

*** NOT FOR PUBLICATION ***

NO. 24387

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant/Cross-Appellee

vs.

ROBERT L. PARRISH, Defendant-Appellant/Cross-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 00-1-0093)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.
and Acoba, J., Concurring and Dissenting Separately)

Plaintiff-appellant/cross-appellee the State of Hawai'i [hereinafter, "the prosecution"] appeals from that portion of the June 19, 2001 order of the circuit court of the second circuit, the Honorable Joseph E. Cardoza presiding, dismissing the indictment against the defendant-appellee/cross-appellant Robert L. Parrish for a violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48(b).¹ The indictment charged Parrish with: (1) one count of sexual assault in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-731(1)(b) (Supp. 1997)² (Count I); (2) one count of sexual assault in the third degree,

¹ HRPP Rule 48 provides in relevant 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 6 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[.]

² HRS § 707-731(1)(b) provides in relevant part that "[a] person commits the offense of sexual assault in the second degree if . . . [t]he person knowingly subjects to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless[.]"

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in violation of HRS § 707-732(1)(c) (1993)³ (Count II); and (3) one count of kidnapping, in violation of HRS § 707-720(1)(d) (1993)⁴ (Count III).

On appeal, the prosecution argues that the circuit court erred by granting Parrish's motion to dismiss based on a violation of HRPP Rule 48 because: (1) the prosecution acted with due diligence in prosecuting the case; and (2) the circuit court should not have included, in its due diligence evaluation under HRPP Rule 48(c)(4)(i),⁵ the delayed actions of the police in conducting alternate light source testing on the evidence recovered from the scene of the alleged incident. Parrish counters that the prosecution waived its arguments by failing to assert them during circuit court proceedings and that, in the alternative, both of the prosecution's arguments are without merit.

³ HRS § 707-732(1)(c) provides in relevant part that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor[.]"

⁴ HRS § 707-720(1)(d) provides in relevant part that "[a] person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to . . . [i]nflict bodily injury upon that person or subject that person to a sexual offense[.]"

⁵ HRPP Rule 48(c)(4)(i) provides in relevant part:

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

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- (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[.]

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On cross-appeal, Parrish argues that: (1) although the circuit court correctly dismissed the indictment based on HRPP Rule 48, it erred by dismissing the indictment without prejudice; and (2) the circuit court erred by denying the motion to dismiss the indictment on the basis of excessive hearsay and prosecutorial misconduct during grand jury proceedings. The prosecution asserts that this court lacks jurisdiction over Parrish's cross-appeal.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold, as to the appeal, that (1) the prosecution asserted its arguments during circuit court proceedings in its motion for reconsideration and thus did not waive its arguments, and (2) the circuit court did not clearly err by finding that the prosecution failed to meet its burden of proving that it acted with due diligence in obtaining evidence, as required by HRPP Rule 48(c)(4)(i). Based on this disposition, the prosecution's other argument on appeal is not addressed. As to Parrish's cross-appeal, we hold that this court lacks jurisdiction, inasmuch as (1) Parrish is not appealing from a final judgment and sentence, as provided in HRS § 641-11 (1993),⁶ (2) this is not an interlocutory appeal, as

⁶ HRS § 641-11 provides in relevant part:

Any party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the supreme court, subject to chapter 602 in the manner and within the time provided by the Hawaii Rules of Appellate Procedure. The sentence of the court in a criminal case shall be the judgment. . . .

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provided in HRS § 641-17 (1993),⁷ and (3) the circumstances in this case do not warrant the application of this court's supervisory powers, as provided in HRS § 602-4 (1993).⁸

Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 21, 2003.

On the briefs:

Simone C. Polak,
Deputy Prosecuting Attorney,
for plaintiff-appellant/
cross-appellee

Hayden Aluli and Mimi
Desjardins, for defendant-
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⁷ HRS § 641-17 provides in relevant part:

Upon application made within the time provided by the rules of the supreme court, an appeal in a criminal matter may be allowed to a defendant from the circuit court to the supreme court, subject to chapter 602, from a decision denying a motion to dismiss or from other interlocutory orders, decisions, or judgments, whenever the judge in the judge's discretion may think the same advisable for a more speedy termination of the case. . . .

⁸ HRS § 602-4 provides that "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."