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Supreme Court
SCWC-20-0000175
15-SEP-2022
10:20 AM
Dkt. 13 RAC

SCWC-20-0000175

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI,	CASE NO. 1PC161001176
Respondent/Plaintiff-Appellee,	RESPONSE TO PETITIONER/DEFENDANT-APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI
vs.	
BRANDON FETU LAFOGA,	INTERMEDIATE COURT OF APPEALS
Petitioner/Defendant-Appellant,	HONORABLE LISA M. GINOZA Chief Judge
and	HONORABLE KATHERINE G. LEONARD HONORABLE KAREN T. NAKSONE Associate Judges
RANIER INES, also known as Schizo,	
Defendant-Appellee.	

RESPONSE TO PETITIONER/DEFENDANT-APPELLANT'S
APPLICATION FOR WRIT OF CERTIORARI

APPENDIX "A"

and

CERTIFICATE OF SERVICE

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RESPONSE TO PETITIONER/DEFENDANT-APPELLANT'S
APPLICATION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

Respondent/Plaintiff-Appellee STATE OF HAWAIʻI ("Respondent"), by and through its attorneys Steven S. Alm, Prosecuting Attorney, and Stephen K. Tsushima, Deputy Prosecuting Attorney, for the City and County of Honolulu, State of Hawaiʻi, pursuant to Hawaiʻi Rules of Appellate Procedure ("HRAP") Rule 40.1(e) (2022), respectfully submits this Response to Petitioner/Defendant-Appellant's Application for Writ of Certiorari ("Application") filed on August 19, 2022, for a review of the Hawaiʻi Intermediate Court of Appeals ("ICA")'s Opinion of the Court by Nakasone, J. filed on April 27, 2022, in State v. Lafoga, CAAP-20-0000175 (Haw.App. April 27, 2022) ("Opinion"). See, Appendix "A" of Application.

II.

STATEMENT OF REASONS
WHY THE APPLICATION SHOULD NOT BE ACCEPTED

A. Petitioner's Application is untimely.

At the outset, Respondent points out that Petitioner/Defendant-Appellant BRANDON FETU LAFOGA ("Petitioner")'s Application was not timely filed. Petitioner correctly notes that "the ICA's Opinion was filed on April 27, 2022," and that "the ICA's Judgment on Appeal was filed on June 20, 2022[.]" Application at 1. Petitioner also correctly notes that, therefore, his "Application may be filed on or before July 20, 2022, pursuant to HRAP Rules 26(a) and 40.1(a)." *Id*. Petitioner then states that "*a request* for an extension of time to file an application for a writ of certiorari was granted and this Application may now be filed on or before August 19, 2022." *Id* (emphasis added). However, a review of the record shows that on June 21, 2022, Defendant-Appellee RANIER INES, also known as Schizo ("Ines"), filed a Request for Extension of Time to File an Application for Writ of Certiorari, and not Petitioner. See, State v. Lafoga, CAAP-20-0000175, JEFS Dkt. #141. Ines's request for an extension of time was granted, bringing Ines's filing deadline date to file an application for writ of certiorari to August 19, 2022. State v. Lafoga, CAAP-20-0000175, JEFS Dkt. #144. In this case, however, Petitioner never requested an extension of time to file his Application. See generally, State v. Lafoga, CAAP-20-0000175. Thus, Petitioner's Application filed on August 19, 2022, was untimely, as his Application may only be filed on or before July 20, 2022. Respondent, therefore, requests this Court dismiss the Application as untimely.

B. Petitioner has not demonstrated the need for further appeal.

Assuming *arguendo* this Court does not dismiss Petitioner's Application as untimely, Respondent submits Petitioner's Application, nevertheless, should not be accepted because he has not demonstrated the ICA committed any "[g]rave errors of law or of fact[]" that dictate the need for further appeal. See, Hawai'i Revised Statutes ("HRS") § 602-59(b).

In the "QUESTIONS PRESENTED" section of Petitioner's Application, he advances the following questions:

1. Whether the ICA gravely erred in holding that the Circuit Court did not err in denying [Petitioner]'s HRPP Rule 48 motion?
2. Whether the ICA gravely erred in holding that the Circuit Court's procedure of withholding the jurors' names from the defendants, but not their counsels, and referring to them by number did not constitute plain error?
3. Whether the ICA gravely erred in holding that the Circuit Court did not err in refusing to instruct the jury on lesser included offenses below the Attempted Murder charge?
4. Whether the ICA gravely erred in holding that the jury instructions that referred to the non-extended sentence for Attempted Murder as a "possible life term of imprisonment" was not erroneous?
5. Whether the ICA gravely erred in holding that extended sentencing under H.R.S. § 706-661(1) applies to attempted second degree murder?

Application at 1-2; JEFS Dkt. #3, PDF at 2-3.

In this case, the ICA held that the circuit court's "modified jury selection procedure of referring to the jurors by number and not by name, and of withholding the jurors' names and information from the defendants but not from their counsels, did not constitute plain error under the circumstances of this case." Opinion at 4. Additionally, the ICA concluded that there was no rational basis in the evidence for the jury to acquit Petitioner of Attempted Murder and convict him of either Assault First or Assault Second Degree, and consequently the Circuit Court did not err in refusing to instruct on the assault offenses. Opinion at 33. Furthermore, the ICA concluded that Petitioner's challenge to the denial of his HRPP Rule 48 Motion is without merit. Opinion at 13. Lastly, the ICA concluded that the extended jury instruction which had the jury consider whether the defendant's sentences should be extended "from a possible life term of imprisonment to a definite life term of imprisonment" was consistent with State v. Keohokapu, 127 Hawai'i 91, 276 P.3d 660 (2012), and were not inaccurate or misleading. Opinion at 45. Consequently, the ICA affirmed Petitioner's February 20, 2020 Judgment of Conviction and Sentence, Notice of Entry. See generally, Opinion.

In his Application, Petitioner essentially puts forth the same arguments he raised in his unsuccessful Opening Brief of Defendant-Appellant ("OB") and Reply Brief of Defendant-Appellant ("RB") before the ICA with respect to the above issues. As such, Respondent likewise relies on its responses submitted in the Answering Brief of the State of Hawai'i ("AB"), JEFS Dkt. #111 in State v. Lafoga, CAAP-20-0000175, filed with the ICA on December 18, 2020.

1. Petitioner's HRPP Rule 48 claim is without merit.

In his first question to this Court, Petitioner asks, "Whether the ICA gravely erred in holding that the Circuit Court did not err in denying [Petitioner]'s HRPP Rule 48 motion?" Application at 1; JEFS Dkt. #3, PDF at 2. Petitioner claims "[t]he ICA gravely erred in concluding that the HRPP Rule 48 clock as to [him] started anew on May 20, 2019." Application at 5; JEFS Dkt. #3, PDF at 6. However, Petitioner's claim is without merit.

