that's what the State's case is all about. [Defendants] are using the system. They are going to use the court, if the [c]ourt allows them. What about all at [sic] defendants that come from neighbor islands?

THE COURT: I know but this one is on welfare. He said they are on welfare.

. . . .

[RANKEN]: Your Honor, they are no longer on welfare. That's the problem. They have been kicked off welfare because of this case. [Camara] --

THE COURT: They're not on welfare?

[RANKEN]: No. [Camara] is working a full-time job at Molokai Ranch in the dining room for minimum wage.

THE COURT: The [c]ourt is going to require they be present. The [c]ourt is going to issue a bench warrant, and the [c]ourt is going to roll the case.

On February 12, 2001, the circuit court announced that Camara's case was "going to roll, the reason being that the court is still continuing in its jury trial in the case of State versus Edward Dean, Criminal No. 99-002; and also because Courtrooms No. 2 and 3 are also continuing in the jury trials." The circuit court then granted the State's motion to continue the trial date from February 12, 2001 to a date after March 16, 2000 because a

key witness had a pre-planned vacation and would not be able to testify from February 22, 2001 to March 16, 2001 and continued the trial until March 19, 2001.

The following colloquy then ensued between the circuit court and Ranken:

[THE COURT]:

Now, let me just deal with this case of [Camara] and [Scarlett]. I had read your motion, [Ranken], and I have considered this very carefully about when the court is more -- is quite certain that a trial could not be held during the following week, and I have mulled this very carefully because you're saying that [Defendants], being out of the island, they should not be punished; that just because they reside on another island they should not be required to bear what other defendants within the county are not required to do.

I'm not ready to pay for their expenses in coming here. However, even -- only when the court is certain that we could not go to trial that following week, I will allow [Defendants] not to be present so long as you will submit something in writing signed by them and signed by you that they will be available.

[RANKEN]: That they will -- that they acknowledge the new trial date?

THE COURT: Yes.

[RANKEN]: Okay.

THE COURT: And I will excuse them from attending the scheduled pretrial conferences. However, they should be available by phone. And also, I will require you and [Scarlett's attorney] to be present at the pretrial conference so that -- and this is because in setting the trial, in considering the cases that go for trial, like the order of cases that go for trial, one, two, three, four, something like that, so that you will be fully informed and that you will be responsible for trying the case should it go to trial on that scheduled day.

[RANKEN]: That's fine, your Honor. We have no problem continuing to attend pretrials. I suppose there is the possibility that the [S]tate will eventually make an offer that we can accept, although that hasn't happened.

THE COURT: One thing also. I know that this case has been going on, and it probably is that it will not settle. But just in case there is a room for settlement, when you come to the pretrial, don't say, "I will talk to my client." Before you come to that pretrial you should be able to know already exactly where [Defendants] stand.

NOT FOR PUBLICATION

[RANKEN]: I can tell the court right now that -- I'm willing to put it on record. [Camara's] position is this case is not going to settle as long as Count 2, the theft count, is out there.

THE COURT: Very well.

THE CLERK: The jury trial will be continued to Monday, March 19th, at 8:30 a.m. There will be a further pretrial conference date set for Thursday, March 15th, at 1:30 p.m.

On March 19, 2001, the circuit court announced that the trial was going to be rolled "because of State versus Eldon Lee" and the court clerk stated: "The jury trial will be rolled to Tuesday, March 22nd, at 8:30 a.m. Pretrial, Thursday, March 22nd, at 1:30 p.m." Because no acknowledgment by Camara and Scarlett of the new trial date had yet been filed, the deputy prosecutor requested that bench warrants be issued for their arrest. The circuit court then asked Ranken whether the Rule 48 speedy trial was being waived, and Ranken replied:

They have not waived speedy trial, and I would strongly enter an objection on the record to the [c]ourt imposing conditions on [Camara's] exercise of a constitutional right. In essence, the [c]ourt is telling them if you want to exercise your right to a speedy trial, then the price you have to pay is you have to fly from Moloka'i; if you are willing to waive your constitutional rights, you can save your money and stay home. I don't think there is any rational relationship to show up for call to roll and their exercise of their speedy trial rights.

During subsequent discussions, Ranken asked the circuit court to notify him by at least 4:30 p.m. on Friday whether Camara would have to go to trial the following Monday. The circuit court informed Ranken that because cases often settle, that was not possible. The circuit court then ordered bench warrants issued for the arrests of Camara and Scarlett, with bail set at \$10,000

NOT FOR PUBLICATION

each but stayed the issuance of the bench warrants until "Tuesday, the 27th, at 8:30."

On March 27, 2001, the circuit court continued the trial until April 23, 2001, based on its understanding that both Camara and Scarlett would be filing a waiver of speedy trial. Defendants' "Limited Waiver of Speedy Trial & Acknowledgment of Notice of [April 23, 2001] Trial [sic] Date" was filed on April 4, 2001.

On April 23, 2001, a circuit court clerk announced that

[t]his case will be preempted by State versus Wilma Ruth Kamakawi. The case will roll to Monday, April 30th, at eight-thirty a.m. There will be a pre-trial conference date set for Thursday, April 26, at one-thirty p.m. and [Defendants'] presence are being waived for purposes of the pre-trial conference.

At the deputy prosecutor's request, the circuit court ordered bench warrants issued for the arrests of Camara and Scarlett, with bail set at \$10,000 each, but stayed the issuance of the bench warrants until April 26, 2001, at 1:30 p.m.

On April 30, 2001, the circuit court announced at the outset of the proceeding that the case "is going to be rolled, it being preempted by State of Hawaii versus Jason Cummings[.]" However, the attorneys for the State and Defendants agreed to continue the trial to May 14, 2001, and a stipulation by Camara and Scarlett that they were waiving their speedy trial rights for the two weeks between April 30 and May 14, 2001 was filed.

On May 7, 2001, the State filed a motion to continue trial until May 29, 2001, on grounds that both the deputy prosecutor and Scarlett's counsel would be attending training and

would thus be unavailable from May 21 through 25, 2001. At a May 10, 2001 hearing on the State's motion, Scarlett's attorney advised the circuit court that the State and Scarlett were close to a plea agreement. The circuit court continued the trial until June 25, 2001.

On June 25, 2001, the trial was rolled to July 9, 2001, even though a circuit court clerk mentioned that "right now we have several cases set to go on the 9th firm[,] because "the [c]ourt will not be in session Wednesday to Friday."

On July 9, 2001, the circuit court rolled the case until July 16, 2001 because the court was "going to have this civil trial today[.]"

On July 16, 2001, the circuit court mentioned that it was going to continue the trial until July 23, 2001. However, because Ranken was unable to start the trial on July 23, 2001, the trial was continued until August 13, 2001 instead.

On July 27, 2001, Camara filed a motion to dismiss the indictment against him. He argued that the indictment was not supported by probable cause because no evidence was presented to the grand jury that he, "as opposed to the business [MSS], received any money that he did not report." The circuit court orally denied the motion on August 10, 2001.

On August 1, 2001, Camara filed a "Second Motion to Dismiss Charges for Violation of [Camara's] Right to Speedy Trial" (Second Motion to Dismiss). He again argued that the case

should be dismissed because his HRPP Rule 48 and constitutional rights to a speedy trial had been violated.

At a hearing held on August 10, 2001, the circuit court orally denied Camara's Second Motion to Dismiss. The circuit court concluded, with respect to Camara's HRPP Rule 48 argument, that when the excludable periods under HRPP were taken into account, only 144 days had elapsed for purposes of determining Camara's HRPP Rule 48 speedy trial right. On December 6, 2001, the circuit court entered its written "[FsOF, CsOL], and Order Denying [Camara's Second Motion to Dismiss]" (December 6, 2001 Order). In its December 6, 2001 Order, the circuit court concluded, with respect to Camara's speedy trial right under HRPP Rule 48, in relevant part, as follows:

5. The period from August 25, 1999, to September 1, 1999 [(7 days)], is excluded under HRPP Rule 48(c)(5).

6. The period from September 8, 1999, to December 2, 1999 [(85 days)], is excluded pursuant to HRPP [Rule] 48(c)(5).

7. The period from December 2, 1999, to December 17, 1999 [sic¹³] [(11 days)], is excluded pursuant to HRPP [Rule] 48(c)(5).

8. . . . [T]he periods from December 13, 1999, to February 7, 2000 [(56 days)]; February 7, 2000, to April 24, 2000 [(77 days)]; April 24, 2000, to July 17, 2000 [(84 days)]; July 17, 2000, to September 5, 2000 [(50 days)]; and from September 5, 2000, to September 18, 2000 [(13 days)], are excluded periods pursuant to HRPP [Rule] 48(c)(3).

9. The period from November 30, 2000, to January 31, 2001 [(62 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(1) and (d)(1).

^{13/} Based on the record, we believe that the circuit court meant for this excludable period to end on December 13, 1999 since the circuit court, in its COL No. 8, excluded the period from December 13, 1999 to February 7, 2000. Otherwise, there would be a double counting of the overlapping periods excluded in COL Nos. 7 and 8.

NOT FOR PUBLICATION

10. The period from February 12, 2001, to March 18, 2001 [(34 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(4). State v. Hirano, 8 Haw. App. 330, 337 (1990); see also, State v. Ahlo, 2 Haw. App. 462, 634 P.2d 421 (1981), cert. denied, 456 U.S. 981, 102 S.Ct. 2252, 72 L.Ed. 2d 858 (1982).

11. The period from March 27, 2001, to April 23, 2001 [(27 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(3).

12. The period from April 30, 2001, to May 14, 2001 [(14 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(3).

13. The period from May 10, 2001, to May 29, 2001 [(15 days)¹⁴], is an excluded period pursuant to HRPP [Rule] 48(c)(4). It is also excluded under HRPP [Rule] 48(c)(3), (c)(7) and (c)(8) because the co-defendant, [Scarlett], consented to this continuance and there was good cause to continue the case for this period of time. State v. Faalafua, 67 Haw. 335, 686 P.2d 826 (1984); State v. Gillis, 63 Haw. 245, 626 P.2d 190 (1981).

14. The period from May 29, 2001, to June 25, 2001 [(27 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(3).

15. The period from July 16, 2001, to August 13, 2001 [(28 days)], is an excluded period pursuant to HRPP [Rule] 48(c)(3).

16. The period from August 1, 2001, to August 10, 2001 [(10 days)¹⁵], is an excluded period pursuant to HRPP [Rule] 48(c)(1) and (d)(1).

. . . .

18. A total of one hundred and forty-four (144) days have elapsed for the purposes of Rule 48.

19. There are four factors to consider in light of [Camara's constitutional] right to a speedy trial, which are "(1) length of the delay; (2) reasons for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." State v. Nihipali, 64 Haw. 65, 67, 637 P.2d 407 (1981). These factors are not to be considered alone as determinative, rather they are related and "must be considered together with such other circumstance as may be relevant. In deciding the question, the courts must engage in a process of balancing those factors." State v. Durry, 4 Haw. App. 222, 224, 665 P.2d 165 (1983).

^{14/} Since the period from May 10 to May 14, 2001 was already included in the period from April 30, 2001 to May 14, 2001 that was excluded in COL No. 12, the overlapping period has been deducted in this calculation.

^{15/} This period is included within the period excluded in COL No. 15.

20. In balancing these factors and in consideration of all the relevant factors known to this court, the [c]ourt finds that [Camara's constitutional] right to a speedy trial has not been violated.

(Bracketed calculations and footnotes added.)

The trial finally commenced on August 13, 2001, and on August 30, 2001, the jury returned a verdict convicting Camara as charged. Pursuant to a written judgment of conviction and sentence entered by the circuit court on October 31, 2001, Camara was sentenced to serve ten years in prison, with credit for time served, and to pay, jointly and severally with Scarlett, \$56,749 in restitution. This timely appeal followed on November 6, 2001.

DISCUSSION

A.

HRPP Rule 48(b)(1) (2003) proves now, as it did when Camara filed his First Motion to Dismiss and Second Motion to Dismiss, that criminal charges against a defendant shall be dismissed "with or without prejudice in [the court's] discretion, if trial is not commenced within 6 months . . . from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made[.]" Pursuant to HRPP Rule 48(c), however, certain periods of delay are excluded from the calculation of the six-month speedy trial period:

(c) Excluded periods. The following periods shall be excluded in computing the time for trial commencement:

(1) periods that delay the commencement of trial and are caused by collateral or other proceedings concerning the

defendant, including but not limited to penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges;

. . . .

(3) periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel;

(4) periods that delay the commencement of trial and are caused by a continuance granted at the request of the prosecutor if:

(i) the continuance is granted because of the unavailability of evidence material to the prosecution's case, when the prosecutor has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(ii) the continuance is granted to allow the prosecutor additional time to prepare the prosecutor's case and additional time is justified because of the exceptional circumstances of the case;

(5) periods that delay the commencement of trial and are caused by the absence or unavailability of the defendant;

. . . .

(7) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance; and

(8) other periods of delay for good cause.

(Emphasis added.)

In reviewing the denial of an HRPP Rule 48 motion to dismiss, we apply both the clearly erroneous and right/wrong tests. State v. Hoey, 77 Hawai'i 17, 28, 881 P.2d 504, 515 (1994). A trial court's findings of fact are clearly erroneous when: (1) the record lacks substantial evidence to support the findings; or (2) despite substantial evidence to support the findings, the appellate court is left with a definite and firm conviction that a mistake has been made. State v. Okumura, 78

Hawai'i 383, 392, 894 P.2d 80, 89 (1995). However, whether a particular fact falls within one of HRPP Rule 48(c)'s exclusionary provisions is a question of law and freely reviewable under the right/wrong standard. Hoey, 77 Hawai'i at 28, 881 P.2d at 515.

B.

On appeal, Camara challenges only the circuit court's exclusion of the 85-day period of time from September 8, 1999 to December 2, 1999. The circuit court concluded that this 85-day period should not count towards HRPP Rule 48's six-month limit because HRPP Rule 48(c)(5) excludes "periods that delay the commencement of trial and are caused by the absence or unavailability of the defendant[.]" Camara disputes this conclusion, arguing that no period of delay resulted from his non-attendance at the September 8, 1999 hearing.

We agree with Camara. Prior to the September 8, 1999 hearing, a pretrial hearing had been set for December 2, 1999 and Camara's trial had been scheduled for December 13, 1999. These dates were confirmed at the September 8, 1999 hearing and Camara's absence from the September 8, 1999 hearing did not in any way affect the previously scheduled dates. While Camara's failure to appear at the December 2, 1999 pretrial hearing certainly caused the period of delay that followed the December 2, 1999 hearing date, his absence at the September 8,

1999 hearing in no way affected the period of time before the December 2, 1999 pretrial hearing.

If the 85-day period between September 8, 1999 and December 2, 1999 is included in the circuit court's HRPP Rule 48 calculations for the January 31, 2001 Order, 192 days (107 + 85 = 192) would have elapsed between the August 25, 1999¹⁶ date that the circuit court used to calculate Camara's HRPP Rule 48 speedy trial right and the date of the January 31, 2001 hearing on Camara's First Motion to Dismiss.

Similarly, if 85 days are added to the 144 days that the circuit court determined had elapsed in its October 11, 2001 Order, 229 days would have elapsed by the time the circuit court heard Camara's Second Motion to Dismiss on August 11, 2001.

The circuit court therefore erred in denying Camara's First Motion to Dismiss and Second Motion to Dismiss, and the judgment convicting and sentencing Camara must be vacated and this case remanded to the circuit court for a determination of whether the indictment against Camara should be dismissed, with or without prejudice.

C.

Camara raised a number of other issues in this appeal. Our disposition of this appeal renders it unnecessary to address

^{16/} As noted above, the circuit court should have measured Camara's HRPP Rule 48 speedy trial right from August 16, 1999, the date Camara was indicted, rather than August 25, 1999, the date Camara was arraigned. If the correct starting date had been used, nine additional days must be added to the 192 figure, so that a total of 201 days would have elapsed for HRPP Rule 48 purposes.

some of those issues. However, for the guidance of the circuit court in the event it decides to dismiss Camara's indictment without prejudice, we resolve several of those issues as follows:

(1) We conclude that the circuit court did not abuse its discretion when it denied Camara's motion to dismiss the indictment. Contrary to Camara's arguments, the record indicates that probable cause existed to support the indictment. Additionally, there is no indication in the record that the indictment "was gained through the improper use of hearsay evidence."

(2) In light of State v. Jhun, 83 Hawai'i 472, 480, 927 P.2d 1355, 1363 (1996), we agree with Camara that the circuit court improperly admitted into evidence a DHS investigative referral form. The form contained hearsay evidence and was not admissible under the public records exception to the rule prohibiting hearsay evidence.

(3) In light of Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 81 Hawai'i 512, 522 at n.4, 918 P.2d 1168, 1178 at n.4 (App. 1996), we agree with Camara that the circuit court erred when it allowed a DHS employee to testify about her interpretation of the laws and rules governing public assistance benefits and food stamps. Instructing the jury on the relevant law is the duty of the trial judge.

CONCLUSION

Based on the foregoing discussion, we vacate the October 31, 2001 Judgment against Camara and remand this case to the circuit court for entry of an order dismissing the indictment against Camara, with or without prejudice, in the discretion of the circuit court.

DATED: Honolulu, Hawai'i, October 14, 2003.

On the briefs:

Anthony L. Ranken for
defendant-appellant.

Tracy A. Jones, deputy
prosecuting attorney,
County of Maui for
plaintiff-appellee.