NO. 24680

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DAVID T. PREBLE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-2363)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

David Taofiaualii Preble (Defendant) appeals the November 19, 2001 amended judgment of the circuit court of the first circuit[1] that convicted him of eleven counts of sexual assault upon twin sisters and one of their younger sisters, seventeen and fourteen years of age respectively at the time of a third and final jury trial held nearly five years after disclosure.

Defendant takes a scattershot approach on appeal -- in fact, his opening brief verges on the stream of consciousness. After an arduous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve the points of error to which Defendant devotes cognizable argument, Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2003) ("Points not argued may be deemed waived."); Ala Moana Boat

[1] The Honorable Marie N. Milks, judge presiding.

Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967), as follows:

1. Defendant first contends the court erred in denying his January 24, 2000 motion to dismiss for pre-indictment delay. We disagree. Defendant failed to establish that "substantial prejudice to [his] right to a fair trial" resulted from the pre-indictment delay in this case. State v. Carvalho, 79 Hawai'i 165, 167, 880 P.2d 217, 219 (App. 1994) (citation and internal quotation marks omitted). This being so, we need not inquire into the reasons for the delay, id. at 170, 880 P.2d at 222, but in an abundance of caution we have reviewed the relevant record, and now conclude that the delay was not "unreasonable and inexcusable." Id. (citation and internal quotation marks omitted). In connection with this point, Defendant cites Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2001) and the constitutional right to a speedy trial. In doing so, however, Defendant mixes apples and oranges because neither of those discrete doctrines is applicable to a claim of prejudicial pre-indictment delay.

2. It appears Defendant presses an independent HRPP Rule 48 point on appeal, by asserting that the speedy trial clock began ticking "on December 17, 1996, with the arrest of the Defendant on parole violation charges related to these allegations, almost 3 years before the filing of the original charging instrument." Opening Brief at 19 (citation to the

record omitted; emphasis in the original). This assertion is incorrect. As we said before in another HRPP Rule 48 case, "Defendant fails to recognize that he was held in custody *not* on the charges for which he was arrested, but for his prior convictions. This distinction is dispositive in this case." State v. Cenido, 89 Hawai'i 331, 335, 973 P.2d 112, 116 (App. 1999) (emphasis in the original). Cf. State v. Johnson, 62 Haw. 11, 12, 608 P.2d 404, 405 (1980).

3. Defendant seems to argue that his trial counsel was ineffective in failing to move to dismiss the indictment based upon the destruction of material evidence favorable to the defense -- namely, pubic hair, vaginal swabs and blood samples taken from one of the complaining witnesses. This argument is not well taken. Other than pure speculation, Defendant fails to advance any support for his assertion that the evidence was material and favorable to his defense. See State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994) (in the absence of supporting evidence in the record, "self-serving speculation will not sustain an ineffective assistance claim" (citation and internal quotation marks omitted)). Hence, Defendant fails to demonstrate "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305

(1992) (citations and footnote omitted).

4. Defendant also claims ineffective assistance of counsel because his trial counsel did not move to dismiss based upon the statute of limitations. However, the statute does not run "[f]or any felony offense under chapter 707, part V [entitled, "Sexual Offenses"] or VI, during any time when the victim is alive and under eighteen years of age." Hawaii Revised Statutes § 701-108(6)(c) (Supp. 2003) (Act effective June 14, 1995, 1995 Haw. Sess. L. Act 171, § 4 at 288). Accordingly, defense counsel did not render ineffective assistance of counsel in this regard. Aplaca, 74 Haw. at 67, 837 P.2d at 1305.

5. Defendant complains that his trial counsel was ineffective in failing to object to testimony about a purported bad act of Defendant. However, as Defendant admits on appeal, defense counsel "proved that it was false on cross-examination." Opening Brief at 22. This is not ineffective assistance of counsel. Aplaca, 74 Haw. at 67, 837 P.2d at 1305.

6. Defendant also asserts ineffective assistance of counsel in connection with the testimony of a medical expert witness. Defendant first contends trial counsel was ineffective in failing to object to the expert witness's opinion because it was based on the evidence, detailed above, that was destroyed. This is incorrect. The expert witness based his opinion on his physical examination of a complaining witness, and not on the destroyed evidence. Defendant also avers that trial counsel was

ineffective in failing to ask the expert witness how many previous times he had testified on behalf of the defense. Defendant asserts that this inquiry would have shown that the expert witness "was exclusively paid by the State to be their expert, and had a financial interest and or personal bias in these cases and his testimony." Opening Brief at 23. There is nothing in the record to support this assertion, without which it is mere wishful thinking. Reed, 77 Hawai'i at 84, 881 P.2d at 1230. Finally on this point of error, Defendant claims that, "No objections were made to hearsay testimony [the expert witness] presented nor his ultimate conclusions, which were based upon opinion." These claims are without merit, because of Hawaii Rules of Evidence (HRE) Rules 803(b)(4) (1993) and 703 (1993), and HRE Rule 702 (1993), respectively. See also State v. Yamada, 99 Hawai'i 542, 555-56, 57 P.3d 467, 480-81 (2002).

7. Defendant complains that the court erred in denying his motion for a bill of particulars. We disagree. Defendant was provided with a copy of the indictment and full discovery, and sat through the two previous trials on the same charges. The foregoing gave Defendant "sufficient notice of the charges against him to enable him to prepare for trial and avoid prejudicial surprise." Reed, 77 Hawai'i at 78, 881 P.2d at 1224. Hence, the court did not abuse its discretion in denying Defendant's motion for a bill of particulars. Id. ("bill of particulars is not required if the information called for has

been provided in some other satisfactory form" (citation and internal quotation marks omitted)).

8. Defendant maintains that certain remarks the court made in the course of the proceedings indicate that the court, in sentencing him, punished him for exercising his right to a trial. *Au contraire*. The court's remarks indicate no such thing.

9. Finally, Defendant types out a lengthy set of what appear to be notations purporting to show that the pretrial statements and the testimonies of the three complaining witnesses are "so riddled with inconsistencies that they are not credible as a matter of law[.]" Opening Brief at 26 (format modified). This kind of argument is void *ab initio*. State v. Vinuya, 96 Hawai'i 472, 481, 32 P.3d 116, 125 (App. 2001).

Therefore,

IT IS HEREBY ORDERED that the November 19, 2001 amended judgment of the court is affirmed. However, we remand for correction of the conviction section of the judgment, in which a count "132" is referenced.

DATED: Honolulu, Hawai'i, December 3, 2004.

On the briefs:

Andre' S. Wooten,
for defendant-appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge