NO. 23502

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DELMON K. ANDERSON, Defendant-Appellant, and
EASU E. FENDERSON and BUNCE L. WILSON, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1853)

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

Defendant-Appellant Delmon K. Anderson (Anderson) appeals from the May 15, 2000, Judgment of the Circuit Court of the First Circuit[1] (circuit court). Anderson was convicted of Robbery in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (1993),[2] and Unauthorized Entry into Motor Vehicle, in violation of HRS § 708-836.5 (Supp. 2001).[3]

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[1]The Honorable John C. Bryant, Jr. presided.

[2]HRS § 708-841(1)(a) provides:

> **§708-841 Robbery in the second degree.** (1) A person commits the offense of robbery in the second degree if, in the course of committing theft:
>
> (a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

[3]HRS § 708-836.5 provides:

> **§708-836.5 Unauthorized entry into motor vehicle.** (1) A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with intent to commit a crime against a person or against property rights.
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> (2) Unauthorized entry into motor vehicle is a class C felony.

On appeal, Anderson contends he was denied his constitutional right to effective assistance of counsel. We affirm the Judgment without prejudice to a subsequent Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 petition on ineffectiveness of counsel.

I. BACKGROUND

Anderson was arrested on September 11, 1999, after a police stop and field line up. Jury trial for Anderson and his co-defendant Bunce Wilson (Wilson), who is not a party to this appeal, commenced on March 13, 2000, at which the following evidence was adduced.

David Cox (Cox) testified that on September 11, 1999, he and Edward Roberson (Roberson) went to a nightclub. Roberson had four or five drinks in the span of two to three hours; Roberson and Cox left at approximately 4:00 a.m. Outside the nightclub, Roberson talked to Easu Fenderson (Fenderson). Roberson and Cox started walking toward their truck and away from Fenderson. Fenderson, Anderson, and Wilson followed Roberson and Cox. Roberson and Fenderson started arguing about a watch. Anderson told Cox that Fenderson wanted to fight. Cox and Roberson then drove away in the truck. Anderson, Wilson, and Fenderson followed in their car, flashing its lights. The car passed Cox and cut him off, forcing Cox to stop the truck.

Cox testified that Fenderson exited the front passenger door of the car, grabbed Roberson out of the truck, and pulled Roberson to the right rear side of the truck. Fenderson began punching Roberson in the face. Anderson exited the driver's side of the car and joined Fenderson. Anderson threw "one or two punches" at Roberson, but Cox did not know if Anderson connected. Cox got out of the truck, ran to the back of the truck, and pushed Anderson away. Cox saw Roberson fall to the ground and Wilson reach into the front passenger side of the truck with his hand. Cox never saw Anderson enter the truck. Roberson was unconscious when Fenderson pulled off Roberson's shoes and jewelry; Anderson just stood next to Fenderson. Anderson, Wilson and Fenderson fled in the car, with Anderson driving. The police arrived, and Cox discovered his wallet was missing from the area near the truck's cup holder.

Honolulu Police Officer Kevin Ching testified that at 4:47 a.m. on September 11, 1999, he received a call about a suspect vehicle, which he later spotted and stopped. Anderson was the driver of the vehicle.

Honolulu Police Officer Ernest Robello (Robello) testified that while on duty between 4:30 and 5:00 a.m. on September 11, 1999, he arrived on the scene of the stopped suspect vehicle and saw a pair of shoes and some jewelry on the rear floor and seat of the car. Robello took photographs of the

inside of the car; his photographs do not depict Cox's wallet as being in the car.

On March 16, 2000, Fenderson took the stand out of the presence of the jury. Fenderson testified that on December 16, 1999, he pled no contest to the charges against him in connection with the events of September 11, 1999. Fenderson's sentencing was scheduled for May 28, 2000. Under the advice of counsel, Fenderson elected not to testify on behalf of Anderson and Wilson, exercising his fifth amendment right to remain silent. The jury was advised by the circuit court that Fenderson elected to exercise his right to remain silent. The no contest plea form signed by Fenderson was admitted into evidence.

Anderson declined to testify in his own defense.

On Friday, March 17, 2000, the jury found Anderson guilty as to both Count III (Robbery in the Second Degree) and Count IV (Unauthorized Entry into Motor Vehicle).

Anderson filed his Motion for Judgment of Acquittal and/or New Trial (Motion) on April 4, 2000. The bases for the Motion were insufficient evidence, prosecutorial misconduct, and the new evidence that would be presented by Fenderson. The State opposed the Motion on the basis that the Motion was filed more than ten days after the March 17, 2000, jury verdict.

The circuit court denied the Motion at the hearing on April 25, 2000, stating:

> And the third thing that disturbs me about Fenderson is that you folks know as well as I do that Fifth Amendment rights attach to a defendant post no contest plea and pre-sentencing. Any efforts to garnder [sic] or by court order, if necessary, Mr. Fenderson's testimony regarding this case should have been accompanied by a motion to continue requesting the Court to continue this case past Mr. Fenderson's testimony. Now I'm a little bit concerned that now we come in and you're requesting a new trial after we spent five days of trial in this case, basically a whole week, and now you're dissatisfied with the result. That request should have been made before we started trial in this case.
>
> . . . .
>
> . . . So your request to have Fenderson testify is untimely. We all -- defense counsel should have been aware that Mr. Fenderson may choose to elect to exercise his Fifth Amendment right against self-incrimination. And the Court did the proper thing in this case and that was to get [Fenderson's counsel] down here so that Mr. Fenderson had advice of counsel. That's to the insufficient evidence argument. I think that is precluded by jurisdictional grounds.