HRPP Rule 48(b)(3) 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:
>
> * * * *
>
> (3) from the date of . . . order granting a new trial[.]

Although the Hawai'i Supreme Court has yet to directly opine[1] on this issue, a review of cases from jurisdictions which have dealt with this claim on appeal concur with the trial court and ICA in this case that the speedy trial clock resets when a defendant pleads guilty and subsequently withdraws such plea. See, State v. Belieu, 314 N.W.2d 382 (1982) (court concluded that defendant's speedy trial rights were not denied; that defendant's speedy trial rights were derivatively waived upon pleading guilty; time for speedy trial began upon granting of withdrawal of guilty plea and resetting of trial); and, Commonwealth v. Jensch, 322 Pa.Super. 304, 312, 469 A.2d 632, 636 (1983) ("It is well established that the withdrawal of a guilty plea, like the grant of a new trial, begins a new 120-day period in which the [prosecution] must bring a defendant to trial."). Such cases recognize that upon pleading guilty, a defendant waives his/her right to trial and derivatively his/her speedy trial right as well. Thus, the time for calculating speedy trial begins upon the date of an order granting a withdrawal of guilty plea. To be certain, while other jurisdictions' speedy trial rules, like ours, "addresses the issue by analogy only," their courts have concluded that "the time for a trial begins to run anew after an order is entered allowing the withdrawal of a guilty plea." See, Kennedy v. State, 297 Ark. 488, 489-490, 763 S.W.2d 648, 649 (1989) (holding that an order allowing the withdrawal of a guilty plea is analogous to an order granting a new trial). This interpretation of the speedy trial rule is

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[1] However, in State v. Palic, 129 Hawai'i 450, 303 P.3d 1227 (Haw. App. 2013) (unpublished memorandum opinion), attached hereto as Appendix "A" pursuant to Hawai'i Rules of Appellate Procedure Rule 35(c)(2) (2019), where defendant Palic was allowed to withdraw his guilty plea and subsequently, on appeal, an HRPP Rule 48 issue was raised, the ICA's HRPP Rule 48 calculation did not include the period of time prior to the withdrawal of guilty plea, presumably because the Hawai'i appellate court considered the speedy trial clock to be reset upon the granting of the withdrawal of guilty plea.

consistent with the federal court speedy trial rule, 18 U.S.C. § 3161(i) [2], which explicitly states that if trial did not commence within the time limitation specified in the section because the defendant had entered a plea of guilty and subsequently withdrew his/her plea, he/she shall be deemed indicted on the date of the order permitting withdrawal of the plea.

When Petitioner pled guilty, he waived his right to a trial and likewise his right to a speedy trial. Belieu, *supra*. In granting Petitioner's motion to withdraw guilty plea and resetting his case, the trial court effectively granted Petitioner a new trial on May 20, 2019. Jensch, *supra*; Kennedy, *supra*. Consequently, Petitioner's HRPP Rule 48 clock started anew on May 20, 2019. As previously stated, Petitioner concedes on appeal that the period of time from July 1, 2019, to September 30, 2019, is excludable. OB at 30. As such, the trial court was correct in concluding that, for purposes of HRPP Rule 48, only 88 days had passed for Petitioner. Accordingly, Petitioner's HRPP Rule 48 claim is without merit.

Petitioner also claims that "[i]n the event that this Court concludes that the ICA gravely erred in concluding that the Rule 48 clock started anew on May 20, 2019, then the ICA gravely erred in declining to address [Petitioner]'s arguments as to the exclusion of time for six continuances of trial." Application at 6; JEFS Dkt. #3, PDF at 7. However, as argued by Respondent in its AB, Respondent submits that there was no HRPP Rule 48 violation where the periods of delay attributable to Ines, pursuant to HRPP Rule 48(c)(3), were properly applied to Petitioner, pursuant to HRPP Rule 48(c)(7), as Ines's co-defendant. HRPP Rule 48(c) designates excludable periods of time in calculating the time for commencement of trial. Specifically, HRPP Rule 48(c)(3) and HRPP Rule 48(c)(7) provides for exclusion of periods of delay, stating, in pertinent part, as follows:

> (c) Excluded Periods. The following periods shall be excluded in computing the time for trial commencement:
>
> * * * *
>
> (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;
>
> * * * *
>
> (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[.]

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[2] 18 U.S.C. § 3161(i) provides:

If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

In State v. Faalafua, 67 Haw. 335, 349, 686 P.2d 816, 829 (1984), the Hawai‘i Supreme Court analyzed HRPP Rule 48(c)(7) and held that "where the exclusion of time as to one defendant is permitted under other paragraphs of Rule 48(c), the same exclusion may be applied to co-defendants unless severance is granted or the interest of justice militates against it." Here, in calculating the time for commencement of trial, the trial court applied the same excludable periods of time to Petitioner as was permitted under HRPP Rule 48(c)(3) with respect to Ines, that is, "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).

In this case, Petitioner only challenges the trial court's HRPP Rule 48 ruling with respect to "six periods of time where continuances were granted at the request of Ines but objected to by [Petitioner,]" to wit, the following periods of delay:

(1) June 13, 2017, to September 18, 2017,
(2) September 18, 2017, to November 13, 2017,
(3) November 13, 2017, to January 1, 2018,
(4) January 1, 2018, to May 21, 2018,
[(1) through (4) = 343 days)
(5) August 27, 2018, to January 21, 2019 [148 days], and
(6) January 21, 2019, to May 6, 2019 [106 days]
[Total = 597 days]

OB at 30. A review of the record reveals that two of the periods of delay -- the second and fourth above -- were due to withdrawal and substitutions of Ines' counsel. See, 1PC1001176, Dkt. #126, 09/13/2017 "Mtn for Withdrawal/Sub of Cnsl;" and, 1PC1001176, Dkt. #144, 01/30/2018 "Withdrawal & Sub of Counsel." The remaining four periods of delay appear to be due to continuances requested by Ines' counsel for trial preparation purposes. See, 1PC161001176, 05/24/2017 Minutes, 1PC161001176, 10/18/2017 Minutes, 1PC161001176, 12/13/2017 Minutes, 1PC161001176, 07/16/2018 Minutes, and 1PC161001176, 12/17/2018 Minutes. Under these circumstances, the trial court did not err in finding the above periods of delay excludable for Ines under HRPP Rule 48(c)(3), and excludable for Petitioner under HRPP Rule 48(c)(7) "where there was no good cause for severance and [] Ines moved to continue their joint trial." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 4-6.

