

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent inasmuch as I believe the November 7, 2002 judgment against Defendant-Appellant Alomalietoa Sua (Defendant) should be vacated, the May 16, 2001 order denying the motion for appointment of examiners to determine Defendant's penal responsibility be reversed, and the case remanded for further proceedings consistent with this opinion. In my view, there was a rational basis in the record which triggered the court's duty to appoint a three-member panel for mental examination of Defendant pursuant to Hawai'i Revised Statutes (HRS) § 707-404(2) (1997), and the court's appointment of one member only was contrary to HRS § 707-404(2).

I.

A.

On December 13, 2000, Defendant was charged in an indictment with five offenses: (1) kidnapping, HRS § 707-720(1)(b) (1993); (2) kidnapping, HRS § 707-720(1)(e) (1993); (3) terroristic threatening in the first degree, HRS § 707-716(1)(d) (1993); (4) and (5) promoting prison contraband in the first degree, HRS § 710-1022(1)(b) (1993). These charges stem from a September 20, 2000 incident at Halawa Correctional Facility (HCF) where Defendant allegedly took Robyn Kalahiki (Kalahiki), a nurse at HCF, hostage and threatened her with a "home made knife."

On January 9, 2001, Defendant was appointed counsel from the Office of the Public Defender. On February 16, 2001, Defendant filed his motion for appointment of examiners to determine his penal responsibility (motion for appointment of examiners). This motion requested that the court appoint a "three-member panel of examiners to determine Defendant's penal responsibility at the time of the alleged offense(s)." As grounds for the motion, Defendant's trial counsel, in a declaration, asserted his belief "[b]ased upon all the information I have been provided in this matter . . . it would seem that the [D]efendant, at the time of the alleged offenses, was suffering from an extreme depression, and also from an anti-social disorder, which led him to conclude that the only alternative he had in life was to commit suicide." Defendant's trial counsel further declared his belief that "during the days just prior to, and including the day in question, the [D]efendant became so despondent that suicide seemed rational to him." Lastly, Defendant's trial counsel stated his belief that Defendant "has had a history of methamphetamine abuse . . . and that said abuse may have led to organic brain damage that has left the [D]efendant with the inability, at times, to make rational choices."

On March 13, 2001, Plaintiff-Appellee State of Hawai'i (the prosecution) filed its memorandum in opposition to Defendant's motion for appointment of examiners. The prosecution

opposed Defendant's motion "because the indicia of penal irresponsibility are weak at best." Relying on State v. Tyrell, 60 Haw. 17, 586 P.2d 1028 (1978), the prosecution argued that this court "held that there was no abuse of discretion in denying the appointment of a board of examiners on the facts of that case because what was before the court was insufficient to compel the exercise of discretion to proceed with the appointment of examiners."

The prosecution conceded that Defendant's intention on the day of the offenses was to commit suicide, citing two letters written by Defendant before the offenses were committed. Defendant's first letter, dated September 18, 2000, was addressed to "Captain Martinez" (Martinez) and stated, in relevant part:

I plan on doin' [sic] something with myself. You may call it a suicide mission but you guyz [sic] are the one's who will take me out. I had this planned out for awhile now. My intention's to go already. I tired of this life. Especially when my brother's and myself are alwayz [sic] getting in trouble. . . . And I also chose Nurse Robin [Kalahiki] as the person I'm goin' [sic] to hold because I knew she is or was close to you at one time or another. Anyway, I'll never hurt her physically. I intend on hurting no one but myself, I promise. I'm doin' [sic] this hoping you guyz [sic] will take me out.

Defendant's second undated letter was addressed to "Danny" and stated, "I really don't know what to do but take the coward way out. Anyway, I plan on making them take me out." The prosecution argued that these "letters establish Defendant was thinking clearly, logically, and without interference from a mental disease, disorder, or defect."

The prosecution also relied on seven additional exhibits from HCF¹ that, according to it, "contradict any assertion that Defendant was suffering from a mental disease, disorder, or defect that excludes penal responsibility."

On February 20, 2001, and March 28, 2001, the court² conducted hearings on the motion for appointment of examiners. The prosecution relied on its arguments in its memorandum in opposition. Defendant's trial counsel stated his understanding that Defendant "had been on occasion seeing a psychiatrist at Halawa, and I don't think it was just in regards to this particular case or what happened or is alleged to have happened in this case, but even previously." (Emphases added.) Defendant's counsel then reiterated his arguments that "at the time of this incident, [Defendant] was suffering from a serious depression, and that's why he went forward with this suicide attempt." (Emphasis added.) Defendant's counsel asserted Defendant's behavior leading up to and including the suicide attempt was "not rational behavior by any means," "that this had

¹ In all, the seven exhibits relied upon and attached to the prosecution's memorandum in opposition included (1) a "Mental Health Intake Screening" dated December 5, 1991, (2) a "Medical/Mental Health Admission Screening" dated August 11, 1993, (3) a "Health Status Classification Report" dated October 26, 1993, (4) a "Health Status Classification Report" dated August 5, 1996, (5) "Multidisciplinary Progress Notes" with notations dated September 20, 2000, (6) a "Separation Log" with an entry dated September 20, 2000, and (7) a letter addressed to Mrs. Brenda Harper, nurse practitioner, dated January 31, 2001. Exhibits (1) through (4) are four prison medical records created prior to the day of the alleged offenses. Exhibits (5) and (6) are handwritten notes taken on the day of the alleged offenses. Exhibit (7) is a letter written by Defendant to the nurse practitioner requesting assistance with his diet four months after the alleged offenses.

² The Honorable Gail C. Nakatani presided.

built up over a period of time as stated in the letters contained in the [prosecution's] memo in opposition . . . , and it had built up because of the frustration and because of the depression that [Defendant] was going through[.]” Finally, Defendant’s counsel argued that neither the court nor the attorneys “are experts in this area and we should not put ourselves in the place of experts.” After hearing from both parties, the court took the motion for appointment of examiners under advisement.

On April 12, 2001, the court by written order appointed Dr. Olaf Gitter (Gitter), a psychologist, “to preliminarily evaluate [D]efendant’s penal responsibility” and “to examine and report upon Defendant’s physical and mental condition.” This order instructed Gitter to include, inter alia, in his report

an opinion as to whether the capacity of the [D]efendant to appreciate the wrongfulness of his/her conduct (cognitive capacity) or to conform his/her conduct to the requirements of law (volitional capacity) was substantially impaired by any such physical or mental disease, disorder, or defect at the time of the alleged conduct.

The court also ordered that “Defendant shall be examined at . . . [HCF].”

B.

On April 30, 2001, Gitter conducted a one-hour telephone clinical interview with Defendant at the Medium Security Special Holding Section of HCF as part of the examination. Gitter also reviewed (1) Defendant’s correctional medical records, (2) Defendant’s HCF institutional records, and (3) Defendant’s Adult Probation Division records. By letter

dated May 1, 2001, and filed on May 8, 2001, Gitter reported as to penal responsibility that Defendant's "cognitive and volitional capacities at the time of the alleged offenses were not substantially impaired as a result of a mental disorder, but may have been impaired due to voluntary crystal methamphetamine intoxication."

Gitter also noted Defendant's prior psychiatric history and stated the following:

According to a Pre-Sentence Diagnosis and Report . . . on February 11, 1998, the [D]efendant has no prior mental health treatment history. As a juvenile, he was evaluated by William Perry, Ph.D., for the Family Court of the First Circuit. Dr. Perry noted that the [D]efendant was suffering from no mental disorder and that [Defendant] had an "adequate level of intellectual functioning".

. . . .

On September 20, 2000, that is right after the alleged instant offenses, [Defendant] was evaluated by a correctional mental health worker, who charted that [Defendant] was oriented in all spheres, showed appropriate affect and gave appropriate responses. Some psychomotor agitation was noted but the [D]efendant stated that "I am okay".

Gitter also reported the following observations of Defendant from the telephone interview:

No signs of psychomotor abnormality were noted. [Defendant's] speech was clear, coherent and goal directed. His associations were tight. His mood was mildly dysthymic. His affect was appropriate to mood and thought content. He denied sleep disturbance, but admitted to a decrease in his appetite and energy level, which he attributed in part at least to be [sic] currently housed in the Special Holding Section at HCF. While he denied homicidal ideation, he admitted to intermittent suicidal ideation and stated that for religious reasons he would not kill himself, but that he might look for another opportunity, i.e. kidnap to force the Adult Correctional Officers to shoot him. No psychotic target symptoms were noted. [Defendant] denied experiencing auditory and visual hallucinations, paranoid ideation, ideas of reference and mind reading. No delusions were elicited. He reported that he had experienced psychotic symptoms, i.e. hallucinations, paranoid ideation and ideas of reference in the past while under the influence of crystal methamphetamine.

