

NO. 22444

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant

v.

BARDWELL EBERLY, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 97-2172)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Plaintiff-Appellant State of Hawai'i (the State) appeals from the "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION BY DEFENDANT[-APPELLANT BARDWELL] EBERLY [(Eberly)] TO DISMISS INDICTMENT FOR PRE-INDICTMENT DELAY" (the Dismissal Order), entered by the Circuit Court of the First Circuit (the circuit court) on April 8, 1999.

The State claims that the circuit court erred in entering the Dismissal Order, thereby dismissing the indictment against Eberly, because the circuit court misapplied the standard for dismissing a charge for pre-indictment delay. We agree.

In Conclusions of Law Nos. 3, 4 and 5 of the Dismissal Order, the circuit court determined that:

3. In the instant case, [Eberly] established prejudice, although not very high, due to loss of potential witnesses and loss of physical evidence.

4. The State's explanations for pre-indictment delay of two years, one month, and eighteen days was not compelling.

5. This balance, when coupled with active attempts by [Eberly] to negotiate a plea and given the relative simplicity of the case, established the grounds for the trial court to grant, with prejudice, [Eberly's] Motion to Dismiss.

Because the circuit court did not require Eberly to establish "substantial prejudice" to his right to a fair trial before balancing the alleged prejudice to Eberly against the State's reasons for the delay, as required by State v. Carvalho, 79 Hawai'i 165, 170, 880 P.2d 217, 222 (App. 1994), and State v. English, 61 Haw. 12, 17 n.8, 594 P.2d 1069, 1073 n.8 (1979), and because the record reveals that Eberly failed to show the substantial prejudice required for a dismissal for pre-indictment delay, we vacate the circuit court's Dismissal Order and remand for further proceedings.

DATED: Honolulu, Hawai'i, July 27, 2000.

On the briefs:

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Chester M. Kanai
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