

NO. 23032

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

DAWN MORGAN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1143)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Dawn Morgan appeals from the first circuit court's judgment of conviction of and sentence for the offenses of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993 & Supp. 1996), and unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993), filed on November 24, 1999. Her sole point of error on appeal is that the circuit court erroneously denied her motion in limine, which sought to preclude the prosecution from introducing evidence of her 1991 conviction of the federal offense of conspiracy either to distribute or possess crystal methamphetamine, in violation of 21 United States Code §§ 841(a)(1) and 846. In denying her motion, the circuit court concluded that State v. Lee, 75 Haw. 80, 856 P.2d 1246 (1993), required it to instruct the jurors that they could, inter alia, consider the presence or absence of Morgan's drug-related prior convictions in deliberating whether Morgan possessed the state of mind required by HRS § 329-43.5(a). Consequently, the

circuit court ruled that it did not retain discretion under Hawai'i Rules of Evidence (HRE) Rule 403 (1993) to preclude the prosecution from adducing evidence of Morgan's prior conviction, but, rather, that it could only moderate the manner in which the prosecution sought to establish that Morgan had been previously convicted of a drug-related offense.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that, although the circuit court misconstrued Lee, the error was harmless beyond a reasonable doubt. Our analysis is as follows:

First, Lee does not require that trial courts must invariably instruct the jury in prosecutions for unlawful use of drug paraphernalia, in violation of HRS § 329-43.5, with a rote reading of the statutory examples and factors regarding "drug paraphernalia" set forth in HRS § 329-1 (1993). In Lee, we observed that a trial court should instruct the jury, in a case brought pursuant to HRS § 329-43.5(b), that "it can rely on the list of specific examples and factors included in HRS § 329-1," but that without the defendant's specific intent that the object be used with illicit drugs, "none of those specific examples or factors, in and of themselves, can transform an object into drug paraphernalia." Lee, 75 Haw. at 109, 856 P.2d at 1261. As we made clear in Lee, the statutory examples and factors may provide circumstantial evidence of a defendant's state of mind: "the fact that any of the examples or factors is present in the case may be used by the jury, along with any other relevant evidence proffered by the prosecution, to infer the defendant's specific intent or the lack of it." Id. Accordingly, we intended, by this language in Lee, that a jury would be instructed regarding the relevant examples and factors enumerated in HRS § 329-1, depending on the state of the evidence actually adduced at trial

pursuant to the HRE.¹

Second, the inclusion in HRS § 329-1 of a factor that focuses on the “[p]rior convictions, if any, of an owner, or of anyone in control of the object, under any state of federal law relating to any controlled substance,” does not, by virtue of Lee, relieve the trial court of the obligation to analyze the admissibility of a defendant’s prior conviction under the rubric established by HRE Rule 404(b) (1993) and Rule 403. If, after addressing evidence of a prior drug-related conviction pursuant to HRE Rules 401 (1993), 402 (1993), and 404(b), the trial court determines that it is relevant and, pursuant to HRE Rule 403, that its probative value is not substantially outweighed by its prejudicial effect, then there is a basis in the evidence for including the “prior conviction” factor in the trial court’s jury instruction modeled on HRS § 329-1.²

¹ In this regard, we observe that the circuit court’s rote reading of all the statutory examples and factors set forth in HRS § 329-1 was erroneous. However, the error was harmless beyond a reasonable doubt in the present matter because Morgan’s conviction of unlawful use of drug paraphernalia was supported by substantial evidence and the record does not reflect any reasonable possibility that the jury relied on any irrelevant example or factor that had been included in the circuit court’s erroneous HRS § 329-1 jury instruction. Morgan testified not only that she knew that some of the objects introduced into evidence were capable of being used as drug paraphernalia, but also that she knew how to use the objects as such. She admitted to using crystal methamphetamine at the time alleged in the complaint and that, at one time, one of the objects -- a plaid pouch -- had been her cosmetics case. Further circumstantial evidence of Morgan’s intent to use one or more of the objects with a controlled substance was provided by exemplars of her own and a codefendant’s handwriting (appearing on waiver forms that both she and the codefendant had signed and dated and on a consent-to-search form signed and dated by the codefendant), which, when compared with notations indicative of drug dealing appearing on slips of paper found in the plaid pouch, reflected a similarity between Morgan’s “closed 4” as it appeared on her waiver form, rather than the “open 4” that appeared on the codefendant’s forms, and the “closed 4” as it appeared on one of the slips of paper. Thus, the likelihood that the circuit court’s erroneous inclusion of irrelevant examples and factors in its HRS § 329-1 jury instruction affected the jury’s deliberations to Morgan’s detriment is so remote that there is no reasonable possibility that the circuit court’s error may have contributed to her conviction of unlawful use of drug paraphernalia.

