

NO. 23144

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CHRISTINA IANNETTA FOTI, also known as
CHRISTINA RENEE PESTANA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 98-0709(3))

MEMORANDUM OPINION

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

Defendant-Appellant Christina Iannetta Foti (Foti) appeals the January 5, 2000, Judgment of the Circuit Court of the Second Circuit (circuit court), which, pursuant to a bench trial,¹ found Foti guilty of Theft in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 708-831(1)(b) (Supp. 2000).² The circuit court sentenced Foti to a five-year term of

¹The Honorable Joseph E. Cardoza presided. The Judgment states that Foti plead to and was found guilty of Theft in the Second Degree. The circuit court, defense counsel, and the State are cautioned to read carefully final judgments to ensure the judgments are correct before an appeal is filed.

²HRS § 708-831 reads, in relevant part, as follows:

§708-831 Theft in the second degree. (1) A person commits the offense of theft in the second degree if the person commits theft:

. . . .
(b) Of property or services the value of which exceeds \$300[.]

The December 7, 1998, Indictment of Foti read:

That during or about the period of December 1, 1996, through September 30, 1997, inclusive, in the County of Maui, State of [Hawai'i], CHRISTINA IANNETTA FOTI, also known as CHRISTINA RENEE PESTANA, did, with intent to deprive, obtain or exert control over the property of the State of [Hawai'i], to wit, public assistance benefits, the value of which exceeded Three Hundred Dollars (\$300.00), by deception, thereby committing the offense of Theft in the Second Degree in violation of Section 708-831(1)(b) of the Hawaii Revised Statutes.

probation (with special terms and conditions) and two hundred hours of community service and ordered Foti to pay \$3,418.00 in restitution and a \$100.00 Crime Victims Compensation fee.

Foti contends on appeal that the circuit court erred in denying her motion for a new trial and that she had ineffective assistance of counsel at trial. We disagree with Foti and affirm the January 5, 2000, Judgment of the circuit court.

I. BACKGROUND

In its January 5, 2000, order finding Foti guilty, the circuit court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. All of the events occurred in the County of Maui, State of [Hawai'i];

2. [Foti] was receiving benefits from the Department of Human Services in the form of checks under the Aid for Dependant [sic] Children program based on the representation by [Foti] that her children were deprived because there was no contact or support from their biological father, Frank Foti, as of October 14, 1996, and continuing until September 30, 1997, and thereafter[;]

3. During the time period from December 1, 1996, to September 30, 1997, [Foti] received Six Thousand Two Hundred Sixty-Eight Dollars (\$6,268.00) in benefits from that program;

4. [Foti] applied for benefits on October 14, 1996, and met with welfare worker Jacqueline Helekunihi on October 16, 1996;

5. On the date of her application and for approximately two (2) weeks afterwards, [Foti] continued to live at the marital residence that she and her husband, Frank Foti, owned . . . ;

6. [Foti] failed to include her interest in real property and any personal property in her application for benefits;

7. During her interview on October 16, 1996, [Foti] told Jacqueline Helekunihi that she was renting. [Foti] also requested that the State not attempt to contact Frank Foti to recover for support to the children as she has a restraining order and she feared retribution by Frank Foti against her or her children;

8. Around the end of October 1996, [Foti] vacated the marital residence and Frank Foti moved into the residence, and he continued to occupy the residence throughout the period in question;

9. Sometime in late October or early November, Frank Foti filed for divorce;

10. On November 11, 1996, [Foti] entered into a rental agreement with Samuel and Ellen Santos to rent a studio unit at their residence . . . for a period of six (6) months;

11. The rental agreement provided that [Foti] would be the only occupant of the unit, although the children would be allowed to visit;

12. Ellen Santos told [Foti] that the Santos's did not want anyone else living in the unit with [Foti];

13. [Foti] turned a copy of her rental agreement in to her assigned case worke[r] at DHS, Rodney Wade;

14. Rodney Wade notified [Foti] that her rental agreement was insufficient because it did not include the children as tenants;

15. [Foti] subsequently turned in an altered version of the lease which included the names of . . . [Foti]'s children, along with their social security numbers;

16. Although [Foti] testified that Ellen Santos added the names upon [Foti]'s request, in fact Ellen Santos did not add the names and had never seen the altered lease until it was shown to her while she was testifying during the trial;

17. [Foti] and the Santos' [sic] mutually agreed that [Foti] would move out of the unit in late December 1996 or early January 1997;

18. On December 27, 1996, [Foti] entered into a rental agreement to rent a small unit (under 1000 sq. ft.) at the residence of Harold Freitas . . . for a period of one (1) year;

19. The lease was to take effect on February 1, 1997;

20. This lease was approximately five (5) pages, and on the first page it listed [Foti] as the only tenant to the unit. The lease also included a page that specifically

referred to [Foti] as the only tenant, and it noted that [Foti]'s children would be visiting. [Foti] signed the first page of the lease and the additional page that stated that the children would only be visiting;

21. [Foti] continued to live at the Freitas' residence for the duration of the period in question;

22. [Foti] did not notify the welfare office of this change in her residence address;

23. As part of the divorce proceedings, . . . on November 27, 1996, . . . the Court awarded the parties temporary joint physical and legal custody of the children, and ordered that the parties have the children equally during the week pursuant to an agreement the parties had entered into prior to the start of the hearing. This temporary custody arrangement continued for eighteen (18) months;

24. [Foti] did not notify the welfare office of this change in custody of the children;

25. [Foti] testified that the sole purpose of this arrangement was so that Frank Foti could avoid paying alimony [sic], and the parties had no intention of sharing the custody of the children;

26. Frank Foti testified that the custody agreement was that he would have the children from noon on Thursdays until 8:00 a.m. on Mondays. He testified that for the next eighteen (18) months he always had the children for at least that much time during the week. There may have been rare exceptions when the agreement may not have been followed;

27. [Foti] never notified the welfare office that Frank Foti was spending any time with their children;

28. Beginning in early 1997, January or February, the relationship between [Foti] and Frank Foti changed such that the parties would often have dinner together and [Foti] was going to the marital residence to do her laundry;

29. [Foti] never notified the welfare office that her relationship with Frank Foti changed from no contact to regular contact;

30. Starting in May of 1997, [Foti] received rent and security deposits from two (2) sub-tenants. At least a portion of that money went directly to Pali Loa Builders, a company owned by [Foti]'s boyfriend; the remaining portion went directly to [Foti];

31. This would be considered income to [Foti], however she did make an attempt to notify the welfare office that she had some income;

32. [Foti]'s boyfriend, Rick Ferreira, would often stay overnight at [Foti]'s residence from at least May 1997;

33. [Foti] never notified the welfare office that her boyfriend was staying overnight;

34. [Foti] spent a substantial amount of money making improvements to the rental property owned by Harold Freitas, including fixing up the units for her subtenants and the building of a horse riding arena;

35. [Foti] testified that she borrowed a lot of money from her grandmother, at least Ten Thousand Dollars (\$10,000.00) to help pay for the work she was doing on the property;

36. [Foti] never notified the welfare office that she received large amounts of money from her grandmother;

37. [Foti]'s boyfriend billed her for over Nine Thousand Dollars (\$9,000.00) for the work that was done at the rental property owned by Harold Freitas;

38. From the period beginning in May 1997, [Foti]'s children were spending a substantial amount of time with [Foti], although it is unclear how much, and it is unclear how much time Frank Foti had the children during this period.

CONCLUSIONS OF LAW

1. That the State has proven its case beyond a reasonable doubt for the period of December 1996 through April 1997;

2. That after weighing all the testimony, the court still had some questions, and thus some reasonable doubt, about what had occurred during the period of May 1997 through September 1997;

3. The fact that [Foti] claims the sole purpose of the joint custody agreement was to assist Frank Foti in avoiding paying child support is not credible, however even if it were, the court would find that by doing so, [Foti] would be committing fraud.

Foti filed a Motion for New Trial on October 7, 1999.

