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NO. CAAP-21-0000516

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
SAMUEL A. NIETO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1PC161001809)

SUMMARY DISPOSITION ORDER

(By: Ginoza, C.J., and Wadsworth and Nakasone, JJ.)

Defendant-Appellant Samuel A. Nieto (**Nieto**) appeals from the "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part, [Nieto's] Motion to Dismiss for Violation of [Hawaii Rules of Penal Procedure (**HRPP**)] Rule 48 and [Nieto's] Right to a Speedy Trial" (**FOFs/COLs/Order**), entered on September 15, 2021, in the Circuit Court of the First Circuit (**Circuit Court**).^{1/}

On November 17, 2016, Nieto was charged with two counts of Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (**HRS**) § 707-730(1)(b), and five counts of Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(b).

On August 10, 2021, Nieto filed a "Motion to Dismiss for Violation of [HRPP] Rule 48 and [Nieto's] Right to a Speedy Trial" (**Rule 48/Speedy Trial Motion**). Nieto requested that the charges be dismissed with prejudice. The State conceded that

^{1/} The Honorable Paul B.K. Wong presided.

there was an HRPP Rule 48^{2/} violation, but argued that the case should be dismissed without prejudice.

On September 15, 2021, the Circuit Court entered the FOFs/COLs/Order, which granted in part and denied in part the Rule 48/Speedy Trial Motion. Specifically, the court granted the motion to the extent it sought dismissal for violation of HRPP Rule 48, but dismissed the case without prejudice. The court denied the motion to the extent it sought dismissal based on a violation of Nieto's constitutional right to a speedy trial.

On appeal, Nieto contends that the Circuit Court: (1) abused its discretion in dismissing the case without, rather than with, prejudice for violation of HRPP Rule 48; and (2) erred in denying the Rule 48/Speedy Trial Motion to the extent it sought dismissal based on a violation of Nieto's constitutional right to a speedy trial. Relatedly, Nieto challenges COLs 6 and 7 with respect to his first contention and COLs 12 through 15 with respect to his second contention.

After reviewing the record on appeal and the relevant legal authorities, and giving due consideration to the issues raised and the arguments advanced by the parties, we resolve Nieto's contentions as follows and affirm.

(1) "We review a trial court's decision to dismiss a case with or without prejudice for violation of HRPP Rule 48 for abuse of discretion." State v. Fukuoka, 141 Hawai'i 48, 55, 404 P.3d 314, 321 (2017) (citing State v. Estencion, 63 Haw. 264, 269, 625 P.2d 1040, 1044 (1981)). "A trial court abuses its discretion when it 'clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.'" Pub. Access Trails

^{2/} HRPP Rule 48 provides in pertinent part:

(b) **By Court.** Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within six months:

(1) 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[.]

Hawai'i v. Haleakala Ranch Co., 153 Hawai'i 1, 21, 526 P.3d 526, 546 (2023) (brackets omitted) (quoting Honolulu Constr. & Draying Co. v. DLNR, 130 Hawai'i 306, 313, 310 P.3d 301, 308 (2013)).

"In determining whether to dismiss a case with or without prejudice, 'the [trial] court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and the circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [HRPP Rule 48] and on the administration of justice.'" Fukuoka, 141 Hawai'i at 55-56, 404 P.3d at 321-22 (quoting Estencion, 63 Haw. at 269, 625 P.2d at 1044). The trial court must also "clearly articulate the effect of the Estencion factors and any other factor it considered in rendering its decision." Id. at 56, 404 P.3d at 322 (quoting State v. Hern, 133 Hawai'i 59, 64, 323 P.3d 1241, 1246 (App. 2013)).

Here, the Circuit Court applied the Estencion factors as follows in COLs 5 through 8:

5. [Nieto] is charged with two counts of Sexual Assault in the First Degree (HRS § 707-730(1)(b)) and three Counts of Sexual Assault in the Third Degree (HRS § 707-732(1)(b)). The court finds these to be serious offenses.
6. With respect [to] the facts and circumstances of the case which led to the dismissal, the State's one continuance, which caused the [HRPP] Rule 48 violation must be viewed in relation to [Nieto's] 19 prior requests to continue the trial date.
7. With respect to the impact of re-prosecution on the administration of the chapter and the administration of justice, the court understands that anxiety that [Nieto] experienced while the charges were pending as well as the financial hardships Defendant has faced and will face should the charges be refiled, however, the State has an interest in adjudicating the case on the merits.
8. Taking the Estencion factors into consideration, this case should be dismissed without prejudice.

On appeal, Nieto does not dispute the Circuit Court's conclusion that the charges at issue are serious. He also does not dispute the court's factual findings that the State requested one, and Nieto requested nineteen, trial continuances.^{3/} See FOFs

^{3/} Unchallenged findings of fact are binding on appeal. See State v. Rodrigues, 145 Hawai'i 487, 494, 454 P.3d 428, 435 (2019).

3-5, 7-11, 13, 16-18, 20-28, 32-33. Rather, Nieto contends that the 19 trial continuances that were granted at his request should not have been considered as facts and circumstances of the case that led to dismissal, because "these continuances were excluded in the Rule 48 calculation[; h]ence all of the delays which led to the dismissal were attributed to the State."^{4/} He further argues that "[t]he State's failure to take reasonable steps to secure the presence of the complainant [for trial] cannot serve as an excuse for such a delay."

Nieto cites no authority supporting his argument that trial continuances granted at the defendant's request, which by rule are excluded from computing the time for trial commencement, see HRPP Rule 48(c)(3), cannot be considered as facts and circumstances of the case that led to dismissal under HRPP Rule 48. Indeed, Nieto's argument conflicts with the relevant case law. In Fukuoka, the supreme court explained:

Under the second Estencion factor, a court in determining whether to dismiss a case with or without prejudice for violation of HRPP Rule 48 must consider "the facts and the circumstances of the case which led to the dismissal." Estencion, 63 Haw. at 269, 625 P.2d at 1044. In evaluating the facts and circumstances of the case, the court should focus on "the culpability of the conduct that led to the delay." United States v. Cano-Silva, 402 F.3d 1031, 1036 (10th Cir. 2005); see United States v. Peppin, 365 F. Supp. 2d 261, 265 (N.D.N.Y. 2005) (under the facts and circumstances factor, "the inquiry thus turns to who is responsible for the delay and for what reasons") [.]

141 Hawai'i at 60, 404 P.3d at 326 (emphasis added; original brackets omitted). "Relevant considerations within this factor may include whether the delay was caused by the State's neglect or deliberate misconduct[,]" and "whether the delay was caused by the defendant's conduct." Id. (citing United States v. Bert, 814 F.3d 70, 80 (2d. Cir. 2016)); see id. (citing United States v. Taylor, 487 U.S. 326, 340 (1988) (discussing the defendant's conduct in analyzing the analogous federal factor)). Fukuoka's reliance on Taylor is particularly germane here. In Taylor, the circumstances included that the defendant had fled before his trial was initially scheduled to commence. 487 U.S. at 328. The

^{4/} On this basis, Nieto also challenges COL 6.

U.S. Supreme Court expressed that the defendant's "culpable conduct and, in particular, his responsibility for the failure to meet the timely trial schedule in the first instance are certainly relevant as 'circumstances of the case which led to the dismissal,' [18 U.S.C.] § 3162(a)(2), and weigh heavily in favor of permitting reprosecution." Id. at 340.

Here, nearly four years and nine months (i.e., 57 months) passed between the November 17, 2016 indictment and the August 10, 2021 filing of the Rule 48/Speedy Trial Motion. Based on the uncontested FOFs, it appears that trial was originally set for January 30, 2017, and that successive continuances of the trial date, granted at Nieto's repeated request, led to the delay of the scheduled trial week to May 11, 2020 - a period of about three years and three months (i.e., 39 months).^{5/} Successive trial continuances thereafter, "[b]ased on the COVID 19 pandemic and for extraordinary circumstances," led to the delay of the scheduled trial week to March 15, 2021 - a period of an additional ten months. Meanwhile, on February 12, 2021, the Circuit Court granted the State's motion to continue trial "due to the minor Complaining Witness [(CW)] being in Japan[,]" and continued the trial week to September 27, 2021. In opposing the Rule 48/Speedy Trial Motion, the State further explained that the CW's father had mistakenly believed that the trial would again be continued and "felt that it was in the best interest of his children[,]" who were accompanied by their mother, "to ride out Covid 19 in Japan with [the children's] grandparents." The CW was back in Hawai'i and available to testify as of August 24, 2021.

Nieto argues that the State failed to take reasonable steps to secure the presence of the CW at trial by not subpoenaing the CW's parents to confirm they were required to have the CW present on the March 15, 2021 trial date. In response, the State contends that the CW and her parents had been cooperative in attending numerous prior proceedings, and even if the State had secured the CW from Japan for trial in March 2021,

^{5/} In other words, the 19 trial continuances that were granted at Nieto's request collectively delayed the trial by roughly 39 months.

she would not have been able to return to Japan after trial due to Japan's COVID-19 border closure, making her "unavailable for trial due to unforeseen events."

On this record and under these circumstances, we cannot say that the Circuit Court erred in COL 6 by concluding that "[w]ith respect to the facts and circumstances of the case which led to the dismissal, the State's one continuance . . . must be viewed in relation to [Nieto's] 19 prior requests to continue the trial date."

For similar reasons, we cannot say that the Circuit Court erred in COL 7 by concluding that "[w]ith respect to the impact of re-prosecution on the administration of the chapter and the administration of justice, . . . the State has an interest in adjudicating the case on the merits." Nieto argues that it would be contrary to the administration of justice to allow the State to re-prosecute him, where the State failed to bring the case to trial within the requisite six-month period and failed to take reasonable steps to ensure that the CW was available for trial in March 2021. However, as discussed above, the 19 trial continuances that were granted at Nieto's request collectively delayed the trial by over three years, and the single trial continuance granted at the State's request because of the CW's temporary relocation to Japan appears to have resulted from the unforeseen circumstances of the COVID 19 pandemic. Further, there is no indication in the record that Nieto was prejudiced by the resulting six-month delay of the trial.

In summary, the record reflects that the Circuit Court considered each of the Estencion factors and explained the effect of the factors in its reasoning to dismiss the charges without prejudice. On this record, we conclude that the Circuit Court did not abuse its discretion in dismissing the case without prejudice for violation of HRPP Rule 48.

(2) Nieto also contends that the Circuit Court erred in denying his Rule 48/Speedy Trial Motion to the extent it sought dismissal based on a violation of Nieto's constitutional right to a speedy trial. We review this question of constitutional law under the right/wrong standard. See State v. Visintin, 143

Hawai'i 143, 152, 426 P.3d 367, 376 (2018) (citing State v. Davis, 133 Hawai'i 102, 111, 324 P.3d 912, 921 (2014)).

The Hawai'i Supreme Court has stated the relevant framework for our review as follows:

The Sixth Amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee a defendant in a criminal case the right to a speedy trial in all prosecutions. State v. Lau, 78 Hawai'i 54, 62, 890 P.2d 291, 299 (1995). Whether the defendant's right to a speedy trial has been violated is determined by applying the four factors articulated in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) length of the delay; (2) reasons for the delay; (3) defendant's assertion of his right to speedy trial; and (4) prejudice to the defendant." Lau, 78 Hawai'i at 62, 890 P.2d at 299 (citing Barker, 407 U.S. at 530, 92 S. Ct. 2182). No one factor "is to be regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." Id. (quoting State v. Wasson, 76 Hawai'i 415, 419, 879 P.2d 520, 524 (1994)). Rather, the factors are related "and must be considered together with such circumstances as may be relevant." Id. (quoting Wasson, 76 Hawai'i at 419, 879 P.2d at 524). When a defendant's right to a speedy trial has been violated, the only remedy is dismissal with prejudice. Id.

Visintin, 143 Hawai'i at 156-57, 426 P.3d at 380-81.

Here, the Circuit Court analyzed the Barker factors as follows in COLs 11 through 15:

11. As to the first Barker factor, the time between the filing of the indictment, November 17, 2016 to the filing of [Nieto's] Motion to Dismiss amounts to 1728 days. As 1728 days is a significant amount of time, the delay "suffices to warrant inquiry into the other Barker factors." State v. Wasson, 76 Haw. 415 (1994).
12. [Nieto] did not face any significant pre-incarceration. While Nieto undoubtedly faced financial costs, stress and anxiety, the reasons for the delay were [Nieto's] nineteen (19) prior continuances.
13. While [Nieto] asserted his right to a speedy trial at the State's Motion to Continue on February 12, 2021[,], and upon filing of the [Rule 48/Speedy Trial Motion, Nieto] had previously requested nineteen (19) prior continuances.
14. [Nieto] has not asserted an impairment of a defense due to the delay.
15. [Nieto's] Motion to Dismiss for Violation of Defendant's Right to a Speedy Trial is denied.

As to the first Barker factor, Nieto and the State agree that more than 1700 days passed between the November 17,

2016 indictment and the August 10, 2021 filing of the Rule 49/Speedy Trial Motion, and that this period is sufficient to trigger analysis of the remaining Barker factors. See Wasson, 76 Haw. at 419, 879 P.2d at 524; see also Lau, 78 Hawai'i at 62, 890 P.2d at 299 (measuring the length of delay from the date of arrest until the filing of the motion to dismiss on speedy trial grounds). We agree that the length of delay was sufficient in these circumstances to warrant further inquiry under Barker; the Circuit Court did not err in so ruling.

As to the second Barker factor, Nieto contends that "the reasons for the delay in this case which could fairly be attributed to the State were due to the State's failure to take reasonable steps and exercise due diligence to secure the presence of the [CW] at trial."

In Visintin, the supreme court provided the following guidance regarding the second Barker factor:

[D]ifferent weights are assigned to different reasons in determining whether a delay of trial violates a defendant's constitutional speedy trial right. Lau, 78 Hawai'i at 63, 890 P.2d at 300 (citing Barker, 407 U.S. at 531, 92 S.Ct. 2182). "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." Id. (quoting Barker, 407 U.S. at 531, 92 S.Ct. 2182). "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Id. (quoting Barker, 407 U.S. at 531, 92 S.Ct. 2182).

When a defendant contributes in substantial part to the delay, we have held that the second Barker factor weighs in favor of the prosecution. . . .

By contrast, when a delay results from a more neutral reason, we have held that the second Barker factor weighs in favor of the defendant.

Visintin, 143 Hawai'i at 159, 426 P.3d at 383.

Here, the Circuit Court concluded in COL 12 that "the reasons for the delay [of trial] were [Nieto's] nineteen (19) prior continuances." This conclusion is partly correct. As discussed above, the 19 trial continuances that were granted at Nieto's request collectively delayed the trial by about 39 months, from January 30, 2017, to May 11, 2020. It is thus correct to say that Nieto "contributed in substantial part" to

the 57-month delay of trial. Id. Based on the uncontested FOFs, the rest of the delay - about 18 months - is properly accounted for as follows: (1) the period from November 17, 2016 to January 30, 2017, which was the period from indictment to the first scheduled trial date; (2) the period from May 11, 2020, to March 15, 2021, which was the period of continuances "[b]ased on the COVID-19 pandemic and for extraordinary circumstances"; and (3) the period from March 15, 2021 to August 10, 2021, which was the period from the beginning of the State's requested continuance to the filing of the Rule 48/Speedy Trial Motion. The delay represented by these three periods was not attributable to Nieto. To the extent COL 12 suggests otherwise, it is wrong.

This error is harmless, however, given that Nieto contributed in substantial part to the 57-month delay of trial, and the remaining delay, though attributable to the government under Visintin, resulted from "more neutral" reasons, including most notably the COVID 19 pandemic. 143 Hawai'i at 159, 426 P.3d at 383. In particular, there is no indication in the record, and Nieto does not contend, that the State's single requested continuance was "[a] deliberate attempt to delay the trial in order to hamper the defense." Id. (quoting Lau, 78 Hawai'i at 63, 890 P.2d at 300). Rather, as discussed above, the record reflects that the State's requested continuance was due to the CW's temporary relocation to Japan, which appears to have resulted from the unforeseen circumstances of the pandemic. The second Barker factor thus weighs in favor of the prosecution.

As to the third Barker factor, Nieto contends that "the [C]ircuit [C]ourt correctly found that Nieto had asserted his right to a speedy trial" at the February 12, 2021 hearing of the State's motion to continue trial, and in Nieto's Rule 48/Speedy Trial Motion. However, the court also noted in COL 13, and Nieto does not dispute, that he had previously requested 19 prior continuances. COL 13 is not wrong. The third Barker factor weighs, at most, slightly in favor of Nieto.

As to the fourth Barker factor, Nieto contends that he has suffered prejudice as a result of the delay of trial, including anxiety, the curtailment of associations, public

obloquy, and an adverse effect on his ability to prepare for trial.

In Visintin, the supreme court construed the fourth Barker factor as follows:

Prejudice to the defendant "should be assessed in the light of the interests of defendants [that] the speedy trial right was designed to protect." Lau, 78 Hawai'i at 64, 890 P.2d at 301 (quoting Barker, 407 U.S. at 532, 92 S.Ct. 2182). These interests are the prevention of oppressive pretrial incarceration, the minimization of the defendant's anxiety and concern, and the preservation of the ability to mount an effective defense. Id.

Visintin, 143 Hawai'i at 161, 426 P.3d at 385. "[T]o demonstrate anxiety, the defendant must offer objective, current evidence," which may take a variety of forms. Id.

Here, Nieto has failed to show prejudice based on the interests that the speedy trial right was designed to protect. First, Nieto did not suffer pretrial incarceration during the delay of trial, as the record reflects that he posted bail on the date he was indicted. Second, although the Circuit Court recognized that Nieto faced financial costs, stress and anxiety stemming from the charges, Nieto did not contend or offer any evidence below that he experienced anxiety sufficient to warrant dismissal of the charges with prejudice. See Lau, 78 Hawai'i at 65, 890 P.2d at 302; see also State v. Ferraro, 8 Haw. App. 284, 300, 800 P.2d 623, 632 (1990) ("'[A] mere assertion that one had been upset or concerned about a pending criminal prosecution is not sufficient' to establish prejudicial anxiety." (quoting Reed v. United States, 383 A.2d 316, 320 (D.C.), cert denied, 439 U.S. 871 (1978))). Nor did Nieto contend or offer any evidence below that he experienced the curtailment of associations or public obloquy resulting from the delay of trial. Third, Nieto made no attempt below to show that the delay of trial impaired his defense in any way. See Lau, 78 Hawai'i at 65, 890 P.2d at 302. COL 14 is not wrong. Even on appeal, Nieto fails to identify or describe any specific witness or evidence that has been adversely affected by the delay. Nieto's "failure to make any showing that he was actually prejudiced due to the delay in his trial militates against a finding that his speedy trial right was

violated." Wasson, 76 Hawai'i at 423, 879 P.2d at 528 (citing United States v. Loud Hawk, 474 U.S. 302, 315 (1986) (the "possibility of prejudice is not sufficient to support the [defendants'] position that their speedy trial rights were violated.")). In short, Nieto failed to establish prejudice.

Based on our analysis of the Barker factors, we conclude that Nieto was not deprived of his right to a speedy trial under either the Hawai'i or United States Constitutions. Accordingly, COL 15 is not wrong, and the Circuit Court did not err in denying the Rule 48/Speedy Trial Motion to the extent it sought dismissal based on a violation of Nieto's constitutional right to a speedy trial.

For the reasons discussed above, we affirm the "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss for Violation of [HRPP] Rule 48 and Defendant's Right to a Speedy Trial," entered on September 15, 2021, in the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, August 28, 2023.

On the briefs:

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Chief Judge

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/s/ Clyde J. Wadsworth
Associate Judge

/s/ Karen T. Nakasone
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