

NO. 23598

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

TEDDY TEMPLE, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0878)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Teddy Temple appeals from the judgment of the circuit court of the first circuit, the Honorable Marie N. Milks presiding, convicting him of and sentencing him for the offenses of sexual assault in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(b) (1993), and sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993). Temple argues on appeal that: (1) the circuit court violated his constitutional right to represent himself by dissuading him from proceeding without counsel; (2) the circuit court interfered with his right to a speedy trial by forcing him to delay his case until his counsel was available for trial; (3) there was no evidence that he committed an act of sexual penetration; (4) the circuit court failed to instruct the jury on all the material elements of sexual assault in the third degree; (5) the circuit court admitted irrelevant evidence of Temple's flight from the complainant's parents three weeks after the alleged crimes; (6) the circuit court abused its discretion

in finding an extended term of imprisonment necessary for the protection of the public; and (7) the sentence of life imprisonment constituted cruel and unusual punishment under both the United States and Hawai'i Constitutions.

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 affirm the circuit court's judgment.

First, we hold that the circuit court appropriately advised Temple against proceeding without counsel. The right to assistance of counsel is automatic. Consequently, this court has held that when a criminal defendant indicates a desire to proceed without counsel the court must determine whether the defendant has in fact voluntarily and intelligently waived his or her right to counsel before granting the defendant's right to proceed pro se. See State v. Merino, 81 Hawai'i 198, 219, 915 P.2d 672, 693 (1996); State v. Dicks, 57 Haw. 46, 48, 549 P.2d 727, 729-30 (1976). In Merino, for example, this court approved a more forceful warning of the hazards of self-representation than that issued by the circuit court in the present case. See Merino, 81 Hawai'i at 202-03, 915 P.2d at 676-77. Because Temple only suggested that he wished to represent himself once and then quickly abandoned the idea, the circuit court did not err in dissuading him from proceeding pro se.

Second, we hold that the circuit court did not interfere with Temple's right to a speedy trial. Indeed, it was Temple's own motion for a continuance that produced the delay of which he now complains. Though he clearly considered withdrawing his motion and proceeding to trial pro se, he ultimately did not. Moreover, even if the circuit court had delayed Temple's trial

over his objections, the delay neither violated Hawai'i Rules of Penal Procedure (HRPP) Rule 48 nor his constitutional right to a speedy trial. The length of the delay was constitutionally insignificant and was for Temple's benefit, Temple failed to unambiguously assert his right to a speedy trial, and the delay did not prejudice Temple's defense in any way. See generally, State v. White, 92 Hawai'i 192, 201-02, 990 P.2d 90, 99-100 (1999); State v. Lau, 78 Hawai'i 54, 62, 890 P.2d 291, 299 (1995).

Third, we hold that the circuit court did not err in denying Temple's motion for judgment of acquittal. HRS § 707-700 (1993) defines "sexual penetration" to include acts of "fellatio," and there is nothing in the statute to suggest that only certain forms of fellatio constitute sexual penetration. Moreover, Temple's reliance on State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996), is misplaced. In that case, we held that a man was properly charged with sexual assault in the first degree for allegedly performing acts of fellatio on his son. See Arceo, 84 Hawai'i at 14, 20, 23, 928 P.2d at 856, 862, 865. Temple was likewise properly convicted of sexual assault in the first degree based on his act of fellatio with the complainant.

Fourth, we hold that the circuit court's jury instructions were not, "when read and considered as a whole, . . . prejudicially insufficient, erroneous, inconsistent or misleading." State v. Balanza, 93 Hawai'i 279, 283, 1 P.3d 281, 285 (2000). The circuit court instructed the jury on the three elements of the offense of sexual assault in the third degree, as set forth in HRS § 707-732(1)(b), and then defined "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor, or the sexual or other

intimate parts of the actor by the person[.]” (Emphasis added.) Thus, the circuit court properly instructed the jury.

Fifth, we hold that the circuit court’s erroneous admission of evidence of Temple’s flight from the complainant’s parents was harmless beyond a reasonable doubt. The evidence of Temple’s flight, inasmuch as he fled to a police station from a person threatening his life, was not probative of Temple’s consciousness of guilt; as such, it was not relevant to any fact of consequence in the present matter and should not have been admitted. Nevertheless, because the only rational inference that could be drawn from the evidence is exculpatory rather than inculpatory, there is no “reasonable possibility that [the] error might have contributed to conviction.” State v. Heard, 64 Haw. 193, 194 638 P.2d 307, 308 (1981). Consequently, the error was harmless beyond a reasonable doubt.

Sixth, we hold that Temple’s sentence of life imprisonment does not constitute cruel and unusual punishment. Given the seriousness of his crime, his fifteen prior felony convictions and eleven misdemeanor or petty misdemeanor convictions, and his repeated recidivism, “the prescribed punishment is not so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community.” State v. Freitas, 61 Haw. 262, 268, 602 P.2d 914, 920 (1979) (citation omitted).

Seventh, we hold that the circuit court did not abuse its discretion in finding that an extended term of imprisonment was necessary for the protection of the public. There was ample evidence, as noted supra, supporting the circuit court’s determination that an extended term of life imprisonment was

necessary for the protection of the public. Despite his many contacts with the criminal justice system, Temple has repeatedly failed to abide by the law. Regardless of whether he might benefit from an appropriate therapy program, the legislature has mandated no such disposition, and it was within the discretion of the circuit court to sentence Temple to an extended term of life imprisonment.

Therefore,

IT IS HEREBY ORDERED that the circuit court's judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, October 30, 2001.

On the briefs:

Dwight C.H. Lum, for the
defendant-appellant
Teddy Temple

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State of Hawai'i