

FILED

2007 JUN 29 9:42

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

ARNOLD KYLE NICHOLSON,
Petitioner,

vs.

SUPERIOR COURT OF GUAM,
Respondent,

vs.

PEOPLE OF GUAM,
Real Party in Interest.

Supreme Court Case No.: WRM06-004
Superior Court Case No.: CF0419-05

OPINION

Cite as: 2007 Guam 9

Appeal from the Superior Court of Guam
Argued and Submitted on June 29, 2007
Hagåtña, Guam

2007¹⁴2302

For Petitioner:

Pablo M. Aglubat, *Esq.*
Assistant Public Defender
Public Defender Service Corporation
110 W. O'Brien Dr.
Hagåtña, Guam 96910

For Respondent:

B. Ann Keith, *Esq.*
Staff Attorney
Superior Court of Guam
120 W. O'Brien Dr.
Hagåtña, Guam 96910

For Real Party in Interest:

Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
287 W. O'Brien Dr.
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; ROBERT G.P. CRUZ, Justice *Pro Tempore*.

TORRES, J.:

[1] Arnold Kyle Nicholson (“Nicholson”) petitions this court for a writ of mandamus compelling the trial court to vacate its November 21, 2006 oral ruling and its subsequent written decision and order dated February 1, 2007, and to dismiss with prejudice the charges in Superior Court Criminal Case No. CF0419-05 on the basis of a denial of his speedy trial rights pursuant to 8 Guam Code Annotated § 80.60. The trial court denied Nicholson’s motion to dismiss the superseding indictment for speedy trial violations and relying on the holding in *People v. Ibanez*, DCA 91-0001A, 1992 WL 97221 (D. Guam App. Div. Apr. 16, 1992), held that Nicholson’s statutory speedy trial rights were not violated.

[2] We hold that there was no good cause shown for the delay of Nicholson’s trial and his statutory right to a speedy trial was violated. We therefore grant Nicholson’s Petition for a Peremptory Writ to the extent it requests that the oral ruling and written decision be vacated and Criminal Case No. CF0419-05 be dismissed, but we will not exercise our discretion to decide based on the record before us whether the dismissal should be with or without prejudice. We remand the case to the trial court to vacate its November 21, 2006 oral ruling and its written decision and order dated February 1, 2007 and dismiss the charges in Criminal Case No. CF0419-05.

I.

[3] On November 18, 2005, Nicholson was indicted and charged with Theft by Deception (As a 2nd Degree Felony). At his arraignment Nicholson asserted his right to a speedy trial. A trial setting was held, and trial was set for December 28, 2005. Nicholson then filed a bail

motion for his release, which was denied. On December 14, 2005, Nicholson filed a motion to dismiss the indictment. However, a superseding indictment was filed charging him with two counts of Theft by Deception (As a 2nd degree Felony), one count of Theft of Services (As a 2nd degree Felony) and two counts of Theft by Deception (As a Misdemeanor).

[4] At his subsequent arraignment, Nicholson again asserted his speedy trial rights. Trial on the superseding indictment was set for February 7, 2006. On January 20, 2006, Nicholson filed a second motion to dismiss the superseding indictment for sufficiency of evidence. A hearing on the motion to dismiss was set for February 2, 2006, which hearing was later rescheduled to February 10, 2006. After the hearing on the motion the trial court took the motion under advisement. Nine months later, Nicholson, still incarcerated, filed a motion to dismiss the superseding indictment for speedy trial violations. Nicholson also filed an ex parte motion to shorten the time to hear the motion. The ex parte motion to shorten time was heard on November 21, 2006 and Nicholson requested that the trial court hear his speedy trial motion the same day. After the speedy trial motion was heard on November 21, 2006, the trial court orally denied the speedy trial motion and also denied Nicholson's previous motion to dismiss which it took under advisement on February 10, 2006. A pre-trial conference was scheduled for November 24, 2006 and trial was set for November 28, 2006. After a hearing on November 22, 2006, Nicholson was released from custody and waived his speedy trial rights on November 24, 2006.

[5] On November 22, 2006, Nicholson filed a Petition for Writ of Mandate with this court. The trial court vacated the jury trial scheduled for November 28, 2006 pending the outcome of this court's decision on the writ. On November 27, 2006 an order was entered by this court denying Nicholson's Writ of Mandate because the petition was not verified pursuant to 7 GCA §

31203 (2005). Nicholson later filed a verified Amended Petition for Writ of Mandate on December 1, 2006. Nicholson seeks to vacate both the trial court's oral ruling of November 21, 2006 and its subsequent written decision and order dated February 1, 2007 denying his ex parte motion to dismiss for speedy trial violations and to dismiss with prejudice the charges in Criminal Case No. CF0419-05.

II.

[6] This court has jurisdiction over original proceedings for mandamus pursuant to 7 GCA § 3107(b) and 7 GCA §§ 31202 and 31203 (2005).

III.

[7] A writ of mandate must be issued on the verified petition of the party beneficially interested in all cases where there is not a plain speedy and adequate remedy in the ordinary course of law. 7 GCA § 31203 (2005). The issuance of a writ of mandate is a drastic remedy that should only be employed in extreme or extraordinary situations. *A.B. Won Pat Guam Int'l. Airport Auth. v. Moylan*, 2005 Guam 5 ¶ 10. The decision of whether to issue a writ of mandate lies within the discretion of the court. 7 GCA § 31401 (2005); *Gray v. Super. Ct. (Gray)*, 1999 Guam 26 ¶ 12. A writ of mandate proceeding is an appropriate remedy when challenging a trial court's denial of a motion to dismiss for lack of a speedy trial. *See Carver v. Super. Ct. (People)*, 1998 Guam 23 ¶ 9 (citing *Gill v. Villagomez*, 140 F.3d 833, 835 (9th Cir.1997)).

[8] A trial court's denial of a defendant's motion to dismiss on speedy trial grounds is reviewed for an abuse of discretion. *Gill*, 140 F.3d at 835 (citing *Apusento Garden v. Super. Ct.*, 94 F.3d 1346, 1351 (9th Cir. 1996)). More specifically, *Gill v. Villagomez* requires the issuance of a writ of mandate compelling dismissal on speedy trial grounds when "it 'clearly appears that

there was no good cause shown at the hearing’ and the trial court had a ‘clear positive legal duty [to] dismiss the indictment.’” *Id.* (quoting *People v. Wilson*, 60 Cal. 2d 139 (Cal. 1963)).

[9] Similarly, in *Carver v. Superior Court (People)*, the following factors were used in guiding this court’s discretion:

1) [w]hether the party seeking the writ has no other adequate means, such as direct appeal, to attain the desired relief; 2) [w]hether the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) [w]hether the court’s order is clearly erroneous as a matter of law; 4) [w]hether the court’s order is an oft-repeated error, or manifests a persistent disregard of the rules; and 5) [w]hether the court’s order raises new and important problems, or issues of first impression.

Carver, 1998 Guam 23, ¶ 8 (quoting *People v. Super. Ct. (Quint)*, 1997 Guam 7 ¶ 8) (emphasis added).

IV.

[10] Nicholson requests this court issue a peremptory writ of mandate directing the trial court to vacate its November 21, 2006 oral ruling and its subsequent written decision and order dated February 1, 2007¹ and to dismiss with prejudice the charges in Criminal Case No. CF0419-05. Alternatively, Nicholson requests this court issue an alternative writ directing the trial court to show cause why it should not vacate its oral ruling and written decision and to dismiss the charges in Criminal Case No. CF0419-05.

[11] The issue we must decide is whether the trial court had good cause for failing to commence Nicholson’s trial within the time prescribed in 8 GCA § 80.60 (a)(2).

[12] Title 8 GCA § 80.60 (2005) provides in relevant part:

(a) Except as otherwise provided in Subsection (b), the court shall dismiss a criminal action if:

...

¹ Because the trial court issued its written decision and order after Nicholson filed his Petition, at oral argument Nicholson also requested that the written decision and order be vacated.

(2) The trial of a defendant, who is in custody at the time of his arraignment, has not commenced within forty-five (45) days after his arraignment;

...

(b) A criminal action shall not be dismissed pursuant to Subsection (a) if:

...

(3) Good cause is shown for the failure to commence the trial within the prescribed period.

[13] The interpretation of Section 80.60 was addressed in *People v. Ibanez* by the Appellate Division of the District Court of Guam, which held that “[w]hat constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court.” *People v. Ibanez*, DCA 91-0001A, 1992 WL 97221 at * 2 (D. Guam App. Div. Apr. 16, 1992). There is an abuse of discretion when the trial court “exceeds the bounds of reason, all of the circumstances before it being considered.” *Id.* at *2. Whether there is good cause for delay beyond the time prescribed in the statute depends on the facts and circumstances of each case and is a determination within the discretion of the trial court. *Hollis v. Super. Ct.*, 165 Cal. App. 3d 642, 645 (1985).

