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SCWC-15-0000950
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,
Respondent/Plaintiff-Appellant,

vs.

ALIK LUKE,
Petitioner/Defendant-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000950; 1PC15100589)

DISSENT OF McKENNA, J., IN WHICH WILSON, J., JOINS

I respectfully dissent from the rejection of the defendant's certiorari application from the April 17, 2020 published opinion of the Intermediate Court of Appeals in State v. Luke, 147 Hawai'i 126, 464 P.3d 914 (App. 2020).

The certiorari application arises from the ICA's opinion vacating the circuit court's dismissal with prejudice of defendant's burglary related charges after a mistrial. The mistrial had been caused by the deputy prosecuting attorney's improper references in rebuttal closing argument to matters the circuit court had ruled inadmissible and that had therefore not been received in evidence. After the mistrial, the circuit

court granted defendant's motion to dismiss based on its analysis of the six factors laid out by this court in State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982):

(1) the severity of the offense charged; (2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; (3) the character of prior trials in terms of length, complexity and similarity of evidence presented; (4) the likelihood of any substantial difference in a subsequent trial, if allowed; (5) the trial court's own evaluation of relative case strength; and (6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

65 Haw. at 56-57, 647 P.2d 705 at 713.

On appeal, the State contended the circuit court erred in dismissing the case with prejudice. The State asserted error in some of the circuit court's findings of fact and conclusions of law, as well as its evaluation of the Moriwake factors. Luke, 147 Hawai'i at 129, 464 P.3d at 917. The ICA vacated the circuit court's dismissal order on the grounds the circuit court "erred in its analysis in precluding surveillance videos taken at the residence Luke [was] alleged to have burglarized[,] and "[i]n turn, because the Circuit Court relied heavily on the State's failure to obtain admission of those surveillance videos in ruling under Moriwake to dismiss this case with prejudice," "the Circuit Court abused its discretion in dismissing th[e] case with prejudice." Luke, 147 Hawai'i at 129, 464 P.3d at 917. The ICA remanded the case to the circuit court "for further

consideration of the Moriwake factors in light of [its] opinion.”
Luke, 147 Hawai‘i at 144, 464 P.3d at 932.

I believe certiorari should be accepted for numerous reasons.

First, despite recognizing that trial court decisions regarding whether or not to dismiss an indictment with prejudice are to be given deference, the ICA vacated, ruling that in evaluating the Moriwake factors, the circuit court “relied heavily on the State’s inability to admit the Shimoda videos into evidence to justify its decision to dismiss the case with prejudice.” Luke, 147 Hawai‘i at 143-44, 464 P.3d at 931-32.

As argued by the defendant, however, this ICA ruling is erroneous. The circuit court did not rely heavily on the State’s inability to admit the Shimoda videos in granting the dismissal with prejudice. The circuit court actually relied heavily on factor 6, the professional conduct and diligence of the attorneys stating:

As to factor 6, the professional conduct and diligence of the attorneys: The Court found this factor to weigh most heavily against a retrial and for dismissal, and noted that the Prosecuting Attorney did not act diligently in this trial, particularly given his many years of experience. The State seemed unprepared to present its evidence and it struggled throughout with laying foundation. The State did not present sufficient evidence to support the drug charges in this case. Furthermore, the State should absolutely not have made the rebuttal arguments that caused the mistrial, as they were clearly in violation of the Motions in Limine and the Court’s ruling after the voluntariness hearing. There were other ways to respond to the Defense argument that would not involve introducing new evidence or violating Court rulings. Additionally, if the State had approached prior to rebuttal argument and asked the Court

to find that the Defense had opened the door somehow for the State to introduce evidence in its closing argument that the Defendant made statements or was the origin of the Cousin Jeff information, or that the Defendant's statements were not worthy of belief, the Court would have absolutely prohibited the State from doing so. Considering that the Court's rulings on the evidence were clear and made close in time to the State's violation, the fact that the Prosecutor has a great deal of experience and should have known better, and the late stage in the case at which the State's conduct occurred, the State's lack of diligence and/or professionalism in this case causes the Court to strongly favor a dismissal over a retrial in analyzing this factor.

