

NO. 23810

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

CHRISTOPHER GRINDLING, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 98-0325)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Christopher Grindling (Defendant) appeals from the September 19, 2000 order of resentencing and revocation of probation. On March 18, 1999, Defendant was convicted by the circuit court of the second circuit (the court)¹ of disorderly conduct, terroristic threatening in the first degree, resisting arrest, and terroristic threatening in the second degree. On May 21, 1999, Defendant was sentenced to a term of probation for the respective offenses. On August 10, 2000, this court, by summary disposition order, affirmed Defendant's judgment, conviction, and sentence.

¹ The Honorable Joseph E. Cardoza presided over the proceedings discussed herein.

On July 17, 2000, Plaintiff-Appellee State of Hawai'i (the prosecution) filed a motion for an order to show cause (OSC) and issuance of an arrest warrant for alleged violation of the terms of Defendant's probation. Defendant was arrested on July 24, 2000 and served with the OSC. The date of Defendant's initial court appearance following his arrest is not reflected in the briefs, and appellate defense counsel did not obtain the transcript of that initial appearance hearing. According to the prosecution, "since Defendant was arrested on July 24, 2000, and the evidentiary revocation of probation hearing was set for September 7, 2000 and the court referred at the evidentiary hearing to a prior hearing, it is clear that Defendant appeared before the court sometime between July 24, 2000 and September 7, 2000."

The only matter before the court at the September 7, 2000 hearing was the terroristic threatening charge.² At the beginning of the September 7, 2000 hearing, the court indicated that Defendant had "stand-by counsel from the Public Defender's office" and had "previously waived [his] right to counsel":

[THE CLERK]: Calling Criminal Number 98-0325, State of Hawai'i versus Christopher Grindling, further evidentiary hearing on order to show cause.

THE COURT: Good morning, Mr. Grindling.

[PROSECUTOR]: Carson Tani on behalf of the State of Hawai'i.

THE COURT: I believe you have stand-by counsel from the Public Defender's Office.

² The court indicated that it "agree[d] . . . that [t]he only matter before [it] is count three, terroristic threatening in the third degree.

[DEFENDANT]: I don't know.

[DEFENSE COUNSEL]: That's correct, your Honor.

. . . .

THE COURT: Mr. Grindling, today is the date set for evidentiary hearing on the order to show cause filed in this matter, and so what you have previously waived your right to counsel. Mr. Hayakawa will be your stand-by counsel.

(Emphases added.)

The public defender confirmed he was acting as standby counsel. At the close of the hearing, the court revoked probation and sentenced Defendant to a five-year prison term on the first degree terroristic threatening charge. On September 15, 2000, the public defender filed a motion for reconsideration of sentence. At the hearing on the motion for reconsideration on September 26, 2000, Defendant again acted in a pro se capacity, and the public defender acted as standby counsel. On January 2, 2001, the public defender's office moved to withdraw as counsel, and private counsel was appointed to represent Defendant in this appeal.

The prosecution requests dismissal on the ground that appellate counsel failed to order a transcript of the initial appearance hearing in which Defendant apparently had waived counsel and had decided to proceed pro se. According to the prosecution, defense counsel's failure to do so is a violation of Hawai'i Rules of Appellate Procedure (HRAP) Rules 10(b)(1)(A), 10(b)(3)³, and 28(b). HRAP Rule 10(b)(1)(A) provides in relevant

³ HRAP Rule 10(b)(3) provides in relevant part:

(continued...)

part as follows: "[A]n appellant who desired to raise any point on appeal that requires consideration of the oral proceedings before the court . . . appealed from . . . shall file . . . a request to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary[.]" HRAP Rule 28(b) requires in pertinent part that an appellant set forth "the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings [and i]n presenting those material facts, all supporting and contradictory evidence shall be presented[.]"

In response, Defendant urges that the court's statement at the September 7, 2000 hearing that "so what you have previously waived your right to counsel" "appears to be a question that went unanswered rather than an indication that Appellant waived his right to counsel at some previous hearing."

It appears from the court's statement as to Defendant having previously waived counsel, the appearance of the public

³(...continued)

(3) Duty of the Appellant in Insufficiency of the Evidence Appeals. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

HRAP Rule 10(b)(3). HRAP Rule 10(b)(3) would not appear to apply, inasmuch as the sufficiency of the evidence as it relates to a finding of fact or conclusion of law is not in issue.

defender's office as standby counsel, and Defendant's acknowledgment of the foregoing, that Defendant had, in fact, previously waived counsel. But there is no transcript of the prior proceeding at which this appears to have occurred. Because Defendant's point of error on appeal "requires consideration of the oral proceedings before the court" at the initial court appearance, Defendant's counsel should have made the transcript a part of the record pursuant to HRAP Rule 10(b)(1)(A). While the prosecution itself could have ordered the transcript, Defendant's purported waiver of counsel, depending upon the circumstances and questions asked by the court, would also be "contradictory evidence," which should have been presented as part of appellant's concise statement of the case under HRAP Rule 28(b). Cf. State v. Hoang, 93 Hawai'i 333, 334, 3 P.3d 499, 500 (2000) ("When an appellant desires to raise any point on appeal that requires the consideration of the oral proceedings before the court appealed from, the appellant bears the burden to show error by reference to the matters in the record, and he or she has the responsibility of providing the relevant transcript.")

Inasmuch as Defendant failed to provide a transcript of the August 10, 2000 hearing, "this court does not have a basis upon which to review the point of error raised on appeal." Id. at 333, 3 P.3d at 500. Therefore,

IT IS HEREBY ORDERED that the appeal is dismissed.⁴

DATED: Honolulu, Hawai'i, September 24, 2001.

On the briefs:

Simone C. Polak, Deputy
Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.

James P. Brumbaugh, for
defendant-appellant.

⁴ This decision is without prejudice to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 proceedings, if any, brought for ineffective assistance of appellate counsel with respect to his failure to order the initial court hearing transcript. Also, because the merits of Defendant's claim on appeal are not decided, assertion of his rights under HRPP Rule 40 are not precluded by this decision.