² Similarly, if the record were to support a finding that the defendant had not been previously convicted of a drug-related offense, then an HRS § 329-1 instruction including the “prior conviction” factor would likewise

(continued...)

Third, in the present matter, Morgan's prior drug-related conviction was relevant under HRE Rules 401, 402, and 404(b) as to her state of mind with regard to the offense of unlawful use of drug paraphernalia. In order to prove beyond a reasonable doubt that Morgan committed this offense, the prosecution was required to prove, inter alia, that Morgan specifically intended to use, or possessed with intent to use, an object with a controlled substance. See HRS §§ 329-43.5(a) and 701-114(1)(b) (1993) (requiring proof beyond a reasonable doubt of the state of mind required to establish each element of the offense); Lee, 75 Haw. at 99-103, 108-109, 856 P.2d at 1257-59, 61. Her prior conviction of a federal offense involving the same illicit drug -- crystal methamphetamine -- as was implicated in the present matter constituted circumstantial evidence of her prior experience with and knowledge of crystal methamphetamine from which the jury could reasonably infer that she was aware, believed, or hoped that the objects she was accused of possessing could be used with crystal methamphetamine. See HRS § 702-206(b) (1993) (defining intentional state of mind with regard to attendant circumstances). This inference reasonably supports the further inference that she specifically intended to use one of the objects she was accused of possessing with crystal methamphetamine. Accordingly, the fact that Morgan had been previously convicted of a drug-related offense involving crystal methamphetamine was relevant to her "intent" and, therefore, survived the general prohibition of "other bad acts evidence" set forth in HRE Rule 404(b).

²(...continued)

be appropriate, inasmuch as the jury could infer from the lack of such prior conviction (1) that the defendant was not aware, or did not believe or hope, that the object was capable of being used with a controlled substance and, further, (2) that the defendant could not have specifically intended to use the object with a controlled substance for a proscribed purpose or in a proscribed manner.

Fourth, the probative value of Morgan's prior conviction as to her state of mind in connection with the offense of unlawful use of drug paraphernalia was not substantially outweighed by its prejudicial effect because: (1) the prosecution offered to prove the fact of her prior conviction by the actual judgment of conviction and the testimony of her former counsel and probation officer; (2) the offense of which Morgan was previously convicted and presently accused were not significantly dissimilar, insofar as both implicated crystal methamphetamine; thus, the jury could reasonably infer that Morgan's prior experience with the drug included knowledge of the objects that were capable of being used with it; (3) the interval of time between the commission of the prior offense and the present offense was not so great as, in itself, to warrant ruling the prior conviction inadmissible; (4) at the close of the prosecution's case-in-chief, when the trial court permitted the prosecution to read a stipulation regarding Morgan's prior conviction to the jury, little alternative proof concerning Morgan's state of mind was available; and (5) neither the prosecution's offer of proof nor the stipulation, which was introduced at trial in lieu of the prosecution's proffered evidence, had the effect of rousing the jury to a pitch of overmastering hostility. See, e.g., State v. Renon, 73 Haw. 23, 38-39, 828 P.2d 1266, 1273-74 (1992); State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988).

Fifth, although the circuit court allowed the admission of evidence of Morgan's prior conviction for the "wrong" reason, the evidence was, in light of the foregoing analysis, relevant and admissible as to Morgan's state of mind in connection with the offense of unlawful use of drug paraphernalia. Therefore, we will not disturb the circuit court's ruling. See State v. Taniguchi, 72 Haw. 235, 240, 815 P.2d 24, 26 (1991) ("where the

decision below is correct it must be affirmed by the appellate court even though the [trial court] gave the wrong reason for its action," (citing State v. Rodrigues, 68 Haw. 124, 134, 706 P.2d 1293, 1300 (1985) (citing Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983)))).

Sixth, Morgan testified that she had used crystal methamphetamine during the period alleged in the complaint. Inasmuch as, of necessity, she therefore must have "possessed" the drug, her testimony is tantamount to a confession to the charge of promoting a dangerous drug in the third degree. See HRS § 712-1243. Consequently, we hold that the circuit court's failure to limit the jury's consideration of Morgan's prior conviction to her intent in connection with the offense of unlawful use of drug paraphernalia was harmless beyond a reasonable doubt. Therefore,

IT IS HEREBY ORDERED that the judgment of conviction and sentence from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 31, 2000.

On the briefs:

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