(Emphasis added.) As to Defendant's mental status at the time of the telephone interview, Gitter reported that "[d]ue to the restrictive interview situation at HCF, no psychological testing was attempted, but my observation during the interview suggests that [Defendant] is of normal intellectual functioning and without any obvious cognitive impairment." (Emphasis added.)

On May 16, 2001, the court issued a written order denying Defendant's motion for appointment of examiners.³ The court noted its receipt of Gitter's letter and Gitter's finding that "Defendant's cognitive and volitional capacities were not substantially impaired at the time of the alleged offenses[.]"

Following numerous pre-trial motions and one mistrial, a jury trial was conducted from August 13, 2002 through September 4, 2002. On September 5, 2002, the jury reached a verdict, finding Defendant guilty of Counts One and Four. The jury found Defendant not guilty of Count Five. On the same day, a judgment of acquittal was filed for Count Five.

On November 7, 2002, the court filed its judgment and sentence. On December 5, 2002, Defendant filed a notice of appeal from the November 7, 2002 judgment and sentence.

³ Throughout the proceedings leading up to Defendant's November 7, 2002 judgment and sentence, Defendant made the following requests or motions to be re-evaluated by a physician or panel of physicians: (1) "Request Order to be Re-evaluated by a Doctor" filed on August 30, 2001; (2) "Motion to be Re-evaluated by Doctor" filed on January 22, 2002 and (3) "Oral Motion for Three Panel Insanity Exam" made at a hearing on July 18, 2002 and denied by the court at a July 22, 2002 hearing. The court denied these motions, not altering the findings or order of the May 16, 2001 order denying Defendant's initial motion for appointment of examiners.

II.

On appeal, Defendant asserts six points of error, the first of which is that the "court violated [his] right to due process when it denied his repeated motions for a full mental examination." The prosecution responds as to this point that the court "did not abuse its discretion in refusing to stay the proceedings and appoint a three-member panel of examiners." I believe that as to Defendant's first point, there was a rational basis for the court to appoint a three-member panel, and, thus, the court abused its discretion when it denied Defendant's February 16, 2001 motion for appointment of examiners. Resolution of this point would be dispositive of this appeal.

III.

Defendant contends the actions of September 20, 2000 were a suicide attempt and "a very clear sign of irrational behavior" with Defendant "going through a major depressive episode." He also claims that "taking a hostage as part of a suicide attempt is a clear and concrete example of 'irrational behavior.'" ⁴

⁴ Defendant also relies on statements made at (1) a July 18, 2002 hearing that (a) he intended to use the insanity defense and that (b) he informed Gitter that he had a "multiple personality," and (2) a July 22, 2002 hearing before the court that he suffered from blackouts as evidence that he was entitled to the requested mental examination. In response to these statements, the prosecution argues that Defendant's claims of "multiple personality" and "blackouts" were "fabrication[s]." The prosecution contends that although Defendant allegedly told Gitter about his "multiple personality," when Defendant had an opportunity to question Gitter about this statement in a court hearing conducted on January 28, 2002, Defendant failed to question Gitter about this claim. The prosecution also discredits Defendant's "blackout" statements because Defendant made these claims only after the court denied Defendant's July 22, 2002 oral "Motion for a Three-

(continued...)

In response, the prosecution argues that "there was no rational basis for convening a panel of examiners." The prosecution points to the lack of any finding by Gitter that Defendant had any organic brain damage and the lack of any history of a mental disease, disorder, or defect in Defendant's prison records. It explains that, although Defendant intended to commit suicide, his "purposeful conduct . . . [was] not indicative of a lack of substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law" pursuant to HRS 704-400(1) (1993). (Quotation marks and brackets omitted.) The prosecution relies on the letters written by Defendant, see supra, to "demonstrate that [Defendant] fully appreciated the wrongfulness of his conduct and could conform his conduct to the requirements of the law."⁵

⁴(...continued)

Panel Insanity Exam." At the July 22, 2002 hearing, as stated supra, the court denied the "Motion for Three-Panel Insanity Exam."

In reply to the prosecution's arguments, Defendant reiterates his argument that "suicide was the motivation for [his] actions back on September 20, 2000." Defendant maintains that he "suffer[ed] from blackouts" and that he told Gitter that the "medical unit was denying him medical assistance" and that he had a "multiple personality." Lastly, Defendant explains (1) that the lack of "any suicidal ideation" in his medical records and (2) that the records were "dated from 1991 and 1993 . . . would indicate that something happened recently[, prior to the alleged offenses,] to spur on [Defendant's] suicidal thoughts." These statements and events of July 18, 2002 and July 22, 2002 occurred after those considered in the court's May 16, 2001 order denying Defendant's motion for appointment of examiners.

⁵ In its answering brief, the prosecution relies on particular statements from Defendant's letters to demonstrate his abilities to substantially appreciate the wrongfulness of his conduct and conform his conduct to the requirements of the law. These statements include:

[Defendant] wrote that he (1) would never physically hurt Kalahiki; (2) did not intend for anyone to be hurt other than himself; (3) chose Kalahiki because he knew she was

(continued...)

In reply, Defendant agrees that his "medical records indicated that [he] did not previously report having any suicidal ideation" but argues that these reports, "dated from 1991 and 1993 . . . would indicate that something happened recently to spur on [Defendant's] suicidal thoughts. [Thus, i]t was incumbent upon the court to appoint a full panel to thoroughly investigate [Defendant's] claims."

IV.

This court has said that "the applicable standard of review on appeal of a trial court's refusal to stay the proceedings and to appoint a panel of examiners is . . . [an] abuse of discretion." State v. Castro, 93 Hawai'i 424, 426, 5 P.3d 414, 416 (2000) [hereinafter "Castro II"].⁶ The relevant statute is HRS § 704-404.

HRS § 704-404 (1993 & Supp. 1999) provides that whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that a physical or mental disease, disorder or defect . . . will or has become an issue in the case, the court may immediately suspend all proceedings, and upon suspension "shall appoint three qualified examiners in felony cases."

Castro I, 93 Hawai'i at 461-62, 5 P.3d at 451-52 (quoting HRS §

⁵(...continued)

close to Martinez; (4) had Kalahiki's kidnapping "planned out for a while now[;]" and (5) "plan[ned] on making them take [him] out."

⁶ In Castro II, this court "approv[ed] and adopt[ed]" the Intermediate Court of Appeals' concurring opinion in State v. Castro, 93 Hawai'i 454, 5 P.3d 444 (App. 2000) [hereinafter "Castro I"], "in its entirety." Castro II, 93 Hawai'i at 427, 5 P.3d at 417.

704-404(1) and (2)) (emphases added) (brackets omitted).⁷

Under HRS § 704-404, the court was obligated to convene a three-member panel upon a showing of some rational basis to believe mental responsibility is or will become an issue in the case.

While the term "may" [in HRS § 704-404] suggests that discretion inheres in the trial court as to whether to appoint examiners, the balance of the pertinent statutory language suggests that only some rational basis for convening a panel is necessary to trigger the court's appointive power. Absolutely no burden of proof is placed upon the defendant in requesting a panel evaluation. The filing of a notice aside, what would seem to be the most minimal of standards -- that there is "reason" to doubt fitness, or to believe that the defendant's physical or mental responsibility will or has become an issue in the case -- invokes the exercise of the court's discretion. Hence, the court is duty bound to sua sponte convene such a hearing if it itself has or is presented with rational basis for believing that the physical or mental defect of a defendant will become an issue on the question of fitness or responsibility. Such a rational basis standard sets its face against any grudging application of the statute by the trial courts.

Castro I, 93 Hawai'i at 462, 5 P.3d at 452 (emphasis omitted) (emphasis added). Thus, "only some rational basis for convening a panel is necessary to trigger the trial court's . . . power to stay the proceedings and thereafter, to appoint examiners."

Castro II, 93 Hawai'i at 427, 5 P.3d at 417 (quotation marks and brackets omitted).

