

NOT FOR PUBLICATION

NO. 25573

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

BETH ANN MINER, Defendant-Appellant v. STATE OF HAWAI'I,
Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(Case Nos.: B36:12/5/02)

MEMORANDUM OPINION

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

Defendant-Appellant Beth Ann Miner (Miner) timely appeals the final judgment entered on December 5, 2002. On appeal, Miner claims that the trial court erred by: (1) failing to grant her "Motion to Suppress" filed on July 29, 2002 and (2) failing to grant her "Motion to Dismiss for Violation of HRPP Rule 48" filed on November 20, 2002.

Our review of the record reveals that while the court did not err in denying Miner's suppression motion, it erred in denying Miner's motion to dismiss without stating its essential findings on the record. We therefore vacate the oral order denying Miner's motion to dismiss and remand for entry of appropriate findings of fact and conclusions of law consistent with this opinion and for entry of a new order deciding Miner's motion to dismiss.

NOT FOR PUBLICATION

FACTS

On April 18, 2002, at approximately 10:15 p.m., special off-duty Maui Police Department (MPD) Officer Nelson Johnson (Ofr. Johnson) was directing traffic at the intersection of Ka'ahumanu Avenue and Mahalani Street in Wailuku, Maui, while road crews were resurfacing the highway. The area was well lit and marked with cones and signs back to Baldwin High School. Ofr. Johnson, who was dressed in his duty uniform, and wearing his badge and an orange vest, was responsible for directing a one-lane contra-flow, and stopping the traffic to let trucks with asphalt and heavy equipment cross onto the work site.

After the traffic had been stopped for a while, Ofr. Johnson was about to signal a truck to go through when he heard behind him a long and loud screeching sound. He turned and ran and saw a gold-colored vehicle being driven by Miner with smoke coming out of its tires, coming to a stop behind another vehicle. Ofr. Johnson thought that Miner was speeding and going to hit the car in front of her.

After Miner's vehicle stopped, Ofr. Johnson spoke to Miner to "see if she was okay." Ofr. Johnson observed that Miner's eyes were red and watery. After speaking with Miner, he noticed that her speech was slurred, her breath had an odor of

NOT FOR PUBLICATION

liquor, and that she took a while to answer his questions. Ofr. Johnson then directed her to pull off to the shoulder of Ka'ahumanu. Miner attempted to pull forward and Ofr. Johnson had to repeat his command about three times before she complied by pulling over onto Mahalani Street. Ofr. Johnson then asked Miner to participate in some field sobriety maneuvers (FSMs). Miner agreed, and as she got out of the vehicle, lost her balance. Ofr. Johnson caught her and helped her to the sidewalk. As he began to conduct the FSMs with Miner, on-duty MPD Officer Kim Massey arrived and began to take over the administration of the FSMs.

Miner failed the FSMs, was arrested and transported back to the police station, where she consented to a breath test, which indicated that she had a blood alcohol level of .259 grams of alcohol per two hundred ten liters of breath. Miner was arrested for the offense of Driving Under the Influence of an Intoxicant, in violation of Hawaii Revised Statutes (HRS) § 261E-61 (Supp. 2001);¹ Driving Without a Current No-Fault Insurance Policy, in violation of HRS § 431:10C-104(a) (Supp. 2001); and Failure to Exhibit a No-Fault Insurance Card in violation of HRS § 431:107(b) (Supp. 2001). Miner was given a court date of

^{1/} The two other charges were later dismissed with prejudice by the State, because Miner was able to prove that she had in fact been covered by a valid no-fault insurance policy on the day of the offense.

NOT FOR PUBLICATION

June 18, 2002 to appear for these charges and was released on bail on the day of her arrest.

On June 10, 2002, a complaint against Miner on the above-mentioned charges was filed and she was arraigned on those charges when she made an appearance with her initial counsel, Richard A. Priest, Jr. on June 18, 2002. A pretrial hearing was set for July 19, 2002.

At the July 19, 2002 hearing, Mr. Priest orally moved to withdraw as counsel. This request was granted and attorney Graham Daniel Mottola appeared. Mr. Mottola orally moved to continue the pretrial hearing to give him the opportunity to file a motion to suppress. The court continued the proceedings until August 9, 2002 for hearing on the motion and for a pre-trial conference. No trial date was set at this time.

On July 29, 2002, Miner filed a Motion to Suppress based in part on the premise that Ofc. Johnson did not have a reasonable basis to initiate the original stop. On August 5, 2002, the State filed a Memorandum in Opposition. A hearing on the motion was held on August 9, 2002, and the motion was denied by Judge Reinetta W. Cooper. Trial was then set for October 25, 2002.

NOT FOR PUBLICATION

Officer Johnson was subpoenaed for trial on September 11, 2002. On September 13, 2002, he notified the State that he would be on vacation from October 25 through 31, 2002 and was therefore unavailable for trial. On September 17, 2002, the State filed a motion for a continuance based on "essential witness" Officer Johnson's non-availability for trial and a hearing on the motion was set for October 8, 2002.

The deputy prosecutor's declaration in support of the State's motion read in pertinent part:

9. The State of Hawaii was informed on September 13, 2002, that State's essential witness, Officer Nelson Johnson, will be unavailable to testify at the time of the scheduled trial in this case because Officer will be on vacation from October 25, 2002, to October 31, 2002;
10. The State has exercised due diligence in securing his attendance;
11. Said witness is essential for the State to prove its case;

There is no record that Miner filed any memorandum in opposition.

On October 8, 2002, the court heard the State's motion to continue trial. Miner's counsel orally objected to the continuance, stating that Miner wanted "to maintain her right to a speedy trial under Rule 48." The court granted the motion over Miner's objection, stating:

All right. I note that we had a delay once for a change of attorneys. There was a motion to suppress.

All right. Over objection I'll grant one continuance to the State.

NOT FOR PUBLICATION

The State requested that the trial be continued to November 22, 2002, which "[a]ccording to the clerk, . . . [was] an open date."

On November 20, 2002, Miner filed a "Motion to Dismiss for Violation of HRPP Rule 48," to be heard on November 22, 2002, "on the grounds that the delay in bringing Defendant to trial [had] exceeded 180 days and require[d] dismissal pursuant to Rule 48(b) of the Hawai'i Rules of Penal Procedure." On November 21, 2002, the State filed a "Memorandum in Opposition to Defendant's Motion to Dismiss for Violation of HRPP Rule 48," claiming that 11 days should be excluded due to Miner's motion to suppress, and that 45 days should be excluded due to the unavailability of Ofr. Johnson.

A hearing was held on November 22, 2002,² where the State argued, in addition, that because Ofr. Johnson was an essential witness and the State exercised due diligence to secure his attendance, the time from the continuance granted on October 8, 2002 until the continued trial date should be excluded under Hawai'i Rules of Penal Procedure (HRPP) Rule 48(c)(4)(i) (2000). The State also asked the court to take judicial notice

^{2/} The Honorable Ruby A. Hamili presided.

NOT FOR PUBLICATION

of its own calendar for "September, October and November." "The Court has been bogged down with trials . . . and, therefore the earliest date that the Court could give us was November 22nd, 2002."

While conceding the time period between July 19 and August 9, 2002 was excluded due to the continuance sought by the defense, Miner argued that "those are the only excludable days you have." As to the State's continuance, the defense made no argument regarding whether Ofr. Johnson was a material witness, arguing instead that the prosecution should have alerted the court at an earlier point that its witness was unavailable or should have sought an earlier trial date to comply with HRPP Rule 48.

The court denied Miner's motion. Trial was then held and Miner was convicted of the offense of Driving Under the Influence of an Intoxicant in violation of HRS § 261E-61.

On December 5, 2002, Miner was sentenced to a one-year suspension of her driver's license, a \$500 fine, and 240 hours of community service. Final judgment was entered on the same day and Miner timely filed her appeal on January 6, 2003. This appeal was assigned to this court on January 6, 2004.

NOT FOR PUBLICATION

DISCUSSION

A. *The Trial Court Did Not Err in Denying Miner's Motion to Suppress Evidence.*

"A trial court's ruling on a motion to suppress evidence is reviewed *de novo* to determine whether the ruling was 'right' or 'wrong.'" State v. Kaleohano, 99 Hawai'i 370, 375, 56 P.3d 138, 143 (2002)(citations omitted).

The proponent of the motion to suppress has the burden of establishing, by a preponderance of the evidence, that the statements or items sought to be excluded were unlawfully secured and that his or her right to be free from unreasonable searches or seizures was violated under the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution.

. . . .

A court's [findings of fact] are reviewed under the clearly erroneous standard and will not be set aside on appeal unless they are determined to be clearly erroneous.

A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed.

The right/wrong standard of review also applies to the trial court's [conclusion of law], which allows the appellate court to examine the facts and answer the question without being required to give any weight to the trial court's answer to it. Thus, [a] [conclusion of law] is not binding upon the appellate court and is freely reviewable for its correctness.

Id. (citations, headings, and internal quotation marks omitted).

The stopping of an automobile and detention of its occupants constitutes a "seizure" within the meaning of the

NOT FOR PUBLICATION

Fourth and Fourteenth Amendments of the United States Constitution. Delaware v. Prouse, 440 U.S. 648 (1979) and State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984). At a suppression hearing, it is the burden of the prosecution to prove that the warrantless search or seizure falls within a specifically established and well-delineated exception to the warrant requirement. State v. Ortiz, 67 Haw. 181, 683 P.2d 822 (1984). The result of a failure to meet this burden is that the evidence gathered from the illegal search will be suppressed as "tainted fruits of the poisonous tree." State v. Moore, 66 Haw. 202, 659 P.2d 70 (1983).

"Of course, the authority of the police to stop vehicles in cases of observed violations is not in question." State v. Bonds, 59 Haw. 130, 135, 577 P.2d 781, 785 (1978). "However, when weighed against the individual's Fourth Amendment rights, the State's interest is not so compelling as to justify subjecting every vehicle to seizure at the unrestrained discretion of law-enforcement officials." State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (1979).

To justify an investigative stop, short of an arrest based on probable cause, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate.

NOT FOR PUBLICATION

State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977)
(internal citations omitted), quoted with approval in State v. Bohannon, 102 Hawai'i 228, 237, 74 P.3d 980, 989 (2003)
(screeching tires and other observations by officer and reasonable inferences therefrom constituted reasonable suspicion that defendant committed the offense of reckless driving).

Eschewing her other claims made below, Miner claims on appeal that her stop and interrogation were unconstitutional and the trial court therefore erred in denying her Motion to Suppress because Ofr. Johnson was unable "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] that intrusion." Defendant-Appellant Beth Ann Miner's Opening Brief (OB) at 9, quoting State v. Bolosan, 78 Hawai'i 86, 92, 890 P.2d 673, 679 (1995). The State argues that the stop in the instant case was objectively reasonable and that Ofr. Johnson did have specific and articulable facts, which taken together with rational inferences from those facts, warranted the stop.

When asked why he initially approached Miner's vehicle, Ofr. Johnson answered:

NOT FOR PUBLICATION

Just to see if she was okay. You know, the reason why, one, she was speeding,^[3] since we had cones all the way from Baldwin High School all the way down and there were signs. And, like I said, traffic had been stopped already.

(Emphasis added.)

Officer Johnson also stated,

When I heard the screeching, cuz it was long, I turned - I ran and I turned and I looked and I saw her stop, cuz I thought she was going to hit the car in front of her.^[4]

(Emphasis and footnote added.)

In denying Miner's motion, the district court ruled that the stop was justified because it

was based on articulable facts by Officer Johnson that he thought something was amiss with the vehicle. And I'm going to find that this type of -- this type of approach to the vehicle under the circumstances was not violative of Ms. Miner's rights in any way to be free of unlawful searches and seizures -- unlawful seizures.

In light of the facts presented and the applicable law, the lower court did not err in denying Miner's Motion to Suppress. Ofr. Johnson testified that he thought Miner was speeding, a traffic violation, and he was thus concerned for her

^{3/} Driving in excess of the speed limit would be a violation of Hawaii Revised Statutes (HRS) § 291C-102 (1993), entitled "Noncompliance with speed limit prohibited."

^{4/} Viewing the facts objectively, there is also possibly a violation by Miner of HRS § 291-2 (Supp. 1999), entitled "Reckless driving of vehicle or riding of animals," which states, in part:

Whoever operates any vehicle . . . recklessly in disregard of the safety of persons or property is guilty of reckless driving of [a] vehicle. . . .

NOT FOR PUBLICATION

safety, since it appeared that her car would collide with the vehicle stopped in front of her, possibly constituting reckless driving, a petty misdemeanor. The record thus demonstrates that Ofc. Johnson did have specific and articulable facts that Miner may have been speeding and driving recklessly, which, taken together with rational inferences from those facts, reasonably warranted the intrusion of an investigatory stop. State v. Bohannon, 102 Hawai'i 228, 237, 74 P.3d 980, 989 (2003). The State was thus able to prove that the warrantless stop in question did fall within one of the specifically established and well delineated exceptions to the warrant requirement.

B. As the Trial Court Did Not State its Essential Findings for the Record, this Court Must Vacate the Oral Ruling Denying Miner's Motion to Dismiss and Remand for Entry of Findings and Entry of a New Order Deciding Miner's Motion to Dismiss.

Although the standard of review applicable to the trial court's findings of fact is the clearly erroneous standard, the question of whether the facts as found constitute any one of the excluded periods of delay described in Rules 48(c)(1) through (8) of the Hawai'i Rules of Penal Procedure is a question of law which involves the right/wrong standard of appellate review.

State v. Miller, 4 Haw. App. 603, 671 P.2d 1037 (1983).

"Under the right/wrong standard, we examine the facts and answer the question without being required to give any weight to the trial court's answer to it." Under that standard, if we decide that the facts constitute an excluded period, then the current version of Rule 48(c) mandates exclusion of the period. The lower court has no discretion. If we decide that the facts do not constitute an excluded period, then Rule 48(c) is inapplicable.

Id. at 606, 671 P.2d at 1040 (citation omitted).

NOT FOR PUBLICATION

However, the Hawai'i Supreme Court has also stated:

HRPP 12(e)⁵ requires a court to "state its essential findings on the record" where "factual issues are involved in determining [the] motion." An HRPP 48(b) motion to dismiss, by its very nature, involves factual issues. Pursuant to the rule, a defendant may move to dismiss the charges against him or her if trial is not commenced within six months (construed as one hundred eighty days) from the events enumerated within its provisions. HRPP 48(c) mandates that the court exclude certain time periods from its computation in determining whether the one hundred eighty days have run. Before the court may conclude as a matter of law that any of the excluded time periods set forth in HRPP 48(c) have been established, it must first make the appropriate FOF.

State v. Hutch, 75 Haw. 307, 330-31, 861 P.2d 11, 23 (1993)

(footnoted added).

The following is a summary of the pertinent events as taken from the record:

DATE	EVENT
4/18/02	Miner arrested and charged for DUI; pretrial set for 7/19/02
7/19/02	Miner's initial counsel withdraws. Minder's new counsel appears and requests that pre-trial hearing date be continued to 8/9/2002 and that a Motion to Suppress hearing be set for 8/9/02
7/29/02	Miner files Motion to Suppress
8/9/02	Motion to Suppress denied; trial set for 10/25/02
9/17/02	State files Motion to Continue Trial due to Ofr. Johnson's unavailability

^{5/} HRPP Rule 12(e)(1977) reads, in pertinent part:

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

NOT FOR PUBLICATION

DATE	EVENT
10/8/02	State's Motion to Continue granted; trial continued from 10/25/02 to 11/22/02
11/22/02	Motion to dismiss denied; trial had

Put another way, the time period involved in the instant case is from April 18, 2002, the date of Miner's arrest, to November 22, 2002, the date of Miner's trial, 218 days later. Rule 48 requires that trial be commenced within 180 days of the date of arrest, if, as with Miner, bail is set. HRPP Rule 48(b)(1). Thus, the question in the instant case is whether there were at least 38 days excludable under HRPP Rule 48, supporting the trial court's decision to deny Miner's motion to dismiss.

1. *Miner's Continuance for the Purpose of Litigating Her Motion to Suppress May Have Delayed Her Trial.*

Rule 48 excludes "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." HRPP Rule 48(c)(3).

Miner's pretrial hearing was continued, at her counsel's request, for the purpose of litigating a motion to

NOT FOR PUBLICATION

suppress. The period between the original and the continued pretrial hearing was 21 days.

On appeal, Miner shifts her position taken below⁶ and argues that only the 11 days between the filing of and decision on her motion to suppress are excludable. She explains that this is because the continuance of the pretrial hearing "did not cause any actual delay of trial[,] "[id.,] and cites State v. Hoey, 77 Hawai'i 17, 881 P.2d 504 (1994), for this proposition.

Miner's reliance on Hoey is misplaced because the periods involved there could not have delayed the trial. Here, the 21-day continuance of the pre-trial hearing delayed the trial. When Miner asked for a continuance of pretrial proceedings, no trial date had yet been set. The trial court set the initial trial date after Miner's motion to suppress was denied as, had the court decided to grant the motion to suppress, it is unlikely any trial would have been necessary. The time spent between the filing and decision on the motion to suppress appears to have delayed the setting of the trial date and consequently, the trial. However, as the trial court did not

^{6/} Below, Miner conceded that the 21 days attributable to her pretrial hearing continuance were excludable. [ROA at 59.] However, in her opening brief, Miner states, without citation to authority, that this concession "is ineffective and void as a matter of law." OB at 11 n.4. As will be seen, this concession may have been well-founded.

NOT FOR PUBLICATION

make any findings regarding the effect of Miner's motion to continue, we are unable to evaluate the trial court's decision in this regard. Compare, State v. Samonte, 83 Hawai'i 507, 516, 928 P.2d 1, 10 (1996) (continuance of trial and extension of pretrial motions deadline granted due to appointment of new counsel who was not ready to proceed to trial).

2. *The State's Continuance, Because a Material Witness Was Unavailable for Trial, May Have Been Excludable Under Rule 48(c)(4)(i).*

Rule 48 allows time to be excluded for certain continuances of trial given to the prosecution, where "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." HRPP Rule 48(c)(4)(i).

On appeal, Miner contends that no time attributable to the State's continuance was excludable. The State, although it argued below in its opposition papers that the 45-day period from October 8, 2002 to November 22, 2002 should be excluded from HRPP Rule 48 calculations under HRPP Rule 48(c)(4)(i), now concedes that it "could not make a good faith argument that the whole

NOT FOR PUBLICATION

period from October 8, 2002, to November 22, 2002, is an excludable period under Rule 48(c)(2) and Rule 48(c)(4)."

This "confession of error" by the prosecution is neither dispositive, nor does it remove Miner's burden to show error in this case. The Hawai'i Supreme Court has said,

In "confession of error" cases where the prosecution "admits" to error, this court has stated that, "even when the prosecutor concedes error, before a conviction is reversed, 'it is incumbent on the appellate court [first] to ascertain . . . that the confession of error is supported by the record and well-founded in law and [second] to determine that such error is properly preserved and prejudicial.'" In other words, a confession of error by the prosecution "is not binding upon an appellate court, nor may a conviction be reversed on the strength of [the prosecutor's] official action alone."

State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000)

(internal citations omitted).

The parties seem to assume that the exclusion attributable to the government's continuance of the trial date should either be 45 days, as argued below, or nothing, as argued by Miner on appeal. However, the plain language of the Rule appears to dictate a 28-day exclusion. The rule allows an exclusion for "periods of delay" caused by the prosecution's continuance.⁷ HRPP Rule 48(c)(4(i)). Here, the delay was the postponement of trial--initially set for October 25, 2002--to

^{7/} Contrast this with the computation dictated by exclusions afforded under HRPP Rule 48(d) which excludes the interval between the filing and prompt disposition of certain motions.

NOT FOR PUBLICATION

November 22, 2002, an interval of 28 days. See State v. Hirano, 8 Haw. App. 330, 336-37, 802 P.2d 482, 485-86, cert. denied, 71 Haw. 668, 833 P.2d 901 (1990) and State v. Ferraro, 8 Haw. App. 284, 800 P.2d 623 (1990). In any event, whether the exclusion is 45 or 28 days, if either is properly excluded, Miner was brought to trial in compliance with Rule 48.

Miner claims that no time attributable to the State's continuance was excludable for two reasons. First, Miner argues that Judge Hamili could not, as matter of law, exclude the period under HRPP Rule 48(c)(4)(i) because Judge Cooper--the judge granting the State's continuance--did not explicitly grant the continuance under HRPP Rule 48(c)(4)(i). Miner further reasons that Judge Hamili, in deciding her motion to dismiss, could not make a *nunc pro tunc* finding that the period was excludable under HRPP Rule 48(c)(4)(i).

The only authorities that Miner cites in support of this contention are federal cases construing the Speedy Trial Act (STA), 18 United States Code § 3161, et seq. While Miner is correct that the Hawai'i Supreme Court has occasionally looked to federal interpretation of the STA for guidance in interpreting HRPP Rule 48,⁸ her analogy in the present case is without merit.

^{8/} See e.g. State v. Coyaso, 73 Haw. 352, 357-58, 833 P.2d 66, 68-69 (1992), State v. Nihipali, 64 Haw. 65, 71-72, 637 P.2d 407, 413 (1981), and (continued...)

NOT FOR PUBLICATION

Unlike HRPP Rule 48, the STA specifically requires that any delay resulting from a continuance must have supporting reasons memorialized either orally or in writing.⁹

Second, Miner claims that the continuance was not excludable because the State never proved, and Judge Hamili never found, that Ofr. Johnson was (1) a witness "material" to the prosecution and (2) that the State exercised "due diligence" in seeking to secure his attendance. Initially, we note that Miner did not challenge the materiality of Ofr. Johnson's testimony and thus raises this argument for the first time on appeal.

The State specifically stated in its declaration in support of its September 17, 2002 motion to continue, that Ofr. Johnson was a "material" witness who was necessary to the prosecution's case and that it had exercised "due diligence" in its attempts to secure his presence at the trial date.

While Hawai'i case law does not define "material" in this context, BLACK'S LAW DICTIONARY 1634 (8th ed. 2003) defines

⁸/(...continued)
State v. Soto, 63 Haw. 317, 320, 627 P.2d 279, 281 (1981).

⁹/ 18 United States Code § 3161(B)(8)(A) reads in part:

No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuances outweigh the best interests of the public and the defendant in a speedy trial.

NOT FOR PUBLICATION

a material witness as "[a] witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters."

By this definition, Ofr. Johnson may have been a "material" witness. He was the officer who initially observed Miner's poor driving, instigated the investigative stop, noticed that Miner may have been impaired by alcohol, and ordered her out of the car for the field sobriety tests. No other witness would be able to establish these facts, and without Ofr. Johnson's testimony, the State would not have been able to prove its case. Again, Miner did not contest this below and although she points out on appeal that Judge Cooper, in granting the continuance, did not make a finding that Ofr. Johnson was a material witness, Miner does not argue on appeal that he was not. In any event, Judge Hamili, in ruling on Miner's motion to dismiss, did not make a finding in this regard.

On the other hand, the State's due diligence has been contested, below and on appeal. As with the term "material witness," there is no definition of "due diligence" in the context of the State's securing the presence of a witness in Hawai'i law. This court noted in State v. Jackson, 8 Haw. App. 624, 817 P.2d 130 (1991), that when an exclusion is sought due to

NOT FOR PUBLICATION

defendant's unavailability under HRPP Rule 48(c)(5), in evaluating the State's attempts to secure the defendant's presence, "the focus is on what was done by the state rather than on what was not done." Id. at 632, 817 P.2d at 136. Thus, "[i]n determining whether due diligence has been shown, [the] primary emphasis must be on the reasonableness of the efforts actually made, not on the alternatives that might have been available. Id. (internal citations and quotation marks omitted).

The record in the instant case arguably shows that the State exercised due diligence in securing the presence of Ofr. Johnson.

For example, the State subpoenaed Ofr. Johnson on September 11, 2002--more than six weeks before trial--to secure his presence. Two days later, Ofr. Johnson informed the State that he would be unavailable for trial as he was scheduled for a vacation. Four days after confirming Ofr. Johnson's unavailability, the State moved to continue trial and secured the next available trial date.

Thus, there is support in the record for a finding of due diligence in obtaining the officer's presence for trial. However, the trial court did not make a finding on this issue and in fact did not mention the State's continuance at all when ruling that the motion to dismiss was denied:

NOT FOR PUBLICATION

Okay. What we're looking at is a six-month period. . . . For the arrest date. We're looking at October 1. Okay. So then we've got to account for that extension, that November 22nd. That's about, what about 30 some odd days or so?

So if we got excludable periods that go through that period of the 30 some odd days--because we've got a deadline of October 18th, right? And we were outside of it at least by a week on our trial date, but all those excludable periods, change of counsel and motion to suppress . . . With respect to the motion [to dismiss for violation of Rule 48], it is denied. Thank you.

In the instant case, the trial court failed to state its findings of fact on the record and consequently, this court is unable to determine whether there was a proper basis for the trial court's actions. State v. Hutch, 75 Haw. 307, 330-31, 861 P.2d 11, 23 (1993). See also, State v. Hanawahine, 69 Haw. 624, 6,31, 755 P.2d 466, 470 (1988) and State v. Durry, 4 Haw. App. 222, 232-33, 665 P.2d 165, 173 (1983).

CONCLUSION

Accordingly, we affirm the denial of Miner's Motion to Suppress. As the trial court failed to state its essential findings in support of its oral denial of Miner's Motion to Dismiss for Violation of HRPP Rule 48 heard on November 22, 2002, we vacate that oral order and remand for entry of appropriate findings of fact and conclusions of law consistent with this

NOT FOR PUBLICATION

opinion and for entry of a new order deciding Miner's Motion to Dismiss.

DATED: Honolulu, Hawai'i, December 30, 2004.

On the briefs:

Hayden Aluli,
for defendant-appellant.

Chief Judge

Artemio C. Baxa,
Deputy Prosecuting Attorney
County of Maui
for plaintiff-appellee.

Associate Judge

Associate Judge