

NO. 21564

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
PAUL POWERS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 96-0162)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

In this consolidated appeal (Nos. 21564 and 21589), Defendant-Appellant Paul Powers appeals the May 8, 1998 Judgment, Guilty Conviction and Probation Sentence entered by the circuit court of the first circuit in Criminal No. 96-0162, convicting him of promoting a dangerous drug in the third degree and sentencing him to five years of probation under terms and conditions, including 122 days of jail confinement with credit for time already served.

Powers was arrested on January 20, 1996, at about 3:20 p.m., after a police officer driving on Nu'uuanu Avenue in downtown Honolulu observed him, standing in a doorway with two others, holding a metal rod which he was using to scrape the inside of a glass pipe of a type commonly used to smoke "crack" cocaine. The pipe was black at one end and filled with a white residue.

In his Second Amended Opening Brief, Powers raises two issues for review on appeal.

First, he contends the court erred in denying his January 28, 1997 Motion to Dismiss Charges for Violation of [Hawai'i Rules of Penal Procedure] HRPP Rule 48. The court's order denying the Rule 48 motion was filed on April 21, 1997.

Second, he asserts the court erred in denying his January 31, 1997 Motion to Dismiss Charges for Prejudicial Delay Due to Violation of Speedy Trial Rights and Ineffective Assistance of Counsel. The court's order denying the speedy trial motion was filed on April 1, 1997.

The entirety of Powers' argument on appeal is as follows:

Attached hereto as Appendices A-E are the pleadings filed on the Rule 48, H.R.P.P., [sic] issue.

Defendant-Appellant incorporates by reference the facts and law presented in Appendices A-E.

In fact, the referenced appendices include pleadings relating to the speedy trial motion as well.

Clearly, Powers has not presented any discernible argument on any issue in this appeal, so we decline to consider his appeal. An appellate court does not have to address matters for which the appellant has failed to present discernible argument. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (1999) ("the appellant shall file an opening brief,

containing . . . [t]he argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon"); CSEA v. Doe, 88 Hawai'i 159, 174 n.20, 963 P.2d 1135, 1150 n.20 (App. 1998) ("Appellant, however, fails to present discernible argument with respect to these allegations and this court, therefore, need not address those matters." (Citations omitted.)); Bank of Hawai'i v. Shaw, 83 Hawai'i 50, 52, 924 P.2d 544, 546 (1996) ("[Appellant's] appeal asserts numerous grounds but fails to provide discernible argument or discussion on many of the points. We will disregard a point of error if the appellant fails to present discernible argument on the alleged error." (Citation omitted.)).

In addition, Powers does not cite to the record or otherwise specify evidence which might explicate his arguments on appeal. For this further reason we decline to address his appeal. HRAP Rule 28(b)(3) (1999) ("the appellant shall file an opening brief, containing . . . the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of trial proceedings"); International Brotherhood of Electrical Workers v. Hawaiian Telephone Co., 68 Haw. 316, 322 n.7, 713 P.2d 943, 950 n.7 (1986) ("Counsel has no right to cast upon the court the burden of searching through a voluminous record to find the ground of an objection. It is counsel's duty to cite accurately the portions of the record supporting counsel's position."

(Internal citation omitted.); cf. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) ("Because the factual basis of [appellant's] alleged point of error is not part of the record on appeal, this court has no basis upon which to rule on the merits of his claim." (Citation omitted)).

In any event, Powers' conviction and sentence came by way of the guilty plea he tendered on May 21, 1997, about a month after the court denied his Rule 48 and speedy trial motions. The guilty plea formed part of a plea agreement with the State. In return for the plea, which was made to the charge in count I of the complaint, the State agreed to *nolle prosequi* the unlawful use of drug paraphernalia charge in count II of the complaint. The State also agreed to the sentence Powers received.

By entering his guilty plea, Powers waived appeal of the court's orders denying his Rule 48 and speedy trial motions. State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318 (1990) ("a guilty plea made voluntarily and intelligently precludes a defendant from later asserting any nonjurisdictional claims, including constitutional challenges to the pretrial proceedings" (citations omitted)).

By way of preface to its holding in Morin, the supreme court noted that the defendants did not challenge the validity of their no contest pleas. Id. In this connection, we observe that Powers' October 29, 1998 Opening Brief, which was stricken by the

supreme court on January 25, 1999 for lack of compliance with HRAP Rule 28, argued, as his only issue on appeal, that the court erred in denying his motion to withdraw guilty plea. His February 24, 1999 Amended Opening Brief, which was also stricken by the supreme court on April 29, 1999 for lack of compliance with HRAP Rule 28, again challenged the denial of his motion to withdraw guilty plea (in addition to other issues, including the Rule 48 and speedy trial issues). However, for reason or reasons not apparent, his May 25, 1999 Second Amended Opening Brief failed to attack the validity of his guilty plea; indeed, it did not even mention his guilty plea.

Nevertheless, the argument contained in the stricken Opening Brief was as follows, here in its remarkable entirety and verbatim:

Court-appointed counsel concurs with the State in its Statement Of Jurisdiction, filed on or about March 17, 1998, that the instant appeals are interlocutory in nature. Defendant-Appellant has not obtained leave of court, required under H.R.S. 641-17, to file an interlocutory appeal.

The State should have moved long ago to dismiss the instant appeals on that ground.

Even if the appeal were not interlocutory, present counsel would file an Opening Brief under Anders v. California, 386, U.S. 738 (1967).

Counsel finds the issue Defendant-Appellant has urged on appeal without merit and wholly frivolous.

Pursuant to Anders, supra, counsel requests permission to withdraw.

Present counsel is the seventh counsel defendant has been able to get the lower courts to appoint herein.

VI. CONCLUSION

Court-appointed counsel is ineluctably drawn to the same conclusion as the State, i.e.[,] that this Court has no jurisdiction since Defendant did not obtain leave of the trial court to file the instant appeal.

The State, in its initial Answering Brief, asserted that the "Statement Of Jurisdiction" referred to in the foregoing passage does not exist. The State concedes that the consolidated appeals are "timely, albeit redundant, appeals."

The stricken Amended Opening Brief contained the following argument, more succinct yet still remarkable, concerning the validity of Powers' guilty plea: "Defendant submits that the Court was in error in denying his motion [to withdraw guilty plea]."

Hence, even if the Second Amended Opening Brief had challenged the validity of Powers' guilty plea, but in a similar fashion, the possibility of effective appellate review would still be problematic.

For the foregoing reasons, we affirm the circuit court's May 8, 1998 Judgment, Guilty Conviction and Probation Sentence.

DATED: Honolulu, Hawaii, December 21, 2000.

Mark Worsham for
defendant-appellant.
(Reinhard Mohr, on the
briefs).

Chief Judge

Alexa D. M. Fujise,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge