
NO. 25009

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee/Cross-Appellant

vs.

HERMAN KAOPUA, Defendant-Appellant/Cross-Appellee

APPEAL FROM THE FIFTH CIRCUIT COURT
(FC-CR. NO. 01-1-0185)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Herman Kaopua (Defendant) appeals from the February 25, 2002 judgment of the fifth circuit family court (court)¹ convicting Defendant of continuous sexual assault of a minor under the age of fourteen years old, Hawai'i Revised Statutes (HRS) § 707-733.5 (Supp. 1999).²

¹ The Honorable Clifford L. Nakea presided over this proceeding.

² Insofar as relevant to this case, HRS § 707-733.5 concerning the offense of continuous sexual assault of a minor under the age of fourteen years, states in pertinent part as follows:

- (1) Any person who:
 - (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
 - (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years,
- is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.

. . . .

On appeal,³ Defendant argues that: 1) at his first colloquy with the court on November 26, 2001, the waiver of his right to a jury trial was not knowingly, intelligently, and voluntarily made as a matter of law inasmuch as the court had misinformed him of the nature of a hung jury; 2) the record demonstrates by a preponderance of the evidence that the initial waiver was involuntary; and 3) the second colloquy with the court on December 10, 2001 failed to remove or clarify misstatements of the law regarding the right to a jury trial made at his first colloquy.

As to Defendant's points of error, it is well established that "[a] defendant may, orally or in writing, voluntarily waive his or her right to trial by jury. In order to obtain a valid waiver, the court is required to inform the defendant of that constitutional right. The failure to obtain a valid waiver constitutes reversible error." State v. Mitchell, 94 Hawai'i 388, 394, 15 P.3d 314, 320 (2000) (citing State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000)).

In Friedman, this court reviewed the validity of the defendant's waiver of his right to a jury trial under the "totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct." Id. at 70, 996 P.2d at 275 (citation omitted).

³ Plaintiff-Appellee State of Hawai'i (the prosecution) cross-appealed but the parties stipulated to dismiss the cross-appeal on January 7, 2004.

We conclude that the information provided by the court in Colloquy I was not misleading. The court initially informed Defendant that “[i]f all 12 couldn’t agree then you would be found not guilty and possibly retried.” (Emphasis added.) Shortly after, however, the court corrected itself stating, “I’m sorry. If you were found not guilty that’s it. But if there’s a hung jury, which means they cannot all -- 12 cannot agree upon guilty or not guilty . . . [t]hat’s a hung jury, which means that . . . you would probably be retried.” After correcting itself, the court reiterated that “12 [jurors] have to agree that each and every element has been proven beyond a reasonable doubt before [Defendant] could be found guilty.” Defendant then affirmed his decision to waive his right to a jury trial.

Second, Defendant argues that he was not informed of his right to participate in a jury selection. He argues that (1) the court in the first colloquy did not advise him of his right to participate in the jury selection process, (2) the court in the second colloquy asked Defendant, “And did you understand that the selection of the jury would be done by your attorney and the prosecutor?” (emphasis added), and (3) the “Waiver of a Jury Trial” document did not indicate that Defendant could participate in the jury selection process. In Friedman the fact that the defendant was not informed of the right to participate in a jury selection did not invalidate the jury waiver. Friedman, 93 Hawai’i at 70, 996 P.2d at 275. The prosecution points out: 1)

that Defendant was represented by competent counsel at all stages of the waiver of the jury trial process; 2) that Defendant does not claim that counsel was ineffective in advising him on waiving his right to a jury trial; and 3) that Defendant's counsel in writing certified that Defendant knowingly and voluntarily waived the right to jury trial in also signing the "Waiver of Jury Trial" document filed on December 10, 2001. Defendant was represented by counsel at all times during the trial process, and Defendant signed the "Waiver of Jury Trial" which set forth the nature of the right and the effect of the waiver. Under the foregoing circumstances, it cannot be said that Defendant has met his burden of demonstrating that his waiver was not knowing, intelligent, or involuntary. See Mitchell, 94 Hawai'i 388, 395, 15 P.3d 314, 320 (holding that defendant's representation by competent counsel was one of the significant reasons defendant did not meet his burden of demonstrating that his waiver was involuntary).

As to his third argument, Defendant contends that Colloquy II failed to remove or clarify misstatements of the law made to Defendant during Colloquy I. As mentioned previously, Defendant was represented by counsel during Colloquy II. At the hearing, the court reviewed the "Waiver of Jury Trial" document in great detail with Defendant. Defendant and his attorney signed the written waiver. Defendant fails to point to any "salient fact" affecting his waiver at the time of Colloquy II.

Therefore, Colloquy II did not fail to remove or clarify prior misstatements of the law inasmuch as the court, with Defendant's counsel present, restated Defendant's rights to a jury trial and Defendant acknowledged he understood.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's February 25, 2002 judgment of conviction, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, February 12, 2004.

On the briefs:

Daniel G. Hempey for
defendant-appellant/
cross-appellee.

Russell K. Goo, Deputy
Prosecuting Attorney,
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plaintiff-appellee/
cross-appellant.