

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

In my view, the Fifth Circuit's calendar call procedure, during which the court discharged Visintin's bail bond and announced that he was free to leave, was effectively and in substance a "dismissal of the charge" for purposes of Hawai'i Rules of Penal Procedure (HRPP) Rule 48. This tolled the running of the Rule 48 speedy trial clock. After the calendar call, there was no charge pending against Visintin, he was not subject to bail conditions, and there was no restraint on his liberty. Because I believe the Circuit Court correctly ruled that the speedy trial clock was tolled during the period between the calendar call and the subsequent filing of the charge against Visintin, I respectfully dissent from the majority's decision to vacate Visintin's conviction based on a violation of Rule 48. I concur in the result reached by the majority on the other issues presented.

I.

On the day of his arrest, Visintin's bail was set at \$10,000. Visintin posted bail the same day by paying a "bondsman approximately \$1,000 as a cost of posting the bail bond." Visintin's bail papers directed him to appear in the District Court of the Fifth Circuit on September 5, 2012. It appears that Visintin was made aware that the State of Hawai'i (State) would not be filing a complaint against him prior to his scheduled appearance date. On August 31, 2012, Visintin's retained counsel emailed the assigned Deputy Prosecuting Attorney (DPA) and asked whether the State would be filing a complaint and the matter would proceed as scheduled on September 5th. The DPA responded that no complaint had been filed. This meant that Visintin's case would not appear on the regular calendar, but would be placed on the calendar call list.^{1/}

^{1/} Under established court procedures in the Fifth Circuit, a complaint had to be filed a week before the scheduled first appearance date for the case to be placed on the regular calendar. If no complaint was filed by this deadline, the case was placed on the calendar call list.

Visintin did not appear in court on September 5, 2012, as directed by his bail papers. On that date, Visintin's case was called and his bail bond was discharged pursuant to the Fifth Circuit's "calendar call" system. At this proceeding, the court announced that for individuals (like Visintin) on the calendar call list, no charges had yet been filed, they were free to go, any cash bail posted would be refunded, and any bail bonds would be discharged.

Visintin did not remain in Hawai'i but returned to his home in Montana. On April 25, 2013, nine months after his arrest, a State Grand Jury returned an indictment against Visintin charging him with Place to Keep Pistol or Revolver (Count 1), and Unregistered Firearm (Count 2). Pursuant to a plea agreement, Visintin entered a conditional plea of no contest to Count 1, and Count 2 was dismissed.

II.

A.

In my view, the Fifth Circuit's calendar call procedure is effectively a dismissal of the charge by the prosecutor and thus excludable under HRPP Rule 48(c)(6). To me, whether the calendar call procedure constitutes a "dismissal of the charge" under Rule 48(c)(6) presents the question of whether substance should prevail over form. Because in substance the calendar call procedure has the same effect as the "dismissal of a charge" for Rule 48 purposes, the period between the calendar call and the subsequent filing of a charge is properly excluded from the Rule 48 speedy trial computation. I would therefore affirm the Circuit Court's denial of Visintin's claim that Rule 48 was violated in his case.

Rule 48(c)(6) excludes from the speedy trial computation "the period between a dismissal of the charge by the prosecutor to the time of arrest or filing of a new charge, whichever is sooner, for the same offense." The Hawai'i Supreme Court has stated that "the provisions of Rule 48(c)(6) are clear and unambiguous, and [] they exclude the period between the

dismissal of the charge and the indictment." State v. Balauro, 73 Haw. 70, 73, 828 P.2d 267, 268 (1992).

Although the court apparently does not utter the words: "The case is dismissed" during the calendar call proceeding, the effect of the court's actions is the same as a dismissal. The court announces that individuals on the calendar call list have not been charged, that they are free to go, that any cash bail posted will be refunded, and that any bail bonds will be discharged. The effect on the arrested person is the same as if the case was dismissed -- there is no pending charge and no restrictions on the person's freedom. As the Circuit Court observed in denying Visintin's motion to dismiss, "The purpose of the [calendar call procedure] is to get cases on calendar so that defendants who have been arrested know that their case is not active and is being dismissed."

B.

I am not persuaded by Visintin's contention that the calendar call procedure does not satisfy the requirements of Rule 48(c)(6) of "a dismissal of the charge by the prosecutor." Because the calendar call procedure is an established Fifth Circuit procedure that has been used on Kaua'i for many years, the prosecutor knows that there is a deadline of one week before the arrested person's scheduled first appearance to file a formal charge in a charging document against the arrested person. The prosecutor also knows that the failure to meet this deadline will result in the "dismissal" of the charge -- after the calendar call, the State will not be allowed to proceed with a prosecution of the arrested person on the crime for which the person was arrested. Therefore, by not filing a charging document by the established deadline, the prosecutor knows that such conduct will effectively lead to the dismissal of the charge.

In my view, it would make no sense to insist that the State must charge the arrested person and then dismiss the charge at the initial hearing to fall within the scope of Rule 48(c)(6).

I suspect that most arrested persons would prefer not being formally charged to being charged by indictment or other charging instrument. Thus, the arrested person would presumably be better off if he or she is released at the calendar call without a formal charge being filed than being released after formally charged through an indictment or other charging instrument that is subsequently dismissed.

The calendar call procedure does not impose any additional burdens on the arrested person when compared to the filing of a formal charging document and a dismissal at the first appearance. Given its long-standing use, criminal defense counsel should be aware that under the calendar call procedure, the State's failure to formally charge an arrested person by the one-week-before-the-scheduled-first-appearance deadline meant that the arrested person was free to go, no charge had yet been filed and no charge was pending, and any bail would be returned and any bail bond would be discharged. This was apparently the message conveyed to Visintin's retained counsel through his email exchanges with the DPA, when the DPA informed Visintin's counsel, less than a week before trial, that no complaint had been filed against Visintin.

Visintin asserted that the State did not provide him with notice that the bail bond he posted would be discharged at the calendar call. However, if he had appeared in court as directed by his bail papers on September 5th,^{2/} he would have heard the court call his name at the calendar call and inform him that any bail bond he posted was being discharged. Thus, any lack of notice regarding the discharge of Visintin's bail bond was due to his failure to appear in court as directed by his bail papers. Presumably, the reason Visintin did not appear in court

^{2/} Visintin's bail bond directed him to appear in court on September 5, 2012 at 8:00 a.m. In signing the bail bond, Visintin agreed to comply with various conditions, including: "I must appear in person for all court hearings, including the [September 5, 2012] hearing set forth above. If I fail to appear, my release will be revoked, a bench warrant will be issued for my arrest, and I may be charged for bail jumping or contempt of court."

was that his lawyer, familiar with the calendar call procedure including the discharge of any posted bail bond, told Visintin that he did not need to appear because no charge had been filed against him.

With respect to posting bail, Visintin was in the same position after the calendar call that he would have been in if the State had charged him and then dismissed the charge at his first appearance. Visintin posted a bail bond after his arrest so he could be released from custody prior to his first appearance. The posting of this bond was necessary to secure his release from custody regardless of whether he was formally charged before his scheduled first appearance. Like the discharge of his bail bond at the calendar call, the dismissal of a formal charge at Visintin's first appearance would have resulted in the discharge of his bail bond. When Visintin was arrested after his indictment, it was necessary for him to again post bail to obtain his release post-indictment. But, that would also be true if the State had formally charged him and dismissed the charge at his first appearance -- after his subsequent arrest on the indictment, Visintin would have to post bail to obtain his release post-indictment.^{3/}

C.

If the State had formally charged Visintin with Place to Keep Pistol or Revolver before his first appearance, and then dismissed that charge at his first appearance, the time between the dismissal and Visintin's subsequent indictment would have been excluded under Rule 48(c)(6) from the speedy trial computation.^{4/} Just like the dismissal of a formal charge, after

^{3/} Visintin notes that he was inaccurately characterized as a "fugitive from justice" in the complaint filed by Montana authorities to obtain a Montana warrant to secure his arrest after he was indicted in Hawai'i. However, there is nothing in the record to indicate that Hawai'i authorities were responsible for any inaccurate information in the Montana complaint.

^{4/} Visintin does not contend that a dismissal by the prosecutor of the felony charge of Place to Keep Pistol or Revolver at his first appearance would have resulted in a dismissal with prejudice.

Visintin's calendar call, he was free to go, there was no charge pending against him, his bail bond was discharged, he was not subject to bail conditions, and there was no restraint on his liberty. Because in substance and effect, the calendar call procedure constituted "a dismissal of the charge" for purposes of Rule 48(c)(6), I would affirm the Circuit Court's denial of Visintin's motion dismiss his indictment on Rule 48 grounds. With respect to the other issues presented, I concur in the result reached by the majority opinion.

Craig H. Nakamura