[14] In *Ibanez* the court held that delay caused by the conduct of the defendant and delay for the defendant’s benefit constitutes good cause under section 80.60 (b)(3). *Ibanez* at *2. Nicholson argues that the holding in *Ibanez* is limited to the facts of that case and is not the *per se* rule that merely because a defendant files a motion to his benefit that the court is relieved from working diligently from resolving a motion it has taken under advisement. Thus, Nicholson asserts that this court reconsider the holding in *Ibanez*. The delay in *Ibanez* was approximately 244 days and the defendant argued that there was no good cause for the delay. In evaluating whether good cause was shown, the court set out the series of events between the time

of arraignment and the defendant's trial.² Defendant Ibanez filed two motions; the motion to disqualify was decided fourteen days later and the motion to dismiss was decided thirty-two days later. *Id.* at *2 - *3. The court took a similar approach to the federal cases under the Speedy Trial Act and excluded the period of time during which the motions were pending.³ Under the Act the period of time during which non-frivolous motions are pending are automatically excluded. The Act also includes a limitation of thirty days after a motion is taken under advisement, as excludable.⁴

[15] When considering the opinions of the Appellate Division, we stated in *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4, that such opinions do not control our construction of the law but are precedent binding on the trial courts and considered persuasive authority. Case law in existence prior to this court's creation "continues unless and until we address the issues discussed there" and "[w]e will not divert from such precedents unless reason supports such deviation." *Id.*

[16] In *Carver* this court did not find any reason to deviate from *Ibanez*, holding that there was good cause for the delay of petitioner's trial because non-frivolous motions were pending

² The Appellate Division, in determining whether defendant Ibanez's rights were violated, considered the following series of events: (1) a motion to disqualify defense counsel, (2) a stay of mandate, (3) lack of an attorney for defendant, (4) mental evaluation of defendant, (5) defendant's express waiver of his speedy trial rights, and (6) defendant's motion to dismiss the indictment. *Ibanez*, 1992 WL97221 at *2-*4.

³ 18 U.S.C. § 3161(h)(1)(F) provides:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

⁴ 18 U.S.C. § 3161(h)(1)(J) provides:

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

and that his statutory right to a speedy trial was not violated. The delay in *Carver* from the time the motion was filed, heard and resolved was nine days. *Carver*, 1998 Guam 23 ¶ 16. Although we saw no need to reconsider the holding in *Ibanez*, we stated:

It would be a different matter, however, if a court made the assumption that merely because a defendant's statutory right to a speedy trial can be suspended (upon the filing of any pre-trial motion(s) occasioned upon the resolution of meritorious issues of law or those that are made because of palpable pre-trial government misconduct) that it would be relieved from working with prompt diligence to resolve the issue.

[17] Further, we announced:

It would invite this court's review if a lower court were to automatically justify any delay attributable to its consideration of a motion after it has been taken under advisement. The instant case does not require that we consider how much time may elapse after a court has taken a motion under advisement before the delay is no longer justified as "good cause."

Id. ¶ 13 n.2.

[18] We held for several reasons in *Carver* that the petitioner's speedy trial rights were not violated. 1998 Guam 23 ¶¶ 14-16. First, the petitioner filed the motion to dismiss initiating the delay. Second, the motion was to petitioner's benefit because if granted, the motion would result in the dismissal of several charges against him. Third, the trial court worked diligently to promptly dispose of the motion. After the motion was filed the trial court scheduled an expedited hearing five days later and issued its decision four days after that. Finally, the petitioner provided no statutory authority or case law to show that the speedy trial time is not suspended while the court diligently resolves the motion involving the defendant.

[19] *Carver* instructs that we would review the issue of delay after a motion is taken under advisement when it is clear that the trial court automatically justifies "any delay attributable to its consideration of a motion after it has been taken under advisement." *Id.* We did not address in

Carver how much time may elapse after a court has taken a motion under advisement before the delay is no longer justified as good cause. In deciding whether to review the issue of delay, we look first to the facts and circumstances of the case and the underlying reasons for the delay in disposing of the motion.

