

CONCURRING AND DISSENTING OPINION BY GINOZA, C.J.

With regard to the points of error raised on appeal by Defendant-Appellant Christopher Hiram Himan (Himan), I agree with the majority that those issues are not meritorious. However, I respectfully dissent from the majority reaching the issue decided in State v. Choy Foo, 142 Hawai'i 65, 414 P.3d 117 (2018), because Himan did not raise that issue in this case, either in the Circuit Court of the Third Circuit (circuit court) or in this appeal. Specifically, Himan has not asserted that, for purposes of speedy trial under Hawai'i Rules of Penal Procedure (HRPP) Rule 48, the circuit court should have excluded the period between his initial court appearance and a continued hearing, during which he was referred to the Office of the Public Defender for representation.

Himan made his first court appearance in this case on May 28, 2014, without counsel, during which the circuit court referred him to the Office of the Public Defender and a further hearing for arraignment and plea was scheduled for July 23, 2014. There was a period of fifty-six days between May 28, 2014 and July 23, 2014 (Continued Arraignment Period). After subsequent proceedings, Himan eventually filed a motion to dismiss on March 23, 2016, which was based in part on HRPP Rule 48. Himan's motion to dismiss specified the periods that he asserted should be included for purposes of the speedy trial calculation under HRPP Rule 48, and he did not assert that the Continued Arraignment Period should be included. Further, at a hearing on May 4, 2016, regarding the motion to dismiss, the State took the position that the Continued Arraignment Period was excluded under HRPP Rule 48, and Himan's counsel agreed. In its "Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss for Violation of HRPP Rule 48, and for Unconstitutional Violation of Speedy Trial Rights" (Order Denying Motion to Dismiss), the circuit court determined that the Continued Arraignment Period was excluded. Himan does not challenge this part of the circuit court's ruling on appeal.

As set forth in HRPP Rule 48, the requirements for speedy trial under the rule must be invoked by "motion of the defendant[.]" See also State v. Lindsey, No. 30390, 2013 WL 2383005, at *1 (Hawai'i App. May 31, 2013). By failing to raise an issue about the Continued Arraignment Period in the circuit court, Himan waived any claim to relief under HRPP Rule 48 for such period. Cf. State v. Kikuta, 125 Hawai'i 78, 89, 253 P.3d 639, 650 (2011) (noting the "well-settled maxim that 'the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal.'" (quoting State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990)); State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992) ("Our review of the record reveals that Ildefonso did not raise this argument at trial, and thus it is deemed to have been waived.").

In Choy Foo, the defendant filed a motion to dismiss and specifically challenged whether a twenty-one day period between his initial court appearance and a continued hearing, during which he was referred to the Office of the Public Defender, should be included in calculating speedy trial under HRPP Rule 48. 142 Hawai'i at 68, 414 P.3d at 120 (noting that the only time frame in dispute was the twenty-one day period). The defendant in Choy Foo thus raised the issue by motion under HRPP Rule 48.

For the reasons set forth above, I respectfully concur in part and dissent in part. I would affirm the Judgment of Conviction and Sentence entered on July 19, 2016.

Eric W. King