Foti's basis for the motion was that she wanted to call two additional witnesses who would testify that Foti spent time with her children. A hearing on the motion was held on January 4, 2000, and an Order Denying Defendant's Motion for New Trial was filed on January 20, 2000. Foti filed her Notice of Appeal on February 7, 2000.

II. STANDARDS OF REVIEW

A. Motion for New Trial

The denial of a motion for new trial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Ganal, 81 Hawai'i 358, 373, 917 P.2d 370, 385 (1996)

(internal quotation marks and citation omitted).

B. Ineffective Assistance of Counsel

When the denial of the right to effective assistance of counsel is raised, the question is: When viewed as a whole, was the assistance provided to the defendant within the range of competence demanded of attorneys in criminal cases? The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. This court will not judge the assistance provided the defendant ineffective solely by hindsight.

State v. Aplaca, 74 Haw. 54, 66-67, 837 P.2d 1298, 1305 (1992)

(internal quotation marks, citation, and brackets omitted).

"The decision whether to call witnesses in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by judicial hindsight." Id. at 70, 837 P.2d at 1307.

"Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered

witnesses." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

III. DISCUSSION

A. Motion for New Trial

Foti brought her Motion for New Trial pursuant to Hawai'i Rules of Penal Procedure Rule 33, which allows for a new trial "if required in the interest of justice." In her opening brief, Foti states:

The testimony of Dawn [Damron] was so material to [Foti]'s defense, the inconvenience of hearing her testimony was so slight and the prosecution of [Foti] was so weak--relying solely on the self serving testimony of Frank Foti, that the trial court's denial of [Foti]'s motion for new trial must be overturned.

According to Defense counsel's offer of proof Mrs. [Damron] was present for the motion for new trial and was prepared to testify that she saw [Foti] with her children on a daily basis from the period of December, 1996 through April, 1997.

A motion for a new trial based on newly discovered evidence must satisfy the following requirements:

(1) The evidence must have been discovered after trial;

(2) Such evidence could not have been discovered before or at trial through the exercise of due diligence;

(3) The evidence must be material to the issues and not cumulative or offered solely for the purposes of impeachment; and

(4) The evidence is of such nature as would probably change the result of a later trial.

State v. Caraballo, 62 Haw. 309, 318, 615 P.2d 91, 97 (1980).

Foti meets none of these requirements. Foti knew of the existence of Dawn Damron (Damron) before trial, and there is

nothing in the record to indicate Foti attempted to locate or subpoena Damron prior to trial. Foti did not seek a continuance for the purpose of locating Damron. Damron's testimony would have been used solely to impeach Mr. Foti's testimony. Damron's testimony in a later trial would probably not change the circuit court's decision finding Foti guilty of Theft in the Second Degree.³

B. Ineffective Assistance of Counsel

Foti contends her trial counsel was ineffective by counsel's failure to call or locate two material witnesses -- Damron and Julie Haslip. There is nothing in the limited record available to us⁴ that demonstrates Foti's trial counsel's "lack of skill, judgment, or diligence . . . that . . . resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Aplaca, 74 Haw. at 67, 837 P.2d at 1305. The record is absent any sworn statement or affidavit that counsel failed to "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf." Id. at 70, 837 P.2d 1307 (internal quotation

³Foti does not allege, pursuant to Hawai'i Rules of Appellate Procedure Rule 28(b)(4), that any of the circuit court's findings of fact or conclusions of law were in error.

⁴Although Foti and the State cite to transcripts in their briefs and it appears from the supreme court record that transcripts were ordered by Foti, no transcripts are part of the record on appeal. Counsel are cautioned to make sure that all documents cited to are part of the record on appeal.

marks omitted). Foti fails to meet the requirement of State v. Richie, supra, of supporting affidavits or sworn statements describing the testimony of the proffered witnesses.

IV. CONCLUSION

For the foregoing reasons, the January 5, 2000, Judgment of the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 15, 2001.

On the briefs:

Kyle B. Coffman
for defendant-appellant.

Chief Judge

Simone C. Polak,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge