

*** NOT FOR PUBLICATION ***

NO. 24220

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

MARK A. CHAR, Defendant-Appellant.
(NO. 24220 (CR. NO. 99190645))

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

MARK A. CHAR, Defendant-Appellant.
(NO. 24279 (CR. NO. 98443274))

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(Cr. Nos. 99190645 and 98443274)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Mark Char appeals from the judgments of the district court of the first circuit, the Honorable Christopher P. McKenzie presiding, convicting him of and sentencing him for two counts of the offense of criminal property damage in the fourth degree, in violation of Hawai'i Revised Statutes (HRS) § 708-823 (1993). On appeal, Char contends that the district court erred by: (1) finding that he could prepare his own case in one month without the assistance of counsel; (2) directing him to be ready to proceed to trial pro se if unable to secure a fifth referral for appointed counsel from the Office of the Public Defender; (3) denying him a continuance on the day of trial and requiring him to defend himself; and (4) imposing an excessive sentence.

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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, we resolve Char's appeal as follows.

In Hawai'i, an indigent defendant charged with a crime for which imprisonment is authorized has a right to the services of the public defender or court-appointed counsel. See Article I, section 14 of the Hawai'i Constitution; HRS § 802-1 (1993). Nevertheless, "there is no absolute right, constitutional or otherwise, for an indigent to have the court order a change in court-appointed counsel." State v. Torres, 54 Haw. 502, 505, 510 P.2d 494, 496 (1973) (citations omitted). Moreover, "[t]he right to counsel may be waived if [the] waiver is voluntarily, knowingly and intelligently made." State v. Tarumoto, 62 Haw. 298, 300, 614 P.2d 397, 399 (1980). A waiver of the right to counsel may also be effectuated by conduct:

In criminal cases, an indigent defendant is deemed to have waived by conduct . . . his or her right to the services of the public defender or court-appointed counsel if the following six requirements are satisfied: (1) the defendant requested a substitute court-appointed counsel; (2) the defendant was afforded a reasonable opportunity to show good cause for a substitute court-appointed counsel; (3) the trial court did not abuse its discretion when it decided that a substitute court-appointed counsel was not warranted; (4) the requirements of State v. Dickson, 4 Haw. App. 614, 619-20, 673 P.2d 1036, 1041 (1983), were satisfied; (5) the defendant was given a clear choice of either continuing with present counsel or being deemed to have waived by conduct his or her right to counsel; and (6) the defendant refused to continue with present counsel.

State v. Char, 80 Hawai'i 262, 268-269, 909 P.2d 590, 596-597 (App. 1995). We emphasize that a "'waiver' or 'waiver by conduct' cannot occur before the Dickson requirements have been satisfied." State v. Sinagoga, 81 Hawai'i 421, 438, 918 P.2d 228, 245 (App. 1996); see also State v. Soares, 81 Hawai'i 332,

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355-356, 916 P.2d 1233, 1256-1257 (App. 1996).

Insofar as Char (1) repeatedly asserted that he wished to retain his right to counsel, (2) was not given a choice of being reappointed counsel at his December 18, 2000 trial, subsequent to (a) the court-approved withdrawal of his previous counsel, or (b) "being deemed to have waived by conduct[,]" Char, 80 Hawai'i at 269, 909 P.2d at 597, his right to counsel, and (3) could not have refused to continue with present counsel, because he had no present counsel, we hold that the district court erred by requiring Char to proceed to trial pro se. We therefore need not address Char's fourth point on appeal, to wit, that the district court erred by imposing an excessive sentence.

Therefore,

IT IS HEREBY ORDERED that the judgments from which this appeal is taken are vacated and remanded for further proceedings consistent with this order.

DATED: Honolulu, Hawai'i, July 20, 2004.

On the briefs:

Jack Schweigert, for
the defendant-appellant
Mark Char

Loren J. Thomas, deputy
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the plaintiff-appellee
State of Hawai'i