

NO. 22861

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
NATHANIEL E. BONTY, also known as Nick E.  
LeBonty, Jr., Defendant-Appellant,  
and JOHN J. LAYTON, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 58523)

MEMORANDUM OPINION

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

On April 6, 1983, Defendant-Appellant Nathaniel E. Bonty, a.k.a. Nick E. LeBonty, Jr., (Bonty) was charged with Promoting a Dangerous Drug in the First Degree (Count IV)<sup>1</sup> in violation of Hawaii'i Revised Statutes (HRS)

---

<sup>1</sup> Counts I-III and Count V pertained to co-defendant John J. Layton (Layton). Bonty and Layton were both charged in Count IV. Count IV charged, in relevant part:

Count IV: On or about the 22d [sic] day of November, 1982, in the City and County of Honolulu, State of Hawaii [Hawaii'i], . . . NATHANIEL E. BONTY, also known as Nick E. LeBonty, Jr., did knowingly distribute one or more preparations, compounds, mixtures, or substances of an aggregate weight of 1/8 ounce or more containing cocaine, or salts of cocaine, thereby committing the offense of Promoting a Dangerous Drug in the First Degree in violation of Section 712-1241(1)(b)(ii)(A) of the Hawaii [Hawaii'i] Revised Statutes.

§ 712-1241(1)(b)(ii)(A) (1985).<sup>2</sup> Bonty waived his right to a jury trial on October 29, 1984, and a nonjury trial commenced before Circuit Court Judge Wilfred K. Watanabe on October 31, 1984. Bonty was found guilty<sup>3</sup> and sentenced to twenty years of imprisonment with credit for time served. The judgment was entered on September 1, 1999.<sup>4</sup>

On appeal Bonty contends his conviction should be reversed because the circuit court erred in allowing expert testimony without a proper foundation and, without such testimony, there was insufficient evidence to support his conviction.

---

<sup>2</sup> HRS § 712-1241(1)(b)(ii)(A) (1985), Promoting a Dangerous Drug in the First Degree, stated, as it did in 1983, in relevant part:

**§712-1241. Promoting a dangerous drug in the first degree.**

(1) A person commits the offense of promoting a dangerous drug in the first degree if he knowingly:

. . . .

(b) Distributes:

. . . .

(ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(A) One-eighth ounce or more, containing heroin, morphine, or cocaine or any of their respective salts[.]

<sup>3</sup> The judgment states that defendant was convicted and found guilty of HRS § 712-1241(1)(b)(i) instead of § 712-1241(1)(b)(ii)(A). We note that this appears to be a typographical error on the judgment since paragraph 6 of the Statement of Evidence and Proceedings Below refers to "an aggregate weight of over one-eighth of an ounce" (§ 712-1241(1)(b)(ii)(A)), as do the opening and answering briefs, and this error was not raised on appeal.

<sup>4</sup> On November 23, 1984, Bonty was released on \$5,000.00 bail. On January 15, 1985, the order for bail was set aside because Bonty failed to comply with the terms and conditions of his bail release (namely, his whereabouts became unknown), and a bench warrant for arrest was issued. The bench warrant was not executed upon Bonty until March 30, 1999.

We disagree with Bonty and affirm the September 1, 1999, judgment of the circuit court.

### **I. BACKGROUND**

As a result of the passage of time between trial and the entry of judgment, the transcripts of the proceedings below, other than that of sentencing on September 1, 1999, were destroyed "per retention schedule." Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(c),<sup>5</sup> a Statement of Evidence and Proceedings Below was submitted by Bonty to the circuit court; it was approved by the court and filed on August 14, 2000. The Statement of Evidence and Proceedings Below is summarized as follows:

Undercover Police Officer Kathleen Sisson (Officer Sisson) testified that she participated in a controlled purchase of cocaine from Bonty and Layton. Layton made the actual purchase and gave a white substance to Officer Sisson. Officer

---

<sup>5</sup> HRAP Rule 10(c) provides that where no transcripts of the proceedings below are available, a party may prepare a statement of the evidence and proceedings below and serve that statement on opposing parties, who may then serve objections or propose amendments thereto within ten days after service. "Thereupon the statement and any objections or proposed amendments shall be submitted to the court or agency appealed from for settlement and approval and as settled and approved shall be included by the clerk of the court appealed from in the record on appeal." HRAP 10(c).

Bonty served his Proposed Statement of Evidence and Proceedings Below on Appellee State of Hawai'i (the State) on June 5, 2000. The State filed its Counter Statement of Facts to Defendant's Submission of Proposed Statement of Proceedings on August 10, 2000, some sixty-six days after service of Bonty's proposed statement. On August 10, 2000, the circuit court approved Bonty's Statement of Evidence and Proceedings Below, and it was filed on August 14, 2000.

Sisson recovered the substance as evidence and submitted it to the Honolulu Police Department's (HPD) evidence room.

Detective Preston Abe (Abe) testified that he was assigned to investigate Bonty's case. Abe requested that HPD's scientific investigation division conduct a chemical analysis on the substance recovered by Officer Sisson.

Claire Chun (Chun) testified that she was employed as a criminalist by HPD. After responding to a number of questions regarding her educational background and training, Chun was qualified as an expert in the identification of controlled substances. Over Bonty's objection as to lack of foundation, Chun testified that she performed a chemical analysis on the evidence submitted by Officer Sisson and determined that it contained cocaine, which was of an aggregate weight of over one-eighth of an ounce. The substance recovered by Officer Sisson was admitted into evidence.

Bonty testified that he did not sell any drug to Layton; rather, he accepted money from Layton because Layton was a prior tenant who owed him back rent.

