

SUPREME COURT OF HAWAI‘I

State v. Wong

97 Hawai‘i 512, 40 P.3d 914 (2002) · No. Nos. 22671, 23151 · Decided February 22, 2002

SUMMARY

The Supreme Court of Hawai‘i reviews the dismissal of indictments arising from alleged misconduct involving Bishop Estate transactions. The court holds that the prosecution was required to obtain judicial review of attorney-client privilege issues before presenting arguably privileged testimony to the grand jury, and that the presentation and bolstering of such testimony undermined the fairness and integrity of the grand jury proceedings. It affirms the dismissals and remands for entry of dismissal orders with prejudice.

CASE DETAILS

COURT	Supreme Court of Hawai‘i
WRITING FOR THE COURT	Per Curiam; Masuoka, Acting Chief Justice; Ibarra, Acting Justice; Kochi, Acting Justice; Raffetto, Acting Justice; Chang, Acting Justice
JURISDICTION	Hawaii
DECIDED	February 22, 2002
DOCKET	Nos. 22671, 23151
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The State appealed from circuit court orders dismissing indictments against the defendants after finding prosecutorial misconduct in grand-jury proceedings involving attorney-client privilege, improper bolstering of testimony, failure to obtain judicial review of privilege issues, and omission of clearly exculpatory testimony.
STANDARD OF REVIEW	A trial court's decision to dismiss an indictment is reviewed for abuse of discretion. The appellant bears the burden of establishing abuse of discretion, and a strong showing is required.
PRECEDENTIAL VALUE	Published and precedential Supreme Court of Hawai‘i opinion.
PARTIES	State of Hawai‘i v. Richard Sung Hong Wong, Mari Stone Wong, Jeffrey R. Stone, Henry Haalilio Peters

TOPICS

grand jury

prosecutorial misconduct

attorney client privilege

appellate procedure

standard of review

PRACTICE AREAS

criminal procedure

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court abused its discretion by dismissing indictments based on prosecutorial misconduct during grand-jury proceedings.
2. Whether a prosecutor seeking to present arguably privileged attorney testimony to a grand jury must provide notice and obtain a preliminary judicial determination of attorney-client privilege and any applicable exception.
3. Whether the State improperly bolstered privileged testimony by presenting it as testimony covered by the crime-fraud exception.
4. Whether the State's presentation of incomplete attorney testimony and restriction of clearly exculpatory witness testimony undermined the fairness and impartiality of the grand jury.
5. Whether dismissal with prejudice was an appropriate remedy for the prosecutorial misconduct.

HOLDINGS

1. When a prosecutor seeks to present arguably privileged testimony before a grand jury, the prosecutor must either give notice to the privilege holder and counsel so that the privilege may be asserted or waived, or, if counsel does not raise the issue, seek a court ruling on the privilege before presenting the testimony.
2. Prosecutorial conduct that prevents the grand jury from exercising fairness and impartiality and induces action other than that warranted by fairly presented evidence is presumptively prejudicial and may require dismissal of the indictment.
3. A prosecutor may not improperly bolster a witness's testimony before the grand jury by emphasizing that the witness is testifying under the crime-fraud exception to attorney-client privilege when the privilege and exception have not been judicially determined.
4. A prosecutor's failure to allow a grand-jury witness to provide testimony that clearly would negate guilt constitutes prejudicial misconduct warranting dismissal of the indictment.
5. Dismissal with prejudice is an appropriate remedy when prosecutorial misconduct in grand-jury proceedings seriously threatens the integrity of the judicial process or clearly denies due process and fundamental fairness.

KEY QUOTATIONS

"In sum, when a prosecutor seeks arguably privileged testimony, the prosecutor must either (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's

counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue.” (923)

“The prosecutor did not allow Okada to testify about his role in making the availability of apartment 1203 known to Stone and Peters.” (928)

“Our duty to administer justice requires that we invoke that authority here to mandate dismissal of these indictments with prejudice.” (929)

“The State's interest in prosecuting these cases is, at this point, clearly outweighed by the lack of fundamental fairness that would ensue were we to allow these prosecutions to continue.” (930)

FACTUAL BACKGROUND

The indictments arose from alleged improper benefits connected to the Kalele Kai leasehold condominium project and transactions involving Bishop Estate trustees and Jeffrey Stone. In the first case, the State presented Stone's former attorney, Richard Frunzi, to the grand jury without prior judicial review of attorney-client privilege and elicited testimony that purportedly fell within the crime-fraud exception. In the second case, the State presented attorney Nathan Aipa's testimony about legal advice concerning an unrelated investment without privilege review and restricted Glenn Okada from explaining that he, rather than Stone, had initiated communications concerning an apartment transaction. The circuit court found that these actions impaired the fairness and impartiality of the grand-jury proceedings.

PROCEDURAL HISTORY

In appeal No. 22671, the circuit court dismissed indictments against Richard Wong, Jeffrey Stone, and Mari Wong without prejudice after the State presented former attorney Richard Frunzi's testimony to the grand jury without notice to Stone or prior judicial review of privilege issues and characterized the testimony as falling within the crime-fraud exception. In appeal No. 23151, the circuit court dismissed counts against Henry Peters and Stone after the State presented attorney Nathan Aipa's testimony without notice or privilege review and restricted witness Glenn Okada from presenting testimony favorable to Stone. The State appealed, and the Supreme Court of Hawai‘i consolidated or jointly considered the appeals, affirmed the dismissals, vacated the without-prejudice limitation, and remanded for dismissals with prejudice.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The circuit court's dismissals are affirmed, but the orders providing that the dismissals were without prejudice are vacated. The circuit court must enter orders dismissing the indictments with prejudice.

CASES CITED

- State v. Chong, 86 Hawai‘i 282, 949 P.2d 122 (1997)
- State v. Klinge, 92 Hawai‘i 577, 994 P.2d 509 (2000)

- State v. Kupihea, 80 Hawai'i 307, 909 P.2d 1122 (1996)
- In re Moe, 62 Haw. 613, 617 P.2d 1222 (1980)
- State v. Joao, 53 Haw. 226, 491 P.2d 1089 (1971)
- State v. Bell, 60 Haw. 241, 589 P.2d 517 (1978)
- State v. Layton, 53 Haw. 513, 497 P.2d 559 (1972)
- United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992)
- United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)
- United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)
- United States v. Chen, 99 F.3d 1495 (9th Cir. 1996)
- DiCenzo v. Izawa, 68 Haw. 528, 723 P.2d 171 (1986)
- Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)
- Sapp v. Wong, 62 Haw. 34, 609 P.2d 137 (1980)
- State v. Pacific Concrete and Rock Co., 57 Haw. 574, 560 P.2d 1309 (1977)
- State v. Mendonca, 68 Haw. 280, 711 P.2d 731 (1985)
- State v. Pulawa, 62 Haw. 209, 614 P.2d 373 (1980)
- State v. Scotland, 58 Haw. 474, 572 P.2d 497 (1977)
- State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982)
- State v. Alvey, 67 Haw. 49, 678 P.2d 5 (1984)
- State v. Lincoln, 72 Haw. 480, 825 P.2d 64 (1992)
- Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)
- United States v. Serubo, 604 F.2d 807 (3d Cir. 1979)

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