

NO. 28987

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MICHAEL CHANG, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 07-1-1190)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley and Leonard, JJ.)

Defendant-Appellant Michael Chang (Chang) appeals from the Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit (circuit court).¹

On November 8, 2007, a jury convicted Chang of Count I, Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (Supp. 2006); Counts II, III, and IV, Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2008); Count V, Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993); Count VI, Promoting a Dangerous Drug in the Fourth Degree, in violation of HRS § 712-1246.5 (1993); and Count VII, Driving Without a License, in violation of HRS § 286-102 (Supp. 2004). The circuit court sentenced Chang to ten years of imprisonment on Count I; five years of imprisonment for each of Counts II, III, IV, and V; and one year of imprisonment for each of Counts VI and VII. The circuit court further sentenced Chang, as a repeat offender, to a mandatory minimum term of imprisonment of three years and four months on Count I and a mandatory minimum term imprisonment of one year and eight months on each of Counts II, III, and IV. The circuit court ordered

¹ The Honorable Karl K. Sakamoto presided.

that Count I was to run consecutively to Count II and Counts III through VII were to run concurrently with each other and with Counts I and II.

On appeal, Chang contended (1) the circuit court erred by not dismissing the charges pursuant to Rule 48 of the Hawai'i Rules of Penal Procedure (HRPP) and (2) the imposition of consecutive terms requires a jury finding under State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007), and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007).

On June 25, 2009, this court, by Summary Disposition Order (SDO), affirmed the Amended Judgment of Conviction and Sentence. On September 23, 2009, Chang filed an Application for Writ of Certiorari, which the Hawai'i Supreme Court accepted on November 2, 2009.

In its November 2, 2009 Summary Disposition Order, the supreme court vacated this court's SDO and Judgment on Appeal, remanded the case to this court with instructions to remand to the circuit court for entry of appropriate findings of fact and conclusions of law and a written order disposing of Chang's HRPP Rule 48 motion, and order the parties to submit additional briefs on the findings of fact and conclusions of law.

The circuit court having issued findings of fact and conclusions of law; the parties having submitted additional briefs pursuant to the November 2, 2009 supreme court Summary Disposition Order; and this court having carefully considered the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Chang's point of error as follows:

(1) On May 14, 2007, Chang's counsel orally requested that the charges against Chang be dismissed. In the written order prepared by Chang's counsel, it states that Chang moved the circuit court to dismiss the charges. Dismissal of charges with or without prejudice is at the discretion of the circuit court.

State v. Jackson, 81 Hawai'i 39, 54-55, 912 P.2d 71, 86-87 (1996).

Contrary to Chang's claim, HRPP Rule 48(b)(2) applies. The circuit court dismissed without prejudice the charges against Chang upon his motion. The State re-filed the same charges against Chang on June 27, 2007. Chang's trial commenced on October 31, 2007. Six months had not elapsed between the re-filing of the charges and Chang's trial. Therefore, the circuit court did not err by denying Chang's oral motion to dismiss pursuant to HRPP Rule 48.

(2) Chang's claim that his consecutive sentences without a jury finding of fact violated Maugaotega and Cunningham is without merit. The Hawai'i Supreme Court has held that the imposition of consecutive sentences does not require a jury to make findings of fact. State v. Kahapea, 111 Hawai'i 267, 279-80, 141 P.3d 440, 452-53 (2006).

Therefore,

The Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 22, 2010.

On the briefs:

Joseph R. Mottl
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

Since Discussion section has been changed for SDO, it has not been cite/record checked in this bench memo - it's here merely for background.

BENCH MEMORANDUM

Defendant-Appellant Michael Chang (Chang) appeals from the Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit (circuit court).² **RA at 157**

On November 8, 2007, a jury convicted Chang of Count I, Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (Supp. 2006); Counts II, III, and IV, Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2008); Count V, Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993); Count VI, Promoting a Dangerous Drug in the Fourth Degree, in violation of HRS § 712-1246.5 (1993); and Count VII, Driving Without a License, in violation of HRS § 286-102 (Supp. 2004). **RA at 157** The circuit court sentenced Chang to ten years of imprisonment on Count I; five years of imprisonment for each of Counts II, III, IV, and V; and one year of imprisonment for each of Counts VI and VII. **Id.** The circuit court further sentenced Chang to a mandatory minimum term of imprisonment of three years and four months as a repeat offender on Count I and a mandatory minimum term imprisonment of one year

² The Honorable Karl K. Sakamoto presided.