## **II. STANDARDS OF REVIEW**

### **A. Sufficiency of the Evidence**

We review the sufficiency of evidence on appeal as follows:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution

when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

### **B. Admission of Expert Testimony**

"Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion."

State v. Wallace, 80 Hawai'i 382, 406, 910 P.2d 695, 719 (1996) (internal quotation marks omitted).

### **C. Findings of Fact**

We review findings of fact according to the clearly erroneous standard.

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999)

(quoting State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)).

#### **D. Conclusions of Law**

We review conclusions of law de novo, under the right/wrong standard. Under the right/wrong standard, this court "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Kapiko, 88 Haw. 396, 401, 967 P.2d 228, 233 (1998) (internal quotation marks omitted; brackets in original and added).

#### **III. DISCUSSION**

Bonty contends the circuit court erred when it allowed HPD's criminalist, Claire Chun, to testify regarding the chemical analysis she conducted on the white substance recovered by Officer Sisson. Bonty argues that there was insufficient foundation provided as to the testing procedures Chun employed, the procedures' scientific reliability, the employment of proper testing procedures, and whether the testing equipment was functioning properly at the time the testing procedures were employed. Bonty concludes that because the circuit court erred in admitting the testimony of Chun, there was insufficient evidence to support his conviction for Promoting a Dangerous Drug in the First Degree.

The Hawai'i Supreme Court has stated that the crime of Promoting a Dangerous Drug in the First Degree by distribution is completed "where, with the specific intent to sell, the accused

has offered to sell the contraband."<sup>6</sup> State v. Schofill, 63 Haw. 77, 81, 621 P.2d 364, 368 (1980). The court based its holding on the definition of "to distribute," which "means to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same." HRS § 712-1240 (1993) (emphasis added). The court expressly held that "the crime of promoting a dangerous drug by distributing the same is complete where, with the specific intent to sell, the accused has offered to sell the contraband. Actual delivery in such case would not be required, and neither, obviously, would a chemical analysis of the substance." Schofill, 63 Haw. at 81, 621 P.2d at 368 (citations omitted).

On the other hand, where a defendant is charged with possession or the sale of narcotics, "the government must establish beyond a reasonable doubt that the substance involved is that specified in the indictment." Id. at 80, 621 P.2d at 368. However, Bonty, like Schofill, was indicted for knowingly distributing proscribed drugs under HRS § 712-1241(1)(b)(ii)(A),

---

<sup>6</sup> "[I]t is not necessary for the prosecution to introduce direct evidence of a defendant's state of mind in order to prove that the defendant acted intentionally, knowingly or recklessly. . . . Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient." State v. Eastman, 81 Hawai'i 131, 140-41, 913 P.2d 57, 66-67 (1996) (citation omitted). Judge Watanabe heard Bonty's testimony that he did not sell drugs to Layton, but, as evidenced by the guilty verdict, Judge Watanabe apparently found Officer Sisson's testimony (that she participated in an undercover purchase of cocaine from Bonty) more credible. Bonty's intent to distribute cocaine may be inferred by his participation in the sale of cocaine to Officer Sisson.

and neither delivery nor chemical analysis of the substance is required for conviction. Schofill, 63 Haw. at 81, 621 P.2d at 368.

Bonty's Statement of Evidence and Proceedings Below, approved in its entirety by the circuit court, states that Officer Sisson "participated in a controlled purchase of purported cocaine from" Bonty. Bonty submitted only a general objection "as to a lack of foundation" without specifically challenging the testing procedures employed, the procedures' reliability, the employment of proper testing procedures, or the proper functioning of the testing equipment at the time the testing procedures were employed.<sup>7</sup> In the context of a "promoting a dangerous drug in the first degree" case, the Hawai'i Supreme Court held that although testimony may be lacking in sufficient foundation and would be inadmissible in the face of an adequately preserved objection, the failure to specifically challenge the accuracy of testing equipment employed waived that issue from being raised on appeal. State v. Wallace, 80 Hawai'i 382, 410, 910 P.2d 695, 723 (1996).

---

<sup>7</sup> Paragraph 6 of the Statement of Evidence and Proceedings Below states as follows:

6. Over the objection of [Bonty] as to a lack of foundation, Ms. Chunn [sic] testified that she performed a chemical analysis on the evidence in this case and determined that it contained cocaine and was of an aggregate weight of over one-eighth of an ounce.



Nothing from Bonty's own Statement of Evidence and Proceedings Below suggests that Chun did not testify as to the testing procedures' reliability or propriety. At best, the fact that Chun's testimony was admitted over Bonty's objection "as to a lack of foundation" only supports the conclusion that Bonty objected to the testimony. "[T]he appellant bears the burden of presenting [the appellate] court with a record sufficient to show that error occurred at trial." State v. Bates, 84 Hawai'i 211, 217, 933 P.2d 48, 54 (1997) (internal quotation marks omitted; brackets in original). Based on the record before us, Bonty did not meet that burden and waived the issues of the propriety, reliability, and accuracy of the testing employed.

"Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion." Wallace, 80 Hawai'i at 406, 910 P.2d at 719 (internal quotation marks omitted). Based on the record provided by Bonty, we cannot conclude that the circuit court's admission of Chun's testimony constituted an abuse of discretion. Furthermore, other than Bonty's objection to a lack of foundation to Chun's testimony, there is nothing in the record, prepared by Bonty, to indicate the circuit court abused its discretion in overruling Bonty's objection.

**IV. CONCLUSION**

The September 1, 1999, judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, June 12, 2001.

On the briefs:

Michael G.M. Ostendorp  
for defendant-appellant.

Acting Chief Judge

Mangmang Qiu Brown,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

Associate Judge

Associate Judge