Thus, the ICA ruling that the circuit court relied heavily on the State's inability to admit the Shimoda videos in granting the dismissal with prejudice was erroneous.

Second, the ICA opinion raises questions regarding applicable standards of review, which should be addressed and clarified. The State contended that the circuit court's finding of fact 11, "During the trial the State also attempted to introduce two video recordings from Complainant Kyle Shimoda's security camera, but was unable to lay foundation for them during a hearing outside the presence of the jury[,] " was erroneous. The ICA then noted that questions regarding whether necessary foundation has been laid are governed by the abuse of discretion standard, and that a trial court's determination would not be overturned "absent a showing of clear abuse." Luke, 147 Hawai'i at 137, 464 P.3d at 925. The ICA stated, however, that the circuit court "erred in its analysis in precluding surveillance videos taken at the residence Luke [was] alleged to

have burglarized[,]” and “[i]n turn, because the Circuit Court relied heavily on the State’s failure to obtain admission of those surveillance videos in ruling under Moriwake to dismiss this case with prejudice,” “the Circuit Court abused its discretion in dismissing th[e] case with prejudice.” Luke, 147 Hawai‘i at 129, 464 P.3d at 917.

The ICA opinion therefore contains confusing language that seemingly conflates various standards of review. At minimum, the issues of the appropriate standards of review should be clarified.

Third, the ICA opinion allows appellate courts to review Moriwake motions based strictly on allegations of trial court “error” or “abuse of discretion” regarding foundational requirements for the admission of evidence. The ICA ruled as follows:

Given our conclusion above that the Circuit Court erred in its analysis in precluding the Shimoda Videos, we further conclude the Circuit Court abused its discretion in dismissing this case with prejudice for the reasons it relied upon. Given our discussion about the foundation needed for admissibility of the Shimoda Videos, any perceived unfairness caused to Luke from a retrial is not as severe, because there was sufficient evidence presented by the State for the Circuit Court to have admitted the Shimoda Videos. Thus, the Circuit Court’s reasoning in analyzing the Moriwake factors was incorrect.

Luke, 147 Hawai‘i at 144, 464 P.3d at 932.

Moriwake factors are applied to address concerns regarding the integrity of the judicial process, not to address whether there was “error” or an “abuse of discretion” in evidentiary

foundation issues. Decisions on whether or not to dismiss a case with or without prejudice after mistrials should not become avenues for reviewing trial court evidentiary rulings. As we stated in Moriwake, just before setting out the six factors to be considered by a trial court in determining whether to dismiss a case after a mistrial:

[W]e are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:

Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the discretion of the prosecutor must be subject to the power and responsibility of the court.

In considering whether such power and responsibility were properly exercised, we in turn will accord deference to the conclusion of the trial court for much the same reason that we will seldom question the propriety of a hung jury mistrial declaration. But we think that the magnitude of the respective interests of society and of criminal defendants which are implicated in this area of the law requires that we more fully delineate the parameters within which this discretion is properly exercised.

Moriwake, 65 Haw. at 56, 647 P.2d at 712 (citations omitted).

As argued by the defendant, the ICA opinion vacating the circuit court's dismissal with prejudice was based on its erroneous analysis that the circuit court relied heavily on the Shimoda videos. But the ICA opinion also opens the door to appeals of trial court rulings on Moriwake motions based on alleged "errors" or "abuses of discretion" in trial court evidentiary rulings. Thus, although I agree with the ICA that

the circuit court erred in ruling the Shimoda videos were not properly authenticated, this was not an issue that the ICA should have reviewed in this appeal of a Moriwake motion.

Fourth, certiorari should also be accepted because the ICA also erred in its analysis regarding the possible bases for authentication of the Shimoda videos. The ICA ruled, "In this case, regarding the Shimoda Videos, HRE Rule 901(b)(9) is applicable, rather than HRE 901(b)(1)." Luke, 147 Hawai'i at 138, 464 P.3d at 926. The ICA then adopted the "silent witness" rule of authentication adopted by some other jurisdictions, which had not been argued or briefed by the parties. Luke, 147 Hawai'i at 138-40, 464 P.3d at 926-28.

As also argued by the defendant, standard HRE Rule 901 authentication methods govern. HRE Rule 901(a) provides that the requirement of authentication can be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. HRE Rule 901(b) then starts with the phrase, "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:[.]" Thus, HRE Rule 901 allows for authentication through various methods, and the illustrated methods in subsection (b) are not intended to be "limitation[s]."

Contrary to the ICA's ruling limiting authentication to HRE Rule 901(b)(9), surveillance videos can also be authenticated under HRE 901(b)(1).¹ Other jurisdictions have allowed surveillance videos to be authenticated by 901(b)(1). See, e.g., Bunch v. State, 123 So.3d 484 (Ct. App. Miss. 2013); State v. Ollison, 78 N.E.3d 254 (Ct. App. Ohio 2016).

Also, as noted, the ICA adopts a "silent witness," rule, which, as argued by the defense on certiorari, was not necessary, as HRE Rule 901 provides for methods of authentication. Also, to the extent the ICA refers to HRE Rule 901(b)(9) as a "silent witness" method of authentication, it adds an unnecessary construct that could cause confusion as to whether a "witness" is actually necessary. Thus, I would accept certiorari to clarify that HRE Rule 901(b)(9) is not necessarily a "silent witness" rule.

Fifth, I would accept certiorari to address the meaning of the fourth Moriwake factor, "the likelihood of any substantial difference in a subsequent trial" in the context of this case. Moriwake addressed the issue from the perspective of whether dismissal was proper after two hung juries. In this

¹ As noted in the ICA opinion, the ICA had previously held in an April 4, 2019 summary disposition order in State v. Hufanga that a surveillance video was properly authenticated by 901(b)(1). Luke, 147 Hawai'i at 138, 464 P.3d at 926. In addition, surveillance videos could perhaps also be authenticated under the general rule of HRE 901(a) by the homeowner's testimony that a surveillance video is what it purports to be. At minimum, we should accept certiorari to address the possible methods of authentication.

case, the mistrial was based on prosecutorial misconduct, and the jury never deliberated. It is therefore unclear what "substantial difference in a subsequent trial" means here. The ICA characterized the "difference" as the possible admission of the Shimoda videos in a retrial. Yet, the mistrial was due to prosecutorial misconduct, not due to a hung jury. Thus, it is not possible to know whether the jury would have been hung despite those videos not being admitted into evidence. Therefore, certiorari should be accepted to address what the fourth Moriwake factor means when a mistrial is caused by prosecutorial misconduct and not by a hung jury.

Finally, I would accept certiorari because the ICA remanded the case to the circuit court "for further consideration of the Moriwake factors in light of [its] opinion." Luke, 147 Hawai'i at 144, 464 P.3d at 932. In doing so, the ICA also completely vacated the presiding judge's findings of fact and conclusions of law. Luke, 147 Hawai'i at 146, 464 P.3d at 933. Thus, it is unclear how, on remand, a new judge should evaluate the Moriwake factors. It appears that the new judge would need to review the record as well as all transcripts of the proceedings and enter its own findings of fact and conclusions of law as long, as they are not inconsistent with the ICA's rulings on specific findings of fact. It therefore appears the new judge could independently address the reasons given by the

trial judge for the mistrial and dismissal with prejudice. At minimum, however, I would accept certiorari to provide such guidance.

DATED: Honolulu, Hawai'i, September 3, 2020.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