and eight months on each of Counts II, III, and IV. **Id.** The circuit court ordered that Count I was to run consecutively to Count II and Counts III through VII were to run concurrently with each other and with Counts I and II. **Id.**

On appeal, Chang contends (1) the circuit court erred by not dismissing the charges pursuant to Rule 48 of the Hawai'i Rules of Penal Procedure (HRPP) **OB at 9-11** and (2) imposition of consecutive terms requires a jury finding under State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007), and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007). **OB at 11-13**

I. BACKGROUND

On June 20, 2005, Chang was arrested on suspicion of committing Counts I through VII. **RA Cr. No. 05-1-1303 (RA 1303) at 6-17** On June 27, 2005, Chang was charged by complaint in Cr. No. 05-1-1303 with committing Counts I through VII. **RA 1303 at 1-3**

On May 14, 2007, the circuit court held a hearing on the State's Motion to Continue Trial. **TR 5/14/07 at 2** The State represented that a police officer was unavailable for trial, the officer would testify about the chain of custody of evidence, and the officer was an essential witness for trial because Chang would not stipulate to chain of custody. **Id. at 2-3** Chang's defense counsel objected and stated "we move to dismiss with prejudice and would object to any other disposition other than trial beginning now or dismissal with prejudice. We would object

to a dismissal without prejudice." **Id. at 4** The circuit court denied the State's Motion to Continue Trial and dismissed the charges against Chang without prejudice. **Id. at 4** On May 29, 2007, the circuit court entered the Order Dismissing Complaint Without Prejudice (Order), dismissing without prejudice all the charges against Chang. **RA 1303 at Doc. 29** The Order was prepared by Chang's counsel and stated: "Defendant, Michael Chang, through his attorney, Joseph R. Mottl, moved the Court to dismiss the Complaint with prejudice on grounds that the State of Hawaii was not ready to begin trial on the morning of scheduled jury selection." **RA 1303 at Doc. 29** Chang did not appeal the dismissal without prejudice of the charges against him.

On June 27, 2007, Chang was indicted in Cr. No. 07-1-1190 for the same seven counts. **RA at 1-3** On October 30, 2007, Chang filed a Memorandum in Support of Oral Motion to Dismiss Indictment for Violation of Rule 48, HRPP. **RA at 54-63** Chang asserted that on October 23, 2007 he had orally moved to dismiss the charges on grounds that 292 days had expired from the date of his arrest. **RA 07 at 55**

Immediately prior to the start of trial on October 31, 2007, Chang orally renewed his motion to dismiss the charges pursuant to HRPP Rule 48. **TR 10/31/07 at 3** Chang claimed that the time period since Chang's arrest to present constituted over 180 days and therefore the charges should be dismissed. **Id. at 4-5** The State argued that HRPP Rule 48(b)(2) applied and that

since the indictment had been filed on June 27, 2007, six months had not elapsed. **Id. at 5-6** The State denied that it had made a previous motion to dismiss the charges in Cr No. 05-1-1303, it asserted that Chang had made the motion to dismiss the charges, and the State had only objected to dismissal with prejudice if the circuit court was inclined to dismiss the charges. **Id. at 6** The circuit court orally denied Chang's motion to dismiss the charges and stated: "The court agrees with the State for the reasons set forth." **Id.**

A jury convicted Chang as charged and the circuit court sentenced Chang as stated above. Chang timely filed this appeal.

II. STANDARD OF REVIEW

HRPP Rule 48

We review a trial court's denial of a Hawai'i Rules of Penal Procedure (HRPP) Rule 48 motion to dismiss under both the "clearly erroneous" and "right/wrong" tests:

A trial court's findings of fact (FOFs) in deciding an HRPP 48(b) motion to dismiss are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed. However, whether those facts fall within HRPP 48(b)'s exclusionary provisions is a question of law, the determination of which is freely reviewable pursuant to the "right/wrong" test.

State v. Samonte, 83 Hawai'i 507, 514, 928 P.2d 1, 8 (1996) (quoting State v. Hutch, 75 Haw. 307, 328-29, 861 P.2d 11, 22 (1993)).

Sentencing

[A] sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for

sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision.

Factors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions. And, generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000) [.]

State v. Kahapea, 111 Hawai'i 267, 278, 141 P.3d 440, 451 (2006) (citations and brackets omitted).