Respondent acknowledges that in at least two of the instances, as noted by Petitioner in his OB at 31, the specific circumstances compelling the continuance by Ines's counsel is not apparent from the record. See, 1PC161001176, 07/16/2018 Minutes, and 1PC161001176, 12/17/2018 Minutes. Respondent submits that to the extent this record is unclear or insufficiently developed for this reviewing court to make accurate conclusions with regard to the application of *any* excludable periods to Petitioner, this case should be remanded to the trial court with instructions to make appropriate findings of fact with regard to HRPP Rule 48, creating a proper record for this reviewing court. To hold otherwise would allow the parties to

take advantage of the lack of a developed record below. As the Hawaiʻi Supreme Court has stated, it "will not countenance the subversion of the purposes of [HRPP] Rule 48, nor permit its utilization to create a 'mockery of justice . . . by technical evasion . . . ' of the rule by either the state *or defendant*." Faalafua, 67 Haw. at 339, 686 P.2d at 829 (emphasis added) (citations omitted).

In State v. Hutch, 75 Haw. 307, 861 P.2d 11 (1993), the Hawaiʻi Supreme Court stated that "pursuant to HRPP [Rule] 48(c)(3), the court must find *whether any period of delay resulting from a continuance was granted* at the request or *with the consent of the defendant or his or her counsel*. If the court so finds, it may then enter an appropriate HRPP [Rule] 48(c) conclusion of law." Hutch, 75 Haw. at 331, 861 P.2d at 23 (emphases added). The Hutch Court explained that an HRPP Rule 48 motion to dismiss, by its very nature, involved factual issues. *Id*. The Hutch Court further stated that

> [b]ecause findings of fact are imperative for an adequate judicial review of a lower court's conclusions of law, we have held that *cases will be remanded when the factual basis of the lower court's ruling cannot be determined from the record*.

Hutch, 75 Haw. at 331, 861 p.2d at 23 (internal quotation marks, ellipsis, and brackets omitted) (emphasis added).

In this case, however, although in a couple of the instances, the specific reasons for Ines's counsel requesting a continuance is not apparent from the record, the record is clear that the continuances were, indeed, caused by a continuance at the request of Ines's counsel. Consequently, Respondent submits that the record is sufficient for this reviewing court to conclude that the trial court did not err in finding the above periods of delay excludable for Ines under HRPP Rule 48(c)(3), and excludable for Petitioner under HRPP Rule 48(c)(7) "where there was no good cause for severance and [] Ines moved to continue their joint trial." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 4-6. Significantly, Petitioner has failed to demonstrate that the trial court erred in concluding that "all of the excludable time outlined by the Court amounts to 1,063 days for [Petitioner]. For purposes of HRPP Rule 48, 153 days passed for [Petitioner]." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 8. Accordingly, Petitioner's HRPP Rule 48 claim is without merit.

2. The trial court did not violate Petitioner's fundamental right to a fair trial where it redacted jurors' telephone numbers and street addresses from the juror summons cards and explained to the jurors that they would be referred to by number and not by name.

In his second question presented to this Court, Petitioner asks, "Whether the ICA gravely erred in holding that the Circuit Court's procedure of withholding the jurors' names from the defendants, but not their counsels, and referring to them by number did not constitute plain

error?" Application at 1; JEFS Dkt. #3, PDF at 2. At the outset, Respondent points out that Petitioner did not object to the trial court's procedures of which he now complains on appeal, and therefore, the issue should be deemed waived. See, State v. Fagaragan, 115 Hawai'i 364, 367-368, 167 P.3d 739, 742-743 (2007) ("Normally, an issue not preserved at trial is deemed to be waived."). As noted by the ICA, although initially all parties raised concerns about the trial court's jury procedure, following Ines's counsel's suggestion regarding how to proceed, Petitioner did not voice any further concerns or objections to the trial court's modified jury procedure. See, Opinion at 14-17. Here, Petitioner's trial counsel expressed satisfaction with the procedure which was agreed upon by the parties and did not convey any concern that Petitioner would be negatively impacted by it. Under these circumstances, Respondent submits this issue should be deemed waived by this Honorable Court. Fagaragan, *supra*.

Moreover, Petitioner mischaracterizes the circuit court's jury procedure as empaneling an anonymous jury and relies upon State v. Samonte, 83 Hawai'i 507, 928 P.2d 1 (1996). However, as pointed out in Respondent's AB, the trial court's redaction of telephone numbers and street addresses in the instant case is more akin to the procedure followed in State v. Villeza, 85 Hawai'i 258, 942 P.2d 522 (1997) where the Hawai'i Supreme Court held that the trial court did not err in redacting jurors' home street addresses and home/work telephone numbers from the juror qualification forms. The Hawai'i Supreme Court did not regard the partial redaction of jurors' home street addresses and home/work telephone numbers as creating an "anonymous jury" situation. Villeza, 85 Hawai'i at 266, 942 P.2d at 530. The Villeza Court, therefore, concluded that the Samonte analysis was not directly applicable. See, Villeza, 85 Hawai'i at 266, fn. 9, 942 P.2d at 530, fn.9. The Hawai'i Supreme Court held that "no danger to Villeza's right to a presumption of innocence and an impartial jury was created by the redaction of only the street addresses and telephone numbers of potential jurors." *Id*. Furthermore, the Villeza Court concluded that

> . . . [t]his redaction did not "raise the specter" that Villeza was a dangerous person so as to endanger his presumption of innocence. Further, because all other vital information regarding the potential jurors was provided to Villeza, the risk of selecting an impartial jury was kept to a minimum. Thus, even under a *Samonte* analysis, the trial court's redaction would be upheld.

Id. Similarly, this reviewing court should conclude that the trial court's redaction of the jurors' telephone numbers and street addresses from the juror summons card did not create an "anonymous jury" situation. Like in Villeza, the Samonte analysis is not directly applicable here. Of significance, however, Petitioner is unable to show how redacting the jurors' telephone numbers and street addresses from the juror summons cards affected his right to a fair trial.

Likewise, the trial court's referring to the jurors by number and not by name did not create an "anonymous jury" situation because the trial court did not leave the jury with the

impression that they were anonymous to the parties where the trial court informed the jury that their actual names are known to the Court and to the attorneys. Petitioner, nevertheless, claims that the ICA's analysis does not comport with Samonte because the ICA held that the trial court did not articulate a strong reason to believe that the jury needed protection, but concluded that there was no plain error since it took "reasonable precautions to minimize any prejudicial effects on the defendant." Application at 7; Dkt. #3, PDF at 8. First, Respondent points out that during the discussion regarding the trial court's jury procedures the parties acknowledged and agreed with the trial court's reasons for modifying the procedures. Moreover, however, Respondent maintains that the Samonte analysis is not directly applicable here where the parties were provided the names of the jurors as suggested by Ines's counsel. Under the circumstances of this case, Respondent submits this Honorable Court should find that Petitioner's right to a fair trial was not violated, and the circuit court's jury procedure did not constitute plain error.

3. There was no rational basis in the evidence to instruct the jury with respect to the lesser included assault offenses.

In his third question presented to this Court, Petitioner asks, "Whether the ICA gravely erred in holding that the Circuit Court did not err in refusing to instruct the jury on lesser included offenses below the Attempted Murder charge?" Application at 1; JEFS Dkt. #3, PDF at 2. Here, Petitioner fails to demonstrate that the trial court gravely erred in finding that there was no rational basis in the evidence to instruct the jury with respect to the lesser included assault offenses.

In this case, the circuit court refused instructing the jury on the included assault offenses, stating, in pertinent part,

> And the facts in this case that we're dealing with -- the shooting is very similar to that in *Moore*. Multiple shots to the body as well as the failure to render aid. What is distinguishable, however, is according to the testimony provided, is of Mr. Lafoga's stated intention to cause the complaining witness's death.
>
> The Court is also mindful of *State v. Kaeo*, 132 Hawai'i 451 (2014), where Assault 1 can be an included offense to Attempted Murder.
>
> * * * *
>
> In this case, the Court finds that the reasoning in *Kaeo* is not applicable because there is no evidence for the jury to find that Lafoga's intent was to only hurt the complaining witness. As stated, even if there was such testimony, the Court would nevertheless decline an instructing on included offenses. The evidence in this case includes the stated intent to kill, the initial shot to the face, and three more shots to the body where whenever the complaining witness showed any signs of life. And these facts prohibit[] a rational basis to find an alternate mens rea. Simply put, to conclude a state of mind other than the conscious object to cause the death of Kele Stout in this case would beggar belief.

State v. Lafoga, CAAP-20-0000175, 12/3/19 Transcript/JEFS Dkt. #19, PDF at 153-155. Petitioner fails to show that the circuit court erred in finding such. Instead, Petitioner repeats the arguments he presented before the ICA in his OB and RB, claiming that he had "advanced a theory that there may have been a second shooter in the van, based on the testimony that [Petitioner] had told a witness that he and [another male] had taken [the victim] 'up the valley' and that [the other male] had also shot at [the victim], but the rest of the shots were fired by a passenger that [the victim] could not see[.]" Application at 8, Dkt. #3, PDF at 9. However, such claim ignores or overlooks the victim's definitive testimony that the Polynesian male shot him each time and that there was not a third person in the van. See, State v. Lafoga, CAAP-20-0000175, 11/22/19 Transcript/JEFS Dkt. #70, PDF at 156-159; see also, State v. Lafoga, CAAP-20-0000175, 11/25/19 Transcript/JEFS Dkt. #71, PDF at 61. To be certain, a claim that it was possible that a second shooter was hidden in the van and shot the victim is so lacking of support in the evidence or credibility that, significantly, Petitioner's trial counsel never argued or even suggested such at any point during his closing argument. See, State v. Lafoga, CAAP-20-0000175, 12/4/19 Transcript/JEFS Dkt. #55, PDF at 85-96. Consequently, notwithstanding Petitioner's claim to the contrary, the defense did not advance the theory he now claims on appeal. Accordingly, in this case, there was no rational basis in the evidence for a verdict acquitting Petitioner of the offense of attempted murder in the second degree and convicting him of assault in the first degree or assault in the second degree; therefore, Petitioner's instructional claim is without merit.

4. The trial court's extended sentencing jury instruction, which was modeled after HAWJIC 19.3.1A and HAWJIC 19.3.4A, was not prejudicially insufficient, erroneous, inconsistent, or misleading.

In his fourth question presented to this Court, Petitioner asks, "Whether the ICA gravely erred in holding that the jury instructions that referred to the non-extended sentence for Attempted Murder as a "possible life term of imprisonment" was not erroneous?" Application at 2; JEFS Dkt. #3, PDF at 3. Here, once again, Petitioner essentially puts forth the same arguments he raised in his unsuccessful OB and RB before the ICA with regard to this issue. As such, Respondent relies on its response submitted in its AB, as follows:

In the instant case, at the hearing on extended sentencing, the trial court's jury instruction in question, provided, in pertinent part:

> 3. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the sentences for Defendant Brandon Fetu Lafoga in Count 2 from a possible life term of imprisonment to a definite life term of imprisonment, in Counts 4 and 6 from a possible twenty-year term of imprisonment to a possible life term of imprisonment, and in Counts 8 from a possible ten-year term of imprisonment to a possible twenty-year term of imprisonment?

State v. Lafoga, CAAP-20-0000175, 12/6/19 Transcript/JEFS Dkt. #21, PDF at 83. The trial court appears to have modeled its jury instruction relating to extended sentencing after the Hawai‘i Pattern Jury Instructions – Criminal (“HAWJIC”) 19.3.1A with regard to Persistent Offender and HAWJIC 19.3.4A with regard to Multiple Offender. See, HAWJIC 19.3.1A[3] and HAWJIC 19.3.4A[4]; see also, State v. Lafoga, CAAP-20-0000175, 12/6/19 Transcript/JEFS Dkt. #21, PDF at 17 (where the trial court explained, “And the way the interrogatory is drafted tries to boil down the options in its most basic and understandable terms to a layperson. I believe that’s the intent when the HAWJIC committee drafted the language for these enhanced sentencings.”).

Respondent acknowledges that while the HAWJIC “have been approved for publication, the Hawai‘i Supreme Court has not approved the substance of any of the pattern instructions[,]” HAWJIC Introduction, and the appellate courts are not bound by them. State v. Nupeiset, 90 Hawai‘i 175, 181 n. 9, 977 P.2d 183, 189, n. 9 (App. 1999). However, the pattern instructions are instructive, in that they contain general language a court may consider when crafting jury instructions. State v. Hattori, 92 Hawai‘i 217, 221 n. 5, 990 P.2d 115, 119 n.5 (App. 1999). In State v. Toro, 77 Hawai‘i 340, 884 P.2d 403 (App. 1994), the ICA noted that the HAWJIC were “a product of the cooperative effort of judges and attorneys to encompass and to standardize rules of law in jury instructions, [which are] widely used by the circuit courts. However, as a general proposition, the circuit courts are not required to give such instructions.” Toro, 77 Hawai‘i at 348, 884 P.2d at 411. Accordingly, although the appellate courts are not bound by the pattern jury instructions, they are instructive. Nupeiset, *supra*; Hattori, *supra*.

Here, the trial court’s instruction regarding extended sentencing (as well as HAWJIC 19.3.1A and HAWJIC 19.3.4A) correctly informed the jury in basic and understandable terms the effect an extended sentence has on the various terms of imprisonment. Thus, the trial court provided an “understandable instruction that aid[ed] the jury in applying the law to the facts of

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[3] HAWJIC 19.3.1A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant’s sentence from a [possible five year term of imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

[4] HAWJIC 19.3.4A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant’s sentence from a [possible five year term of imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

the case." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998). In this case, the trial court's extended sentence jury instruction, which utilizes the language "possible life term of imprisonment to a definite life term of imprisonment," properly explains in basic and understandable terms the effect an extended sentence has on a life term of imprisonment. Indeed, by referring to the non-extended life term of imprisonment as a "possible life term imprisonment," the trial court's instruction seemingly accounted for the possibility of parole. Inasmuch as the trial court's extended sentencing jury instruction specifically references the possible amount of *imprisonment* that the defendant may serve, Petitioner fails to explain how doing so is erroneous. Additionally, Petitioner fails to suggest what he claims is the proper instruction that the trial court should have provided in lieu of the instruction in question. Of importance, Petitioner fails to demonstrate how such language was erroneous or misleading to a layperson, particularly with respect to the possible term of imprisonment. In failing to do so, Petitioner has failed to demonstrate he was prejudiced. Consequently, Respondent submits there is nothing about the trial court's instruction that is "prejudicially insufficient, erroneous, inconsistent, or misleading." Valentine, *supra*.

5. The trial court did not abuse its discretion in sentencing Petitioner to the extended sentence of life imprisonment without the possibility of parole for the offense of accomplice to attempted murder in the second degree.

In his fifth question presented to this Court, Petitioner asks, "Whether the ICA gravely erred in holding that extended sentencing under H.R.S. § 706-661(1) applies to attempted second degree murder?" Application at 2; JEFS Dkt. #3, PDF at 3. HRS § 706-661 provides, in pertinent part:

> The court may sentence a person who satisfies the criteria for any of the categories set forth in § 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:
>
> (1) For murder in the second degree--life without the possibility of parole;
> (2) For a class A felony--indeterminate life of imprisonment;
> (3) For a class B felony--indeterminate twenty-year term of imprisonment; and
> (4) For a class C felony--indeterminate ten-year term of imprisonment.

A review of HRS § 706-661 reveals that the extended term of imprisonment statute lays out the various extended sentences of imprisonment available to the sentencing court based on the class and grade of the offense, as shown above. In this case, Petitioner claims that HRS § 706-661(1) only applies to murder in the second degree and not to attempted murder in the second degree. OB at 33. However, in so claiming, Petitioner conspicuously overlooks or ignores HRS § 705-502 (2014 Repl.), "Grading of criminal attempt," which states that "[a]n attempt to commit a crime is an offense of the same class and grade as the . . . offense which is attempted." HRS § 705-502. Therefore, based on the plain language of HRS § 705-502, because the offense of

Attempted Murder in the Second Degree is the same class and grade as the offense of Murder in the Second Degree, the extended sentence of "life without the possibility of parole" would apply to it. Consequently, Petitioner's claim is without merit.

III.
CONCLUSION

Based on the foregoing reasons and authorities, Respondent submits Petitioner's Application should not be accepted because he has not demonstrated the ICA committed any "[g]rave errors of law or of fact[]" that dictate the need for further appeal. See, HRS Section 602-59(b). Accordingly, Respondent asks that this Honorable Court reject Petitioner's Application.

Dated at Honolulu, Hawai'i: September 15, 2022.

Respectfully submitted,

STATE OF HAWAI'I
Respondent/Plaintiff-Appellee

By STEVEN S. ALM
Prosecuting Attorney

By /s/ STEPHEN K. TSUSHIMA
Deputy Prosecuting Attorney
City and County of Honolulu

129 Hawai'i 450
Unpublished Disposition
Unpublished disposition. See HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

STATE of Hawai'i, Plaintiff–Appellee,
v.
Rinson PALIC, also known as Johnny Nena and Johnny Neha, Defendant–Appellant.

No. CAAP–11–0000609.
|
June 6, 2013.
|
As Corrected Sept. 13, 2013.

Appeal from the Circuit Court of the First Circuit (CR. NO. 02–1–2327).

Attorneys and Law Firms

Harrison L. Kiehm, on the briefs, for Defendant–Appellant.

Stephen K. Tsushima, Deputy Prosecuting Attorney, City and County of Honolulu, on the briefs, for Plaintiff–Appellee.

NAKAMURA, C.J., and FOLEY, JJ., with REIFURTH, JJ., dissenting separately.

MEMORANDUM OPINION

*1 Plaintiff–Appellee State of Hawai'i (State) charged Defendant–Appellant Rinson Palic (Palic), also known as Johnny Nena and Johnny Neha, by complaint with second-degree robbery (Count 1); promoting a dangerous drug in the third degree (Count 2); and unlawful use of drug paraphernalia (Count 3). The alleged victim and complaining witness for the robbery charged in Count 1 was Thaddeus Pisarek (Pisarek).[1] Pisarek cooperated with the State in the initiation of the robbery prosecution against Palic.

The charges against Palic were originally resolved through a plea agreement in which Palic agreed to plead guilty to the reduced charge of second-degree theft in Count 1 and guilty as charged to Counts 2 and 3. The Circuit Court of the First Circuit (Circuit Court) accepted Palic's guilty pleas and sentenced him to probation. However, Palic subsequently violated the terms of his probation, which resulted in the revocation of his probation and his being resentenced to five years of imprisonment. While incarcerated, Palic filed a post-conviction petition to withdraw his guilty pleas. In support of the petition, Palic asserted, among other things, that he had not been adequately apprised of the immigration consequences of his pleas.

More than five years after Palic had originally pleaded guilty, the Circuit Court granted Palic's motion to withdraw his pleas, vacated his convictions, and set his case for trial. The State moved to continue the trial to secure the presence of Pisarek, who by this time was no longer residing in Hawai'i and who was an essential witness on the second-degree robbery charged in Count 1. The Circuit Court granted the motion, continued the trial, and later excluded a 92–day period of this trial continuance from the speedy-trial computation under Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2000). Additional continuances largely attributable to Palic further delayed the trial for an extensive period of time.

Appendix "A"

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Immediately prior to the jury being sworn, the State moved to *nolle prosequi* Count 1, which the Circuit Court granted. The jury found Palic guilty as charged of Counts 2 and 3. The Circuit Court sentenced Palic to concurrent five-year terms of imprisonment on Counts 2 and 3, with credit for time served. The Circuit Court [2] filed its Judgment of Conviction and Sentence on July 15, 2011 (July 15, 2011, Judgment).

On appeal, Palic argues that: (1) the Circuit Court erred in excluding under HRPP Rule 48(c)(4)(i) [3] a 92–day period that the trial was continued to permit the State to secure its material witness Pisarek; and (2) there was insufficient evidence to convict Palic of Counts 2 and 3. As explained below, we affirm the Circuit Court's July 15, 2011, Judgment.

BACKGROUND

I.

Palic was arrested on October 15, 2002, for second-degree robbery, promoting a dangerous drug in the third degree, and unlawful use of drug paraphernalia. That same day, the arresting officer, Honolulu Police Department Officer Alvin Kahawaii signed an "Affidavit in Support of Warrantless Arrest," which described Officer Kahawaii's basis for believing there was probable cause for each of Palic's [4] arrests and to support the extended restraint of his liberty. Officer Kahawaii stated that he observed Pisarek chasing Palic at the intersection of Pauahi and Bethel Streets; that Pisarek shouted out to Officer Kahawaii that Pisarek had just been robbed; and that Officer Kahawaii and Officer Jack Long gave chase and apprehended Palic. In his affidavit, Officer Kahawaii relied upon information Pisarek provided to Officer Kahawaii during his investigation, including that: Palic had grabbed Pisarek's ten dollar bill that was in front of Pisarek on the bar at Paradise Lost Lounge; that Pisarek followed Palic and attempted to retrieve the money, but Palic punched Pisarek in the mouth with his right fist and fled on foot; and that Pisarek chased Palic and flagged the officers when Pisarek saw them. Officer Kahawaii also stated that during Palic's arrest, a glass pipe with white residue was recovered from Palic's pants pocket, which Officer Kahawaii recognized as a pipe used to smoke crack cocaine that appeared to contain crack cocaine residue. Officer Kahawaii also recovered a ten dollar bill from Palic, which Palic acknowledged belonged to Pisarek.

*2 On October 16, 2002, a judge of the District Court of the First Circuit (District Court) signed a "Judicial Determination of Probable Cause for the Extended Restraint of Liberty of Warrantless Arrestee" regarding each of Palic's arrests.

On October 21, 2002, the District Court held a preliminary hearing on the charges against Palic. Pisarek appeared and testified as a witness for the State. Pisarek testified that while at an establishment called Paradise Lost, he paid for drinks and received change that included a ten dollar bill that was in front of him on the bar; that Palic grabbed Pisarek's ten dollar bill and ran out of Paradise Lost and into a video store; that Pisarek gave chase, caught up to Palic, and demanded that Palic return the money; that Palic punched Pisarek in the mouth with a closed fist and ran away; that Pisarek followed Palic and asked two police officers for assistance; and that the officers stopped Palic and recovered the ten dollars Palic had stolen. Pisarek made an in-court identification of Palic as the person who had taken his money. The State also presented evidence on the drug-related charges. The District Court found that the State had established probable cause and committed the case to Circuit Court.

The State filed its complaint against Palic in Circuit Court on October 23, 2002. On January 27, 2003, pursuant to a plea agreement, Palic pleaded guilty to the reduced charge of second-degree theft as to Count 1 and guilty as charged on Counts 2 and 3. The Circuit Court entered judgment against Palic on April 29, 2003, sentencing him to concurrent five-year terms of probation on each count. Palic subsequently violated the terms of his probation. The Circuit Court revoked Palic's probation and resentenced him on December 13, 2005, to concurrent five-year terms of imprisonment on Counts 1, 2, and 3.

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II.

While incarcerated, Palic learned that federal authorities had placed an immigration detainer on him. On February 10, 2009, Palic filed a petition for post-conviction relief, seeking to withdraw his guilty pleas that were entered on January 27, 2003. Palic claimed that when he entered his guilty pleas, he had not been properly advised of the likelihood that deportation proceedings would be brought against him and that he had valid defenses to the charges which should have been raised. A hearing on Palic's petition set for April 27, 2009, was continued at Palic's request to permit Palic to obtain a transcript of the change of plea hearing and to obtain information from immigration authorities. On June 22, 2009, the Circuit Court held a hearing on Palic's petition, granted the petition, and set trial for the week of August 10, 2009. On July 8, 2009, the Circuit Court issued its written order withdrawing Palic's guilty pleas, vacating his judgment, and setting trial for the week of August 10, 2009.

On August 5, 2009, the State filed a Motion for Continuance of Trial to permit it to secure the presence of Pisarek, an essential witness on Count 1, at trial. In support of the motion, the State submitted the declaration of the Deputy Prosecuting Attorney then handling the case (DPA Young). DPA Young's declaration asserted that the State was utilizing an investigator, Kai Dodson ("Investigator Dodson"), from the Honolulu Prosecutor's Office to attempt to locate Pisarek and serve him with a trial subpoena. Investigator Dodson's efforts eventually led him to contact Mr. Bugarin, a Fireman's Union Port Agent in Wilmington, California ("Agent Bugarin"), from whom Investigator Dodson learned that Pisarek was on a ship at sea and would not return to port for "several weeks." Agent Bugarin was unable to be more specific about the exact date of Pisarek's return. Investigator Dodson asked Agent Bugarin, and Agent Bugarin agreed, to deliver a message to Pisarek to call the Honolulu Prosecutor's Office when Pisarek returned to port.

*3 On August 10, 2009, the Circuit Court held a hearing on the State's motion for continuance. Based on a plea offer extended to Palic by the State, a tentative change of plea hearing had also been scheduled for that date, but Palic advised the Circuit Court that he was rejecting the State's plea offer. [5] The Circuit Court granted the State's motion for continuance and set the trial for November 16, 2009. As a result of numerous additional continuances largely attributable to Palic, including continuances required to determine Palic's competency to proceed and necessitated by two withdrawals and substitutions of Palic's appointed counsel, trial did not begin until July 7, 2011.

In the intervening period, on December 16, 2010, Palic filed a motion to dismiss the complaint with prejudice for violating the time limits set forth in HRPP Rule 48 (Motion to Dismiss). The State filed a memorandum in opposition to the Motion to Dismiss. The State asserted that the period from August 10, 2009, to November 10, 2009, of its requested continuance to secure the presence of Pisarek should be exculuded from the HRPP Rule 48 speedy-trial computation

> as it was determined that the victim in Count I, Thaddeus Pisarek now resides on the mainland (California) and was not available to return to Hawaii for trial as scheduled due to his work as a merchant marine. Pursuant to HRPP Rule 48(c)(4)(i), Mr. Pisarek is a material and necessary witness in the prosecution of Count I, and the State through it'[s] diligence was able to track him down, and even make contact with him while he was at sea. At that point, it appeared that Mr. Pisarek may be willing to participate in the prosecution of this matter, and the State moved the Court for a continuance of the trial in order to try and secure Mr. Pisarek's presence at a future proceeding.

On June 27, 2011, the Circuit Court held a hearing on Palic's Motion to Dismiss. DPA Young, who had been assigned to Palic's case in August 2009 when the State moved for the trial continuance, testified that on June 22, 2009, the Circuit Court allowed Palic to withdraw his guilty pleas and reset the case for trial during the week of August 10, 2009. DPA Young explained that the State, through its investigator, attempted to locate Pisarek at his original 2002 Honolulu address, but determined that Pisarek

was a merchant seaman and had moved to California. Attempts to locate Pisarek in California revealed that he would be out at sea during the period of the scheduled trial. Therefore, the State moved to continue the trial as it "hoped to make the evidence or testimony from [Pisarek] available at some future date," because he was a necessary witness for the robbery charge.

At the same hearing, the deputy prosecuting attorney who had assumed responsibility for the case (DPA Clark) advised the Circuit Court that the State was "still having a very difficult time reaching [Pisarek]" and may not be able to secure his presence at trial. DPA Clark stated that the State's investigator "is having a hard time trying to nail down Mr. Pisa[r]ek as to whether he's on shore or off." Because the State did not have a direct connection to Pisarek, it was working through the merchant marine union to contact him. DPA Clark asserted that "[p]reviously we were able to get in touch with [Pisarek] on the ship ... through [the merchant marine union], so I'm hoping that this means will yield that contact again."

*4 On July 26, 2011, the Circuit Court issued its order denying Palic's Motion to Dismiss, which contained the following relevant findings of fact and conclusion of law:

Findings of Fact

....

11. On August 5, 2009, the State filed a Motion for Continuance of Trial based upon its efforts to locate and subpoena witnesses in the case and determination that the complaining witness for the Robbery in the Second Degree charge was working aboard a ship at sea as of August 3, 2009; would not return to port for "several weeks;" and the Fireman's Union Port Agent Robert Bugarin, located in Wilmington, California, did not know specifically when the complaining witness would return to port.

12. Hearing on the State's Motion for Continuance of Trial was had on August 10, 2009, when a tentative Change of Plea was scheduled based on a plea offer extended by the State but which the Defendant rejected at that hearing. The court granted the State's Motion for Continuance of Trial and, at the State's request, set trial for November 16, 2009....

....

CONCLUSIONS OF LAW

....

4. From August 10, 2009, to November 10, 2009, 92 days elapsed, but the State's continuance was necessitated by an unavailable material witness—the complaining witness in Count [1]—as to whose location the State had exercised due diligence, who had been located but who was working on a ship at sea, and as to whom there were reasonable grounds to believe that the witness would become available to testify. Thus, the 92 days are excluded under [HRPP] Rule 48(c)(4)(i).

III.

Palic's trial commenced on July 7, 2011. The State was unable to obtain Pisarek's presence and moved to *nolle prosequi* Count 1 just prior to the jury being sworn. The Circuit Court granted the motion. With respect to Counts 2 and 3, the State presented evidence that police officers involved in Palic's arrest recovered a pipe with cocaine residue from Palic's pocket. Officer Kahawaii testified that during a search incident to arrest, Palic disclosed that he was in possession of a crack pipe, stating, "eh, I get crack pipe." Officer Spencer Andersen read portions of his police report into evidence, as past recollection recorded, which showed that Officer Anderson had recovered a glass pipe containing a black and white powdery substance, along with a lighter from Palic. The State presented evidence regarding the chain of custody for the pipe and the results of a chemical analysis, which revealed that the residue found inside the pipe contained cocaine.

Palic did not testify or call any witnesses. His main theory of defense was that because of the age of the case, the witnesses did not have a present recollection of their actions and therefore there was insufficient evidence and a reasonable doubt regarding his guilt. Palic also argued that the absence of the glass pipe due to its destruction prior to trial created a reasonable doubt. The jury found Palic guilty as charged on Counts 2 and 3.

DISCUSSION

I.

*5 Palic argues that the Circuit Court erred in excluding the 92–day period from August 10, 2009, to November 10, 2009, during which the trial was continued to permit the State to secure the presence of Pisarek. Palic contends that contrary to the Circuit Court's ruling, this period was not properly excludable under HRPP Rule 48(c)(4)(i) and, if included in the speedy-trial computation, resulted in the State violating the HRPP Rule 48 time limits. We review the trial court's factual findings in ruling on a motion to dismiss under HRPP Rule 48 for clear error and its determination of whether those facts fall within HRPP Rule 48's exclusionary provisions *de novo*. *State v. Samonte,* 83 Hawai'i 507, 514, 928 P.2d 1, 8 (1996).

HRPP Rule 48(c)(4)(i) excludes from speedy-trial computation the period of a continuance that 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[.]" Palic argues that the Circuit Court erred in excluding the 92–day period under HRPP Rule 48(c)(4)(i) because "[t]here was no evidence based on reasonable grounds that [Pisarek] was ever personally contacted and may become 'available at a later date.' " We conclude that the Circuit Court did not err in excluding the 92–day period.

It is not clear from Palic's argument whether he is claiming that the State failed to exercise due diligence to obtain Pisarek's presence at trial prior to the requested continuance. If Palic is making such a claim, it is without merit. The record reveals that Palic had originally pleaded guilty and was sentenced in 2003. Thus, the State had no reason to keep in contact with Pisarek. However, on June 22, 2009, the Circuit Court orally ruled that it was granting Palic's petition to withdraw his guilty pleas and setting the case for trial during the week of August 10, 2009, and it filed a written order memorializing its ruling on July 8, 2009. The State assigned an investigator with the Honolulu Prosecutor's Office to locate Pisarek. The investigator attempted to locate Pisarek at his last known 2002 Honolulu address, learned that Pisarek was a merchant seaman and had moved to California, located him through a union agent as being aboard a ship at sea, determined that Pisarek was not expected to return to port until after the scheduled trial, and arranged through the agent to have Pisarek contact the Honolulu Prosecutor's Office once he returned. Palic does not indicate, under the circumstances, what more the State could have or should have done. We conclude that the State exercised due diligence to locate Pisarek and secure his presence prior to requesting the trial continuance.

We also conclude that there were "reasonable grounds to believe" that Pisarek and his testimony would be available at a later date within the meaning of HRPP Rule 48(c)(4)(i). We must evaluate whether this requirement of HRPP Rule 48(c)(4)(i) was satisfied based on the information reasonably available to the Circuit Court and the State at the time the Circuit Court granted the State's motion for continuance on August 10, 2009. Prior to the Circuit Court's ruling on the State's continuance motion, the record shows that Pisarek had cooperated with the State in the prosecution of Palic. Pisarek requested the assistance of the police in apprehending Palic. Pisarek then provided information to the police in its investigation of Palic, and Pisarek testified for the State as a witness at the preliminary hearing held on the charges against Palic. At the time the Circuit Court ruled on the State's motion for continuance, there is nothing in the record to suggest that Pisarek would not continue to cooperate with the State in its prosecution of Palic.

*6 As noted, the Circuit Court orally granted Palic's petition to withdraw his guilty pleas on June 22, 2009, and set the case for trial during the week of August 10, 2009. Prior to filing its motion for a continuance on August 5, 2009, the State had been able to locate Pisarek through a union agent, determine that he was at sea but would return to port at a later date, and obtain assurances that the union agent would deliver a message to Pisarek to call the Honolulu Prosecutor's Office when Pisarek returned to port. Because Pisarek was at sea, the State was limited in its ability to directly communicate with Pisarek and obtain definitive information regarding his availability prior to filing its continuance motion on August 5, 2009, and the Circuit Court's ruling on the motion on August 10, 2009.[6] Under these circumstances, we hold that the Circuit Court did not err in concluding that there were reasonable grounds to believe that Pisarek would become available to testify at a later date.