In this case, the question of Defendant's physical or mental disease, disorder or defect had indisputably become an issue in the case. Based on the matters submitted by counsel,

⁷ Castro II had been decided by this court six months before the filing of Defendant's motion for appointment of examiners. This court's decision in Castro II was filed on July 27, 2000. Defendant's motion for appointment of examiners was filed on February 16, 2001. Yet, neither counsel nor the court referred to Castro II in the pleadings or at the hearings on the motion for appointment of examiners.

there was a rational basis for the court to appoint a panel of examiners pursuant to HRS § 704-404(2). Defendant's trial counsel, by his declaration and "as court-appointed counsel acting in good faith and out of a professional duty," Castro I, 93 Hawai'i at 462, 5 P.3d at 452 (emphasis added), filed the motion for appointment. Defendant's trial counsel cited to (1) his understanding that Defendant had seen a psychiatrist at HCF prior to the alleged offenses; (2) his belief that Defendant was suffering from "an extreme depression" and "an anti-social disorder" at the time of the alleged offenses, leading Defendant to "conclude that the only alternative he had in life was to commit suicide"; (3) his belief that drug abuse by Defendant "may have led to organic brain damage," leaving Defendant with the "inability, at times, to make rational choices;" (4) Defendant's suicide attempt; and (5) Defendant's letters leading up to the events of the suicide attempt as "specific conduct [by] Defendant which convinced counsel that an examination should be performed." Castro I, 93 Hawai'i at 462, 5 P.3d at 452.

On the other hand, the exhibits relied on by the prosecution in its opposition to the motion were insufficient to nullify counsel's declaration. As mentioned, see supra note 1, the prosecution's exhibits include (1) four prison medical records prior to the alleged offenses ("Mental Health Intake Screening" dated December 5, 1991; "Medical/Mental Health Admission Screening" dated August 11, 1993; "Health Status

Classification Report" dated October 26, 1993; and "Health Status Classification Report" dated August 5, 1996), (2) two sets of handwritten notes dated September 20, 2000, the day of the alleged offenses (the "Multidisciplinary Progress Notes" and the "Separation Log"), and (3) one letter addressed to an HCF nurse practitioner dated January 31, 2001. Taken as a whole, these exhibits provide little information as to Defendant's mental health status at the time of the alleged offenses.

For example, the four prison medical records are old, with a four to nine year gap between these records and the day of the alleged offenses. The August 5, 1996 Department of Public Safety "Health Status Classification Report" indicates that Defendant was "referred" to a "mental health professional" for some type of "mental health" evaluation or treatment. There is, however, no follow-up indicated from this report. The handwritten notes on the day of the alleged offenses are equally uninformative and sparse, as they do not elaborate on the circumstances preceding and surrounding the day of the alleged offenses. Finally, the January 31, 2001 letter addressed to a nurse practitioner at HCF is irrelevant as to Defendant's mental status of September 20, 2000, as it was written after the alleged offenses. The letter is a request to alter Defendant's diet and the only statement in the letter that alludes to the offenses is Defendant's statement that he thinks "everyone over there [at the medical unit] is against me . . . [a]nd I won't blame them. There

was an incident over here this morning involving one of your nurse [sic] where I supposedly said something bad to her[.]”

This court has cautioned against the practice of appointing one examiner to assist the court in exercising its discretion to appoint a panel of examiners.⁸ In Tyrell, this court qualified its “one expert” holding by stating that “[w]e do not endorse an examination by a single psychiatrist, based on a single interview with the defendant, as sufficient to remove the question of competency to stand trial in the face of evidence raising a substantial question of competency.” Tyrell, 60 Haw. at 23 n.3, 586 P.2d at 1032 n.3 (emphasis added) (citation omitted). Similarly here, the court’s reliance on the examination by Gitter is questionable in light of the matters raised by the defense and the nature, number, and seriousness of the charges. HRS § 704-404(2), in effect at the time Defendant filed the motion for appointment of examiners, provided, in relevant part that a one examiner “panel” was reserved for nonfelony cases. The examination as to this felony case, then, was contrary to statute.

Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be either a psychiatrist, licensed psychologist or qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health form within the department of health.

⁸ HRS § 704-404 does not refer to such an appointment as authorized under its provisions.

(Emphasis added.)

Gitter conducted only a one-hour telephone interview and conceded in his letter to the court that “[n]o psychological testing was attempted.” Under the circumstances, Defendant established a rational basis for the court to appoint a three-member panel of examiners. The court thus abused its discretion when it denied Defendant’s motion for a three-member panel mental examination and instead ordered a one-examiner review.