III. DISCUSSION

A. The Circuit Court Did Not Err By Denying Chang's Motion To Dismiss Pursuant To HRPP Rule 48

Chang claims the circuit court erred by denying his Motion to Dismiss pursuant to HRPP Rule 48. Chang claims the charges were dismissed at the request of the State, therefore HRPP Rule 48(b)(2) does not apply. Contrary to Chang's claim, the State did not request that the charges be dismissed, rather Chang requested that the charges be dismissed. Therefore, HRPP Rule 48(b)(2) does apply.

HRPP Rule 48 states in part:

Rule 48. DISMISSAL.

(a) By prosecutor. The prosecutor may by leave of court file a dismissal of a charge and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(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; or
- (2) from the date of re-arrest or re-filing of the charge, in cases where an initial charge was dismissed upon motion of the defendant; or (3) from the date of mistrial, order granting a new trial or remand, in cases where such events require a new trial.

Clauses (b)(1) and (b)(2) shall not be applicable to any offense for which the arrest was made or the charge was filed prior to the effective date of the rule.

On May 14, 2007, Chang's defense counsel orally requested that the charges be dismissed. **[TR 5/14/07 at 3-4]** In the written order prepared by Chang's defense counsel, it states that Chang moved the court to dismiss the charges. **[RA 05 at document 29]** Dismissal of the charges with or without prejudice is at the discretion of the circuit court. State v. Jackson, 81 Hawai'i 39, 54-55, 912 P.2d 71, 86-87 (1996). It is not significant that Chang only requested that the charges be dismissed with prejudice and the circuit court dismissed the charges without prejudice. If Chang disputed the dismissal of the charges without prejudice instead of with prejudice, he should have appealed the circuit court's May 29, 2007 order in Cr. No. 05-1-1303 because it was a final appealable order. Chang did not do so. Therefore, Chang may not argue in this appeal that charges should have been previously dismissed with prejudice and that he did not request dismissal of the charges.

Contrary to Chang's claim, HRPP Rule 48(b)(2) applies. The circuit court previously dismissed the charges against Chang

without prejudice upon his motion. Charges against Chang were re-filed on June 27, 2007. Chang's trial commenced on October 31, 2007. **[TR 10/31/07 generally]** Six months had not elapsed between the re-filing of the charges and Chang's trial. Therefore, the circuit court did not err by denying Chang's Motion to Dismiss pursuant to HRPP Rule 48.

B. Consecutive Sentencing Claim

In his Opening Brief, Chang claimed that his consecutive sentences violated Maugaotega, supra, and Cunningham, supra. In his Reply Brief, Chang conceded that his argument concerning his consecutive sentencing claim was rendered null in part. However, in his Reply Brief, Chang asserted a new ground for challenging his mandatory minimum sentences because they appear to run consecutively. **[RB at 4]** Chang belatedly claims that his mandatory minimum sentences may not be imposed consecutively, citing State v. Cornelio, 84 Hawai'i 476, 935 P.2d 1021 (1997) in support of his argument. Chang argues that the Amended Judgment "can be clearly interpreted as issuing consecutive mandatory minimum terms in Counts 1 and 2." **[RB at 4]**

The Amended Judgment states:

Mandatory minimum terms as a repeat offender:
Three (3) years and four (4) months in Count 1;
One (1) year and eight (8) months each count in Counts 2, 3, and 4
Incarceration:
Ten (10) years in Count 1; Five (5) years each count in Counts 2, 3, & 4; Five (5) years in Count 5, One (1) year each count in Counts 6 and 7, with Counts 1 and 2 to run consecutively to one another and with remaining counts running concurrently w/one another and with Counts 1 and 3;

This sentence shall run consecutively to any other term that the defendant is currently serving; Credit given for time already served; Mittimus to issue immediately.

[RA 07 at 157]

We agree that consecutive mandatory minimum sentences may not be imposed in connection with the same multi-count indictment. See Cornelio, 84 Hawai'i at 480, 935 P.2d at 1025. However, a plain reading of Amended Judgment does not require imposition of consecutive mandatory minimums sentences for the multi-count indictment for which Chang was convicted. Even if the language of the Amended Judgment is ambiguous, Chang cannot prove that consecutive mandatory minimum sentences have actually been imposed and that his sentence is illegal. Chang also raised this issue in his Reply Brief. Thus, the State was not afforded an opportunity to state whether the Amended Judgment imposed a consecutive mandatory minimum sentence. Therefore, Chang's point of error is dismissed without prejudice to raising the issue in petition pursuant to HRPP Rule 40.

IV. CONCLUSION

The Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit is affirmed.