II.

Palic contends that there was insufficient evidence to support his convictions on Counts 2 and 3. Palic does not contest the "competency" of the evidence presented at trial, but argues that it was insufficient because no physical evidence of the pipe (which had been destroyed) was presented; testimony concerning the recovery of the pipe was inconsistent; and due to the passage of time, the witnesses had difficulty specifically recalling the actions they had taken.

In evaluating the sufficiency of the evidence on appeal, we must consider the evidence in the light most favorable to the State. *State v. Richie*, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." *Id.* (block quote format and citation omitted). Applying the appropriate standard of review, we reject Palic's claim that the evidence was insufficient.

CONCLUSION

We affirm the July 11, 2011, Judgment of the Circuit Court.

Dissenting Opinion by REIFURTH, J.

*6 While I agree that there was substantial evidence to support Palic's conviction, I would not reach this question because, contrary to the majority's conclusion, I believe his conviction should be vacated on speedy trial grounds. The majority's conclusion—that there were <u>reasonable grounds to believe</u> that Pisarek would later be present at trial—is simply unsupported by the underlying facts. I, therefore, respectfully dissent.

The majority relies upon Pisarek's original cooperation with the police to establish "reasonable grounds to believe" that Pisarek and his testimony would be available at a later date within the meaning of HRPP Rule 48(c)(4)(i). Mem. Op. at 10–11. Pisarek's original, and only, assistance with this case, however, came in 2002, within days of Palic's alleged offense. It was not for another seven <u>years</u> that the question of whether Pisarek's presence could be secured at trial arose. In light of such temporal separation, I find Pisarek's original assistance to be irrelevant to the question of whether he would be so amenable seven years later.

*7 Moreover, at the time of the continuance, Pisarek was no longer local. As best the prosecution could determine, as ascertained through an intermediary, Agent Bugarin, Pisarek was out at sea and not expected to return for several weeks time. Furthermore, he was not returning to Hawai'i, but to somewhere in California, an ocean away.

In the State's efforts to locate Pisarek, the only certainty is that the State left a message with Agent Bugarin; all else, however, is at best vague or speculative. Agent Bugarin could only say that Pisarek was expected to return in "several weeks" time.[1] The record is vague as to whether Agent Bugarin ever even spoke to Pisarek, but even if he did, the content of any such

communication was never established.[2] Further, there is no evidence of precisely where Pisarek would return ashore, and it is entirely speculative whether he would remain ashore for any meaningful length of time.

In the end, the State's—and the majority's—argument is tied not to any legitimate expectation but, rather, to several speculative contingencies. Would Pisarek receive the message left for him with Agent Bugarin? Would he be inclined to respond after so long?[3] Most dubiously, would Pisarek be both available and willing to take time to travel overseas to help prosecute a ten-dollar robbery that occurred seven years earlier?

Whatever "reasonable grounds to believe" means, it must mean something more definite than an attenuated hopefulness. For example, a witness's demonstrated and contemporaneous willingness to testify, *see* *State v. Ferraro,* 8 Haw.App. 284, 298–99, 800 P.2d 623, 631–32 (1990), the predictability of a witness's return from a temporary absence, *see* *State v. Ahlo,* 79 Hawai'i 385, 393–94, 903 P.2d 690, 698–99 (App.1995), or the reliability of a witness's whereabouts for purposes of service, *see State v. Filoteo,* No. 29921, 2011 WL 2126149, at *2 (Haw.Ct.App. May 25, 2011), may suffice.

But I find it wholly inadequate to predicate any likelihood of securing the presence of an overseas witness, whose current employment involves some degree of extended travel, and whose interest in assisting the prosecution is utterly unknown and unpredictable, at trial in Hawai'i upon no more than a phone message left with a third party who promises to pass along the message seven years after the offense.

Therefore, I respectfully dissent.

All Citations

129 Hawai'i 450, 303 P.3d 1227 (Table), 2013 WL 2450841

Footnotes

1 It appears that Pisarek's name was misspelt as "Pisanek" in the complaint and in certain other parts of the record. To avoid confusion, we will use "Pisarek" when referring to the complaining witness for the charged robbery.

2 The Honorable Karen S.S. Ahn presided over the proceedings relevant to this appeal.

3 HRPP Rule 48(c)(4)(i) provides:

> **(c) Excluded Periods.** The following periods shall be excluded in computing the time for trial commencement:
>
> ...
>
> (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[.]

4 Palic was identified in Officer Kahawaii's affidavit by the alias "Johnny Nena."

5 According to the Circuit Court's minutes, the State advised the Circuit Court that the plea offer would remain open until "the complainant is flown in for trial."

6 We note that Hawaii Revised Statutes § 836–3 (1993) establishes procedures by which witnesses from another state may be summoned to testify in Hawai'i in a criminal prosecution.

1 What formed the basis for Agent Bugarin's expectation is not made clear, although while discussing Pisarek's unavailability for the 2011 trial, the State clarified that Agent Bugarin's role was to "log[ ] the different merchant marines' trips out because they handle the insurance matters and things like that."

2 In its January 26, 2011 memorandum in opposition to Palic's Motion to Dismiss, the State represented that it had been "able to track [Pisarek] down, and even make contact with him while he was at sea." Later, in 2011, when the State was discussing Pisarek's unavailability for the continued trial, the State asserted: "[p]reviously we were able to get in touch with him on the ship, and that was through [Agent Bugarin], so [we're] hoping that this means will yield that contact again." If there were more specific facts regarding the nature or substance of Agent Bugarin's contact with Pisarek, it is reasonable to expect that the State would have presented them below.

3 Indeed, there is no indication that Pisarek ever received the State's message or contacted the State in response. Ultimately, the State had to *nolle prosequi* the robbery charge.

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SCWC-20-0000175

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

<table>
<tr><td>STATE OF HAWAI‘I,

Respondent/Plaintiff-Appellee,

vs.

BRANDON FETU LAFOGA,

Petitioner/Defendant-Appellant,

and

RANIER INES, also known as Schizo,

Defendant-Appellee.</td><td>CASE NO. 1PC161001176

RESPONSE TO PETITIONER/DEFENDANT-APPELLANT’S APPLICATION FOR WRIT OF CERTIORARI

INTERMEDIATE COURT OF APPEALS

HONORABLE LISA M. GINOZA
Chief Judge
HONORABLE KATHERINE G. LEONARD
HONORABLE KAREN T. NAKSONE
Associate Judges</td></tr>
</table>

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, one (1) copy of the **Response to Petitioner/Defendant-Appellant’s Application for Writ of Certiorari** was served by electronic notification through JEFS to the following:

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Attorney for Petitioner/Defendant-Appellant

/s/ STEPHEN K. TSUSHIMA
Deputy Prosecuting Attorney
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