[20] Nicholson asserted his right to speedy trial when first arraigned on November 23, 2005. On December 14, 2005, Nicholson filed a motion to dismiss the first indictment.⁵ Twenty-one days elapsed from November 23, 2005 to December 14, 2005. Nicholson did not file his second motion to dismiss until January 20, 2006 as a result of the superseding indictment. The second motion was heard on February 10, 2006 at which time the court took the matter under advisement. It was not until November 13, 2006 that Nicholson filed his speedy trial motion. After hearing the speedy trial motion on November 21, 2006 the court orally denied both the motion to dismiss which it took under advisement on February 10, 2006 and the speedy trial motion, thus prompting Nicholson to file his writ of mandate petition with this court. The trial court issued its written decision on the motion to dismiss on November 24, 2006. Then on February 1, 2007 the trial court issued its written decision on the speedy trial motion.

[21] Nicholson contends that the trial court's sole reason for denying his speedy trial motion on November 21, 2006, was because the delay caused by the filing of the motion was for Nicholson's benefit. The record before us does not indicate the reasons the trial court orally denied Nicholson's speedy trial motion. In fact, the trial court did not issue its written decision on the speedy trial motion until February 1, 2007, so Nicholson relied on the trial court's oral ruling when he filed his Petition. In its written decision, the trial court held that the delay was

⁵ Nicholson alleged in the amended petition that he filed a bail motion on December 7, 2005 which was subsequently denied, however, the petition does not state the date the motion was denied.

for good cause and Nicholson was not prejudiced by the delay thus warranting dismissal. People's P. & A. in Opp'n to Am Pet., Ex. 2 (Decision and Order, Feb. 21, 2007). The court found that the time period from Nicholson's second assertion on January 4, 2006 and its decision on November 21, 2006 was 321 days. People's P. & A. in Opp'n to Am Pet., Ex. 2 (Decision and Order, Feb. 21, 2007). Of this number, the court concluded 284 days were excludable from the calculation of time under 8 GCA § 80.60 and thus there were "8 days . . . left in which to bring the [d]efendant to trial."⁶ People's P. & A. in Opp'n to Am Pet., Ex. 2, p. 4 (Decision and Order, Feb. 21, 2007).

[22] In denying Nicholson's speedy trial motion, the trial court relied on the holding in *Ibanez* and excluded the period of time during which Nicholson's motion was pending. Specifically, the court stated "[t]he time calculations in the *Ibanez* case do not differ substantially from the numbers presented in this case, therefore, the Court finds no reason to depart from its binding authority." People's P. & A. in Opp'n to Am Pet., Ex. 2, p. 4 (Decision and Order, Feb. 21, 2007). While the trial court compared the time period of delay in *Ibanez* to this case, it is clear that the facts in *Ibanez* are distinguishable. In *Ibanez*, in determining whether there was good cause, the court considered a series of events which transpired between the arraignment and the commencement of the defendant's trial. 1992 WL 97221 at *2. Although the delay in *Ibanez* was 244 days, the length of time it took for the court to resolve the motions filed by the defendant were not lengthy. Similarly, in *Carver*, the court's action in resolving defendant's motion resulted in a delay of only nine days.

⁶ Twenty-one days elapsed from Nicholson's first assertion until the filing of his first motion to dismiss on December 14, 2005. An additional sixteen days elapsed from his second assertion until the filing of his second motion to dismiss on January 20, 2006. Thus, of the 321 days, thirty-seven days were not excluded by the trial court, leaving eight days left to bring Nicholson to trial.

[23] In this case, other than his speedy trial motion, Nicholson filed two motions to dismiss the first and second indictment. There was no hearing on the first motion because a superseding indictment was filed. The second motion was heard on February 10, 2006 and the court did not rule on the motion until November 21, 2006, while Nicholson was still incarcerated. Unlike *Ibanez*, the length of time it took for the trial court to resolve Nicholson's motion to dismiss was nine months. Moreover, the record does not show whether other events transpired during the time the court took the matter under advisement and the time it ruled on the motion, that is, between February 10, 2006 and November 21, 2006. The trial court failed to provide an underlying reason to show why the pending motion was not resolved until nine months later.

[24] The trial court also stated that "even assuming that the delay in this case constitutes the length of delay which the Supreme Court of Guam contemplated in its footnote in *Carver*, the Defendant alleges no prejudice substantial enough to warrant dismissal of the indictment." People's P. & A. in Opp'n to Am Pet., Ex. 2, (Decision and Order, Feb. 21, 2007). However, where a defendant seeks pretrial relief, he is not "required to affirmatively show that he [has] been prejudiced by the delay." *People v. Johnson*, 606 P.2d 738, 748 (Cal. 1980) (citation omitted). Nicholson filed a pre-trial motion to dismiss and therefore was not required to show prejudice from the delay. Moreover, on pretrial review of whether the trial court abused its discretion, prejudice is presumed by any delay not founded upon good cause. *People v. Wilson*, 383 P.2d 452, 460 (Cal. 1963).

[25] While the determination of good cause lies within the discretion of the trial court, the record should reflect a showing by the trial court that it was diligent in working towards a prompt disposition of the motion. The trial court made no specific or reasonable statements that the motion to dismiss in this case was novel or complex, which may constitute good cause. The

trial court also did not provide any reason why the delay in this case was reasonable or reasonably necessary to the prompt handling of the motion. Although the People argue that the trial court did not automatically justify the delay because of the filing of Nicholson's motion, we cannot on review determine whether the discretion by the trial court in determining good cause was proper, given that the trial court did not provide any substantive reasons for us to consider.

[26] Generally a defendant must accept some reasonable delay as a consequence of filing a motion, but unreasonable delay does not toll the statute. Unlike the Speedy Trial Act, which automatically excludes the period during which pre-trial motions are pending, section 80.60 does not provide such language. Rather, dismissal is mandatory unless good cause is shown. The Speedy Trial Act, however, also includes a limitation of a specified amount of time, after a motion is taken under advisement, as excludable; section 80.60 does not similarly provide an analogous limitation. Section 80.60 was derived from California Penal Code, section 1382 which has been amended since our adoption in 1976. The notes to section 80.60 provide that such section "continues the policy of enforcing specific time limits for filing an information or indictment and commencing trial." Note, 8 GCA § 80.60. The policy underlying the prompt disposition of a criminal trial is also favored by 8 GCA § 80.50 (2005) which provides:

§ 80.50. Criminal Trials Expedited; Precedence.

(a) The welfare of the people of the territory of Guam requires that all proceedings in criminal cases *shall be set for trial and heard and determined at the earliest possible time*, and it *shall* be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. (emphasis added.)⁷

⁷ The policy for the prompt disposition of cases is further supported by 7 GCA § 4101(e)(1) (2005), which was amended to allow for the enactment of rules by this court on case management and disposition of cases within the trial court to include "time frames and deadlines for matters taken under submission to provide speedy and efficient disposition of cases." Under Administrative Rule No. 06-001, this court promulgated an administrative

[27] In reviewing *Ibanez* we note that the delay of 244 days in *Ibanez* did not completely result from the court's disposition of the two motions filed by the defendant but was caused in great part by other events in the case. Moreover, the exclusion of fourteen days for the first motion and thirty-two days for the second motion was a reasonable delay and is distinguishable from this case, where a substantial amount of the delay was a result of the court's disposition of one motion. What is reasonable depends on the facts and circumstances of each case. Where the length of time taken to resolve a motion is inordinate and unreasonable, such time shall not be attributed to the defendant.

[28] We hold that a trial court may not automatically justify any delay attributable to its consideration of a motion after it has been taken under advisement. Rather, good cause for the delay must be apparent on the face of the record. The trial court failed to provide a reason to explain why the motion was not disposed of in a reasonable period. We therefore hold that good cause was not shown for the delay in resolving Nicholson's motion and in bringing Nicholson to trial under the time prescribed in 8 GCA § 80.60. We further find that a defendant is not required to show prejudice from the delay when seeking pre-trial relief.

V.

[29] There was no good cause shown for the delay of Nicholson's trial and his statutory right to a speedy trial was violated. Accordingly, Nicholson's Petition for a Peremptory Writ is **GRANTED** to the extent it requests that the oral ruling and written decision be vacated and Criminal Case No. CF0419-05 be dismissed, but we will not exercise our discretion to decide

rule in accordance with 7 GCA § 4101(e)(1). The administrative rule provided deadlines for all matters taken under advisement by the trial court. The rule provides that where a motion is taken under advisement a decision on the motion must be issued within ninety days. We note however, that this rule was not in effect at the time the trial court took the motion in the instant case under advisement.

based on the record before us whether the dismissal should be with or without prejudice. The case is **REMANDED** to the trial court to vacate its November 21, 2006 oral ruling and its written decision and order dated February 1, 2007 and dismiss the charges in Criminal Case No. CF0419-05. The issue of whether the case should be dismissed with or without prejudice should be decided in the first instance by the trial court.

ROBERT G. CURZ

ROBERT G. CRUZ
Justice *Pro Tempore*

ROBERT J. TORRES, JR.

ROBERT J. TORRES, JR.
Associate Justice

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Chief Justice