NO. 22725

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee

vs.

EDDIE T. KAUPE, Petitioner/Defendant-Appellant

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CASE NO. CT1-3 OF 7/21/99)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

We granted the application for a writ of certiorari herein on March 20, 2001, to vacate that part of the memorandum opinion issued by the Intermediate Court of Appeals (the ICA) in State v. Kaupe, No. 22725, mem. op. (Haw. Ct. App. Feb. 26, 2001) [hereinafter "ICA's opinion"], affirming the conviction of Petitioner/Defendant-Appellant Eddie T. Kaupe (Petitioner) for terroristic threatening in the second degree. While we believe there was substantial evidence to support that conviction, we hold that Petitioner's waiver of his right to a jury trial on that offense was not knowingly, voluntarily, and intelligently made. Additionally, we advise the trial courts with respect to jury trial waivers.

I.

Following a jury-waived trial before the district court of the second circuit (the court), Petitioner was convicted of the offenses of harassment, Hawai‘i Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2000), simple trespass, HRS § 708-815 (1993), and terroristic threatening in the second degree, HRS § 707-717 (1993). Judgment of conviction and sentence was entered on July 21, 1999. Petitioner filed his notice of appeal on July 23, 1999. The appeal was assigned to the ICA on October 21, 1999. The ICA filed its memorandum opinion affirming the convictions on February 26, 2001. Petitioner filed his application for a writ on March 19, 2001.

II.

In his application, Petitioner contends, contrary to the holding of the ICA, that (1) he did not commit terroristic threatening in the second degree because the alleged threat was not "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution," State v. Chung, 75 Haw. 398, 416-17, 862 P.2d 1063, 1073 (1993) (internal quotation marks and citations omitted); and (2) he did not knowingly, intelligently, and voluntarily waive jury trial on the threatening charge.

Because he does not challenge the harassment and the simple trespass convictions, we affirm those convictions.

III.

A.

The evidence with respect to the terroristic threatening charge[1] adduced at Petitioner's July 21, 1999 trial is as follows. On September 22, 1998, Petitioner and his friends, Timothy Kealohanui, Derek Velez, and John Vuich, went to the "Ale House Restaurant" for drinks and "pupus." Complainant Henry H. Stant testified that he had been a professional bouncer and bodyguard for thirteen years and had worked at the Ale House Restaurant for one year. His duties were to "maintain order, check [identification], [and] make sure people don't get drunk and disorderly at the bar and restaurant."

Stant observed and was informed of Petitioner's harassment of an Ale House waitress. He then approached Petitioner's table and told Petitioner that he should leave. According to Stant, Petitioner replied that "he didn't do anything wrong, that he works for the government, that he's a prison guard, that he puts people in jail, that [Stant had] no

[1] Count III of the October 21, 1998 complaint filed against Petitioner charged him "with the intent to terrorize or in reckless disregard of the risk of terrorizing Henry Stant, [did] threaten, by word or conduct, to cause bodily injury to Henry Stant, thereby committing the offense of Terroristic Threatening in the Second Degree . . . ."

right to talk to him like [that] . . . [and he was] not leaving until [he] finished [his] beer."

Testifying for the defense, Vuich reported that Stant then told Petitioner to "follow me" in an "intimidating" fashion. Kealohanui, also a defense witness, contended that Stant had not identified himself as an Ale House employee.

Stant related that he had been wearing a T-shirt that said "Ale House" and an "Ale House" cap. When Petitioner did not get up from the table, Stant grabbed Petitioner's beer, gave it to the bartender, walked back to the table, and informed Petitioner that the police had been called. Petitioner allegedly refused to leave and told Stant that Stant would have to "drag him out of the bar."

As they waited for the police at the table, Petitioner became "more agitated" and, according to Stant, allegedly said, "I got to kill this guy." Stant admitted that he had not been certain that Petitioner's statement, "I got to kill this guy," was directed toward him, but he believed "[Petitioner] was referring to [him]" because the only other people at Petitioner's table were Petitioner's friends. Petitioner's three friends related they did not overhear Petitioner say, "I got to kill this guy." Vuich admitted to having a "slight hearing impairment" which could have prevented him from hearing the statement.

Stant recounted that he "didn't expect [Petitioner] to kill [him; but] maybe throw a punch." However, Stant declared he was "scared" by the comments because he "really believed that [Petitioner] was . . . going [to] engage in some kind of fight or assault." In response to defense counsel's question of whether Stant "really [thought Petitioner] was going to" "kill" him, Stant replied, "Well, I thought he was going to try."

When Petitioner left the table and walked toward the rear exit of the restaurant, Stant followed behind him. Stant "closed the door behind [Petitioner] and . . . walked toward[] the front door. [His] goal was to remove [Petitioner] from the room . . . ." Stant "believe[d] if [Petitioner] was to throw a punch it would be where people couldn't see him do it." As he looked out the window, Stant observed Petitioner "running toward[] the front door [of the restaurant] . . . [to] get to where [Stant] was." The police arrived just as Petitioner opened the front door.

B.

The ICA noted that while Stant sat or stood at Petitioner's table and Petitioner threatened, "I got to kill this guy," Stant could hear the statement, and Petitioner challenged Stant to a fight soon thereafter. The ICA concluded that "the threat to 'kill,' on its face, coupled with the circumstances

. . . rendered the threat unambiguous, unconditional, immediate, specific, imminent -- in short, a true threat." ICA's opinion at 10.

"Terroristic threatening" is defined by HRS § 707-715 (1993) as follows:

> A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:
> (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
> (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of transportation.

(Emphases added.)

Terroristic threatening in the second degree is described in HRS § 707-717 as follows:

> (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.[2]
> (2) Terroristic threatening in the second degree is a misdemeanor.

(Emphasis added.)

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[2] HRS § 707-716 (1993) defines terroristic threatening in the first degree as follows:

> (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
> (a) By threatening another person on more than one occasion for the same or a similar purpose; or
> (b) By threats made in a common scheme against different persons; or
> (c) Against a public servant . . . ; or
> (d) With the use of a dangerous instrument.
> (2) Terroristic threatening in the first degree is a class C felony.

There was, from the foregoing testimony, evidence that Petitioner had, by his words, "I got to kill this guy," threatened bodily injury against Stant within the meaning of HRS §§ 707-715 and 707-717. The court could infer from the circumstances that Petitioner either had the intent to terrorize or made the statement in reckless disregard of terrorizing Stant. "[T]he mind of an alleged offender may be read from his [or her] acts, conduct[,] and inferences fairly drawn from all the circumstances." State v. Jenkins, 93 Hawai'i 87, 106, 997 P.2d 13, 32 (2000) (internal quotation marks and citations omitted).

Petitioner asserts, however, that the court erred in convicting him because, as a matter of law,[3] his statement did not possess the attributes of a "true threat" and was constitutionally protected free speech under the first amendment. See ICA's opinion at 9. Plainly, "'a statement that amounts to a threat to kill . . . would not be protected by the [f]irst [a]mendment.'" Chung, 75 Haw. at 415-16, 862 P.2d at 1072 (quoting Rankin v. McPherson, 483 U.S. 378, 386-87, reh'g denied, 483 U.S. 1056 (1987)) (brackets omitted). However, the prosecution must prove that the words were uttered under circumstances which conveyed a "gravity of purpose and imminent prospect of execution":

[3] In its opinion, the ICA characterizes the question as one of substantial evidence to sustain the conviction.

> The word 'threat' . . . excludes statements which are, when taken in context, not 'true threats' because they are conditional and made in jest (citing Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401 22 L.Ed.2d 664 (1969). . . . Threats punishable consistently with the First Amendment are only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected 'vehement, caustic and unpleasantly sharp attacks . . . .' (Citation omitted.)
>
> . . . Proof . . . focuses on threats which are so unambiguous and have such immediacy that they convincingly *express* an *intention* of being carried out. . . .
>
> . . . So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

Id. at 416-17, 862 P.2d at 1072-73 (quoting United States v. Kelner, 534 F.2d 1020, 1026-27 (2d Cir.), cert. denied, 429 U.S. 1022 (1976)) (brackets omitted) (italicized emphases in original and underscored emphases added) (some ellipsis points in original and some added).

Petitioner argues: (1) that the statement was not unequivocal because "kill" was not used in a literal sense; (2) that his statement was conditional since Stant believed Petitioner would only act "if he had an opportunity" and if there were no people around; (3) that "the statement was not immediate and specific as to Stant"; (4) that the statement did not convey a gravity of purpose and imminent prospect of execution; and (5) that, as "a professionally trained bouncer and bodyguard," Stant should be held to the standard "of a police officer." In

his application, Petitioner maintains that the ICA failed to address the last issue and erred in sustaining the conviction.

IV.

Applying the definition of a "true threat" adopted in Chung, we "[r]esort to legal or other well accepted dictionaries . . . to determine the ordinary meanings of certain terms." State v. Chen, 77 Hawai'i 329, 337, 884 P.2d 392, 400 (App.), cert. denied, 77 Hawai'i 489, 889 P.2d 66 (1994) (internal quotation marks and citations omitted).[4]

We conclude that, as to Stant, the threat was unequivocal.[5] On its face, the words, "I got to kill this guy," are definite and unambiguous.

Second, the threat was unconditional.[6] It was not restricted or qualified in any way.

Third, the threat was immediate.[7] Stant expected a fight to commence after the statement was uttered. When Petitioner walked toward the exit, Stant closed the door behind

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[4] We note that there is no standard jury instruction embodying the definition of a "true threat" as being unequivocal, unconditional, immediate, and specific as to the person threatened.

[5] "Unequivocal" is defined as, "leaving no doubt," "expressing only one meaning," "leading to only one conclusion," "clear," "unambiguous." Webster's Third New Int'l Dictionary 2494 (1961).

[6] "Unconditional" means, "not limited in any way; not bound or restricted by conditions or qualifications." Id. at 2486.

[7] "Immediate" is defined as, "occurring, acting, or accomplished without loss of time"; "made or done at once." Id. at 1129.

him, but Petitioner came running back toward the front door to confront Stant.

Fourth, the threat was specific[8] as to Stant. The reference to kill "this guy" could only have been directed at Stant, who had just ordered Petitioner to leave and informed him that the police had been called.

Thus, under the circumstances, the statement, "I got to kill this guy," manifested an unmistakably grave purpose and imminent prospect of execution rather than one that was conditioned or made in jest. See Chung, 75 Haw. at 416-17, 862 P.2d at 1072-73.

Finally, that Stant was a professional bouncer and bodyguard would have no bearing on the determination of whether the threat was outside the parameters established by Chung. The case of In re Doe, 76 Hawai'i 85, 869 P.2d 1304 (1994), that Petitioner cites in support of this proposition, involved the offense of harassment under HRS § 711-1106(1)(b). In Doe, this court reversed a conviction for harassment, noting that because a police officer was the object of the subject conduct, offensive speech must usually be coupled with "outrageous physical conduct" to constitute the crime of harassment:

> [F]or speech to be punishable under HRS § 711-1106(1)(b), there must be a "causal relationship" between the speech at issue and "the disturbance sought to be

[8] "Specific" means, "restricted by nature to a particular individual, situation, relation, or effect." Id. at 2186.

> prevented" -- *i.e.*, the "likelihood" of provoking "a violent response." Establishing such a "causal relationship obviously requires an examination of the totality of the circumstances, or, put differently, the context in which the speech is uttered. It is equally obvious that the fact that the object of the speech is a trained and experienced police officer is a part of that context. Where abusive speech is directed at such a police officer, it must generally be "coupled with . . . outrageous *physical* conduct," see [State v.]Jendrusch, 58 Haw. [279,] 282 n.3, 567 P.2d [1242,] 1245 n.3 [(1977)] (emphasis added), which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response, in order to rise to the level of harassment punishable under HRS § 711-1106(1)(b).

Id. at 96, 869 P.2d at 1315 (footnote omitted) (italicized emphasis in original) (underscored emphases added). Assuming arguendo that the offense of harassment is analogous to that of terroristic threatening, Stant was not a police officer and the "training and professional standard" that set the police officer apart from a layperson in Doe does not apply here.

Because application of the factors set forth in Chung establishes that Defendant's statement was a true threat, we conclude that the court did not err as a matter of law with respect to that issue. Considering the evidence adduced, we conclude there was substantial evidence to support the terroristic threatening conviction. See State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997). However, we vacate the conviction because, on this record, we conclude Petitioner's jury trial waiver was invalid.

V.

A.

It is well established that the trial court has a duty to inform the defendant of the defendant's right to a jury trial. "For a valid waiver of the right to a jury trial, the trial court has a duty to inform the accused of that constitutional right." State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000) (citations omitted). Informing the defendant in open court of the right to a jury trial "serves several purposes: (1) it more effectively insures voluntary, knowing and intelligent waivers . . . ; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal . . . ; and (3) it emphasizes to the defendant the seriousness of the decision[.]" Id. (internal quotation marks and citations omitted). The waiver of a trial by jury must be a knowing, intelligent, and voluntary one. See id. (citing Reponte v. State, 57 Haw. 354, 361, 556 P.2d 577, 583 (1976) (citation omitted)).

In reviewing a defendant's purported waiver of jury trial, this court has eschewed a "bright line rule," id. at 69, 996 P.2d at 274, in favor of a totality of the circumstances test. See id. at 69-70, 996 P.2d at 274-75. Thus, "the validity of a waiver concerning a fundamental right [such as the right to a jury trial] is reviewed under the totality of the facts and

circumstances of the particular case." Id. In this case, the court engaged in the following colloquy with Petitioner:

> Q. [THE COURT]: Okay, [Petitioner], you have a lawyer? Do you have a lawyer?
>
> A. [PETITIONER]: Actually, not right now, Your Honor.
>
> Q: Do you want a lawyer?
>
> A: Actually, I'm in the process of getting me an outside lawyer.
>
> Q: You're going to hire your own lawyer?
>
> A: Yes, sir.
>
> Q: You understand that if you want to you can apply for the Public Defender's services?
>
> A: Yes, sir.
>
> Q: If you qualify the Public Defender will be your lawyer free of charge; do you understand?
>
> A: Yes, sir.
>
> Q: Do you want to do that?
>
> A: No.
>
> Q: You're going to get your own lawyer?
>
> A: Yes, sir.
>
> Q: And have you had a chance to discuss your case with your lawyer yet?
>
> A: Uh. Actually, he just told me to plead not guilty, okay. Pleas of not guilty will be entered.
>
> [PROSECUTOR]: (Inaudible) right to a jury trial. Count C6.
>
> [THE COURT]: Pardon me?
>
> [PROSECUTOR]: B, terroristic threatening in the second degree. It's a full misdemeanor.
>
> Q. [THE COURT]: I see. You have a right to a trial by jury. Do you want [a] jury trial?
>
> A. [PETITIONER]: No, sir.
>
> Q: You discussed this with your attorney?

A: No, sir. I'll just go ahead and dismiss the jury trial. I just want to go ahead (inaudible).

Q: If you plead not guilty you're going to have a trial.

A: Yes.

Q: You have a right to be tried before a judge and a jury.

A: I just want to have a judge there.

Q: You just want only a judge?

A: Yes, sir.

Q: You give up your right to a jury trial?

A: Yes, sir.

Q: Okay. Then we'll set your case for trial in the Wailuku District Court.

A: Yes, sir.

(Emphases added.)

B.

In Friedman, the following circumstances viewed in their totality persuaded this court that Friedman's jury waiver was knowing, intelligent, and voluntary:

> Friedman [did more than] simply acknowledge his right to a jury trial with a simple "yes"; rather, Friedman articulated to the trial court that "[a] jury trial is where the outcome of . . . whether it's guilty or not is to be determined by the 12 adults instead of a judge." Additionally, the trial court specifically informed Friedman that a judge would be trying his case if he waived his jury trial right. The record also reflects that, at the arraignment, Friedman was represented by competent counsel, who informed the court that he had previously "explain[ed] to [Friedman] the differences between a jury trial and judge trial"; moreover, Friedman acknowledged his attorney's representation. Finally, Friedman affirmatively indicated to the trial court that his waiver of the right to a jury trial was voluntary and a result of his own reflection.

Id. at 70, 996 P.2d at 275.

In his application, Petitioner claims that, in contrast to the facts in Friedman, (1) he specifically informed the court that he was not represented by an attorney, (2) he stated that his only contact with an attorney involved an advisement that he plead not guilty, (3) he specifically informed the court that he had not spoken with an attorney about his right to a jury trial, (4) there was no objective indication from the record that he understood the difference between a judge and jury trial or the ramifications of his decision, and (5) he never articulated to the court that he was voluntarily waiving his right to a jury trial or that he had reflected on his decision. Therefore, according to Petitioner, the colloquy "failed to establish that [Petitioner] knew the difference between a jury trial and a bench trial, that he knew the ramifications of giving up this right . . . or that [Petitioner] was giving up his right voluntarily after having reflected on it." Finally, Petitioner contends that the ICA erroneously imputed knowledge of the judicial system to Petitioner because of his occupation as a prison guard.

VI.

In connection with Petitioner's last contention, the ICA stated, "[Petitioner] is an adult corrections officer who would be familiar with the judicial system" and appended to this statement a footnote indicating that "[Stant] testified

[Petitioner] taunted that he worked for the government, that he was a prison guard, and that he put people in jail." ICA's opinion at 17 n.6.

We must disagree with the ICA's reliance on Petitioner's alleged prison guard status. That Petitioner "would be familiar with the judicial system," ICA's opinion at 17, to the extent of knowing the scope of his right to a jury trial, does not necessarily follow from the nature of his work. It cannot be presumed that simply by virtue of their occupation, prison guards have knowledge of all relevant characteristics of a jury trial and the consequences that ensue upon waiver of that right.

VII.

We conclude that the ICA erred in rejecting Petitioner's defective waiver claim. The ICA stated that Petitioner had been informed he had a right to a jury trial, waived that right orally in open court "five times," and that, "in response to being told he had a right to a trial before a judge and a jury, [Petitioner] expressly stated twice that he only wanted a judge . . . at trial, indicating that he understood the difference between a jury and bench trial." ICA's opinion at 17.

However, in contrast to the circumstances in Friedman, Petitioner "was in the process" of obtaining an "outside lawyer," had been told "just . . . to plead not guilty," had not discussed his right to a trial by jury with an attorney or had the right explained to him by counsel, had made no reference to a twelve-member jury determining guilt, obviously was not represented at the hearing by counsel, and had not indicated that the waiver was "a result of his own reflection." Friedman, 93 Hawai'i at 70, 996 P.2d at 275. The court's colloquy with Petitioner informed him only that he had a right to a jury trial and that a trial before a judge meant he gave up his jury trial right.

Because Petitioner had indicated that he was going to obtain counsel, plainly, the prudent course for the court to have followed would have been to defer questioning as to a jury trial until Petitioner was present in open court with counsel. While Petitioner's waiver may have been voluntary, the record does not support the conclusion that his waiver was knowing or intelligent. The record establishing a waiver was "minimal." State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993) (citations omitted). "[I]n light of the importance we place on the personal nature of a defendant's right to a jury trial," id. (citations omitted), we hold that Petitioner's "waiver" was insufficient and that, as a result, Petitioner's terroristic threatening conviction must be vacated.

VIII.

This court has rejected the proposition that "a jury waiver can never be voluntary and knowing if a trial court fails" to engage a defendant in a specific colloquy. Friedman, 93 Hawai'i at 69, 996 P.2d at 274. However, to provide guidance to the trial courts in performing their "duty to inform . . . [defendants] of that constitutional right[,]" id. at 68, 996 P.2d at 273, we believe the four-part colloquy referred to in Friedman is apropos. Indeed, this court had "advise[d] the trial court[s] to engage in such a colloquy to aid in ensuring voluntary waivers[.]" Id. at 69, 996 P.2d at 274. We reaffirm that advice. To "ensure[] voluntary waivers" of the right to jury trial, trial courts should, in open court, directly inform defendants that "(1) twelve members of the community compose a jury, (2) . . . defendant[s] may take part in jury selection, (3) . . . jury verdict[s] must be unanimous, and (4) the court alone decides guilt or innocence if . . . defendant[s] waive[] a jury trial." Id. (internal quotation marks and citations omitted). By the trial courts' use of this procedure, the three purposes of an open-court colloquy, see supra, are fully satisfied, the trial courts' ascertainment of defendants' waivers are facilitated, and appeals premised on defendants' defective waiver claims are curtailed.

IX.

For the reasons stated herein, we vacate Petitioner's July 21, 1999 terroristic threatening conviction and remand that charge for a new trial. In all other respects, the district court's July 21, 1999 judgment is affirmed.

DATED: Honolulu, Hawai‘i, May 10, 2001.

Jon N. Ikenaga, Deputy
Public Defender, for
Petitioner/Defendant-
Appellant on the
writ.