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NO. CAAP-15-0000564

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
ROBERT Y. GIERHART, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HONOLULU DIVISION)  
(CASE NO. 1DTA-14-00816)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Robert Y. Gierhart (Gierhart) appeals from a Notice of Entry of Judgment and/or Order and Plea/Judgment filed on July 8, 2015 in the District Court of the First Circuit, Honolulu Division (District Court), convicting him of Operating a Vehicle Under the Influence of an Intoxicant (OVUII) under Hawaii Revised Statutes (HRS) §291E-61(a)(1) and (a)(3), based on a prior ruling by the District Court<sup>1</sup> that denied Gierhart's motion to dismiss for violation of Hawaii Rules of Penal Procedure (HRPP) Rule 48.

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<sup>1</sup> The Honorable David W. Lo presided.

On appeal, Gierhart contends that: (1) the District Court erred in determining that exceptional circumstances existed to continue the trial based on court congestion and thus not counting the period against the State under HRPP Rule 48 and, where the continuance based on court congestion resulted in violation of HRPP Rule 48, in failing to dismiss the case for such violation; and (2) if the court congestion issue is deemed waived for failure of trial counsel to object, counsel was ineffective.

Plaintiff-Appellee State of Hawai'i (State) does not dispute that the District Court failed to articulate exceptional circumstances supporting exclusion under HRPP Rule 48 based upon court congestion. The State instead argues that the continuance for court congestion was effected through Gierhart's consent where he did not object, and, as to ineffective assistance of counsel, an HRPP Rule 40 proceeding is more appropriate for trial counsel to provide the basis for his actions.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised therein, as well as the relevant case law and authority, we resolve Gierhart's points of error as follows:

(1) Under HRPP Rule 48(c)(2), "periods that delay the commencement of trial and are caused by congestion of the trial docket when the congestion is attributable to exceptional circumstances" are excluded in computing the time for trial commencement. The District Court ruled that the eighty-five-day

period between September 15, 2014 and December 9, 2014 was excluded due to exceptional and extraordinary circumstances where "the State was ready on both cases each time, and witnesses are present for the State" and ruled that the case would be "congested out," and further determining that the "[t]ime does not run against the State."

A trial court's findings of fact (FOFs) in deciding an HRPP Rule 48(b) motion to dismiss, are subject to the clearly erroneous standard of review. However, whether those facts fall within HRPP Rule 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. Diaz, 100 Hawai'i 210, 216-17, 58 P.3d 1257, 1263-64 (2002) (citation and ellipses omitted).

The District Court erred when it concluded that exceptional and extraordinary circumstances existed based on the State being ready for trial and court congestion and, therefore, improperly excluded the eighty-five days under HRPP Rule 48. As set forth in HRPP Rule 48(c)(2), a period is excluded when congestion of the trial docket is due to exceptional circumstances. "In order for court congestion to qualify as 'exceptional,' as opposed to usual, there must be a showing of deviation from the norm." State v. Caspino, 73 Haw. 256, 257, 831 P.2d 1334, 1335 (1992).

The Hawaii Supreme Court has held for purposes of HRPP Rule 48(c)(2) that there were exceptional circumstances causing court congestion in circumstances far different than this case. See State v. Baron, 80 Hawai'i 107, 110, 905 P.2d 613, 616 (1995) (finding exceptional circumstances when two judges were reassigned, one judge retired, one judge was temporarily assigned

to another court, potential replacement judges were on vacation, and there was a marked increase in jury trial demands); State v. Herrera, 63 Haw. 405, 407, 629 P.2d 626, 628 (1981) (finding exceptional circumstances when the normal condition of the trial court's criminal division was affected because two of the four judges submitted their resignations and their workload was reduced so they could complete prior assignments, replacement judges were in place at different times, the number of judges was increased due to the workload, a newly assigned criminal judge had a limited schedule in order to complete his family court cases, new judges had limited assignments to familiarize themselves with the assignments, and there was an increase in the number of indictments from fifteen to twenty-one cases per week to twenty-three to twenty-five cases per week); State v. Lord, 63 Haw. 270, 273, 625 P.2d 1038, 1040 (1981) (holding that court congestion was caused by exceptional circumstances when there were two judges to handle both criminal and civil cases and defendant's trial was continued because there was "an inordinate number of criminal indictments returned by the grand jury"). The instant case is unlike Baron, Herrera, and Lord. Here, the record does not reflect any exceptional circumstance meeting the requirements of HRPP 48(c)(2). Therefore, it was error for the District Court to exclude the eighty-five-day period.

We agree in part, however, with the State's argument that there was consent by Gierhart's trial counsel. Under HRPP 48(c)(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" are excluded.

(Emphasis added). Although informed of the continued trial date, Gierhart's trial counsel did not object when apprised of the new date, the District Court's determination of exceptional and extraordinary circumstance due to court congestion, or that the continuance would not be counted against the State. Although trial counsel later objected to the District Court's determination, at that point the Rule 48 time period had already lapsed, and such objection was untimely. In this circumstance, we conclude that Gierhart's trial counsel effectively consented to the period that delayed trial. Based on such consent, we conclude that the District Court did not err in denying the motion to dismiss for violation of Rule 48.

(2) The standard for claims of ineffective assistance of counsel on appeal is whether, "viewed as a whole, the assistance provided was 'within the range of competence demanded of attorneys in criminal cases.'" Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (citation and brackets omitted).

General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting the defendant's case and it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then it will be evaluated as information that an ordinarily competent criminal attorney should have had.

Id. (ellipses and brackets omitted; emphasis in original)

(quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)). However, "[i]f the record is unclear or void as to the basis for counsel's actions, counsel shall be given the

opportunity to explain his or her actions in an appropriate proceeding before the trial court judge." Briones, 74 Haw at 463, 848 P.2d at 977 (1993) (citation omitted). Here, the record is unclear as to the basis for counsel's actions. "Normally, a [HRPP] Rule 40 hearing is the proper vehicle for ineffective assistance of counsel claims." State v. Brantley, 84 Hawai'i 112, 122, 929 P.2d 1362, 1372 (App. 1996), as amended (Nov. 26, 1996). In this case, we conclude that an HRPP Rule 40 hearing would be the appropriate vehicle to address an ineffective assistance of counsel claim.

For these reasons, the District Court's Notice of Entry of Judgment and/or Order and Plea/Judgment filed on July 8, 2015 is affirmed, without prejudice to Gierhart filing a petition pursuant to HRPP Rule 40 to allege ineffective assistance of trial counsel.

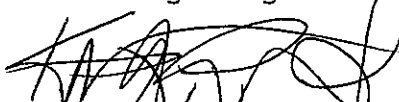
DATED: Honolulu, Hawai'i, June 29, 2016.

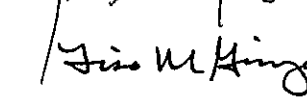
On the briefs:

Jonathan Burge,  
for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge