

***** NOT FOR PUBLICATION *****

NO. 23882

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

MICHAEL KAHAPEA, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-1135)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.
and Acoba, J., concurring separately)

Defendant-appellant Michael Kahapea (Kahapea) appeals from the October 19, 2000 judgment of the circuit court of the first circuit, the Honorable Reynaldo D. Gaulty presiding, convicting him of and sentencing him for: (1) ten counts of theft in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-830.5(1)(a) (1993); (2) three counts of theft in the second degree, in violation of HRS § 708-831(1)(b) (Supp. 2000); (3) eleven counts of forgery in the second degree, in violation of HRS § 708-852 (Supp. 2000); (4) five counts of unlawful ownership or operation of business, in violation of HRS §§ 842-2(3) (1993) and 842-3 (Supp. 2000); (5) two counts of money laundering, in violation of HRS §§ 708A-3(a)(1)(A) (1995) and 708A-3(d)(2) (1995); (6) one count of bribery, in violation of HRS § 710-1040(1)(b) (1993); and (7) two counts of failure to report income, in violation of HRS § 842-11 (1993). On appeal, Kahapea argues that (1) the circuit court erred in admitting testimony about his gambling history, (2) he was denied effective assistance of counsel, and (3) he did not voluntarily, knowingly and intelligently waive his right to testify.

Upon carefully reviewing the record and the briefs

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submitted and having given due consideration to the issues raised and arguments advanced, we hold that: (1) the circuit court did not err in admitting testimony about Kahapea's gambling activity, inasmuch as (a) the casino representatives' testimony established the required foundation for the admissibility of the casino records, which detailed Kahapea's gambling history, by explaining that the records were kept in the ordinary course of the casinos' business and made at or near the time Kahapea gambled, and, therefore, the testimony relating the contents in the casino records was admissible under the "business records" exception to hearsay, see Hawai'i Rules of Evidence (HRE) Rule 803(b)(6), (b) the testimony did not violate Kahapea's right to confront adverse witnesses, see State v. Sua, 92 Hawai'i 61, 987 P.2d 959 (1999), (c) Kahapea failed to demonstrate how the testimony was irrelevant and prejudicial to him, and (d) the casino representatives had personal knowledge of the information they relied upon to testify about Kahapea's gambling history, see HRE Rule 602; (2) Kahapea's defense counsel did not render constitutionally ineffective assistance, inasmuch as Kahapea failed to demonstrate that defense counsel's failure to obtain a copy of the investigative grand jury transcript and object to testimony about Kahapea's gambling activity as hearsay reflected defense counsel's lack of skill, judgment, or diligence demanded of attorneys in criminal cases and resulted in the withdrawal or substantial impairment of a potentially meritorious defense, see Adams v. State, 103 Hawai'i 214, 81 P.3d 394 (2003); State v. Poaipuni, 98 Hawai'i 387, 49 P.3d 353 (2002); and (3) Kahapea voluntarily, knowingly, and intelligently waived his right to testify in his own defense, inasmuch as (a) the circuit court

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informed Kahapea of his constitutional right to testify and elicited an on-the-record waiver of his right, as required by Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), (b) Kahapea affirmed his understanding of his right to testify, and (c) the record does not indicate that the recorded responses were an inaccurate reflection of what was said during the colloquy or that Kahapea was unable to understand the trial judge's statements, see id.; State v. Lewis, 94 Hawai'i 292, 12 P.3d 1233 (2000). Therefore,

IT IS HEREBY ORDERED that the circuit court's October 19, 2000 judgment of guilty conviction and sentence, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, October 6, 2004.

On the briefs:

Edward K. Harada,
Deputy Public Defender,
for the defendant-
appellant Michael Kahapea

Donn Fudo, Deputy
Prosecuting Attorney,
for the plaintiff-appellee
State of Hawai'i

I concur in the result.