Anderson's attorney responded as follows:

> I'm disturbed that the Court was disturbed that we didn't file for a motion for continuance prior to the trial starting or the jury being empanelled [sic] and selecting the jury because what we knew, what I knew, what the defense for Anderson knew before empanelling [sic] and jury selection was that we had a friendly witness who was going to come in and exonerate in all respects my client.

The circuit court issued its Conclusions of Law on May 26, 2000:

> 1. Time limitations in filing a motion for judgment of acquittal after discharge of the jury and/or new trial are considered jurisdictional and must be strictly complied with. Rule 29(c) of the Hawaii Rules of Penal Procedure (H.R.P.P.) expressly limits the filing of a motion for judgment of acquittal after discharge of the jury to within ten days after the jury is discharged or within such further time as the court may fix during the ten-day period. H.R.P.P. Rule 33 expressly limits the filing of a motion for new trial to within ten days of the entry of verdict. H.R.P.P. Rule 45 expressly prohibits the trial court from granting an extension of time on any H.R.P.P. Rule 29 or Rule 33 motion.
>
> 2. The present court has no jurisdiction to entertain the motion filed by Defendant Anderson and joined in by Defendant Wilson.

. . . .

5. There clearly was sufficient evidence to support the jury's verdict regarding Defendants Anderson and Wilson.

6. There was ample evidence that Defendant Anderson acted at least as an accomplice to Robbery in the Second Degree during the flight of Easu Fenderson and as an accomplice to Unauthorized Entry Into Motor Vehicle with regard to the actions of Easu Fenderson.

. . . .

8. The jury is the sole judge of witness credibility and the weight of the evidence.

9. Considering the evidence presented at trial, a granting of Defendant's motion for judgment of acquittal would require this court to invade into an area that is strictly the province of the jury, i.e., to be the sole judge of the credibility of witnesses or the weight of the evidence, as well as reasonable inferences therefrom.

10. Rule 33 of the Hawaii Rules of Penal Procedure states that the court on motion of a defendant may grant a new trial to him if required in the interest of justice. A motion for new trial may also be granted where certain circumstances, **not known to the defense during trial**, come to light after verdict.

11. The "new" evidence claimed by Defendants Anderson and Wilson is not new evidence under the law, as Defendant Anderson knew that such evidence existed at the time of trial.

12. The "new" evidence claimed by Defendants Anderson and Wilson is not new evidence under the law, as Defendants Anderson and Wilson fail to demonstrate that the evidence is of such a nature as would probably change the result of a later trial.

13. The record does not support that any prosecutorial misconduct occurred.

(Citations omitted; emphasis and quotation marks in original.)

II. STANDARD OF REVIEW

When an ineffective assistance of counsel claim 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? Additionally,

> 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.

State v. Silva, 75 Haw. 419, 439-40, 864 P.2d 583, 593 (1993) (internal quotation marks, citation, and brackets omitted) (quoting State v. Aplaca, 74 Haw. 54, 66-67, 837 P.2d 1298, 1305 (1992)).

III. DISCUSSION

Anderson contends in his opening brief that he was denied effective assistance of counsel because trial counsel

> should have 1) obtained some type of testimony-written [sic] affidavit or recorded oral deposition from Fenderson in regards to the fact that he acted alone with no accomplices [sic] in [Anderson], 2) obtained a continuance of the trial until after Fenderson's sentencing, thereby allowing Fenderson to testify without the risk of self-incrimination, and 3) filed [Anderson]'s Motion for Judgment of Acquittal and/or New Trial on time.

In regards to an ineffectiveness of counsel claim, the Hawai‘i Supreme Court has stated:

> General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting defendant's case and it resulted in the withdrawal or substantial impairment of a potentially meritorious defense, then the knowledge held and investigation performed by counsel in pursuit of an informed decision will be evaluated as that information that, in light of the complexity of the law and the factual circumstances, an ordinarily competent criminal attorney should have had. An informed, tactical decision will rarely be second-guessed by judicial hindsight. If the record is unclear or void as to the basis for counsel's actions, counsel shall be given the opportunity to explain his or her

> actions in an appropriate proceeding before the trial court judge.

Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976-77 (1993) (internal quotation marks and citations omitted; emphasis in original).

A. Fenderson's Testimony

Anderson argues that his trial counsel rendered ineffective assistance of counsel by failing to present Fenderson's testimony, either in written or oral deposition form, or by failing to request a continuance. Fenderson was Anderson's sole witness. At trial, however, Fenderson asserted his right against self-incrimination. According to Anderson, Fenderson would have testified that Fenderson acted alone in the robbery and that Anderson was involved only in the fight.

Anderson has the burden of showing that "there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence." Silva, 75 Haw. at 440, 864 P.2d at 593. As proof of counsel's lack of skill, judgment or diligence, in his reply brief Anderson points to the following statement made by the circuit court at the hearing on Anderson's Motion:

> THE COURT . . . [sic] And the third thing that disturbs me about Fenderson is that you folks know as well as I do that Fifth Amendment rights attach to a defendant post no contest plea and pre-sentencing. Any efforts to garnder [sic] or by court order, if necessary, Mr. Fenderson's testimony regarding this case should have been accompanied by a motion to continue requesting the Court to continue this case past Mr. Fenderson's testimony. Now I'm a little bit concerned that now we come in and you're requesting a new trial after we spent five days

> of trial in this case, basically a whole week, and now you're dissatisfied with the result. That request should have been made before we started trial in this case.

(Emphasis added in reply brief.)

"Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny." Briones, 74 Haw. at 462-63, 848 P.2d at 976.

Anderson's counsel argued at the hearing on his Motion:

> [Fenderson] comes to court and, to our surprise, he brings his father with him and, upon the father's advice, Mr. Fenderson -- the next day with [Fenderson's counsel], decides not to testify now, and at that point we're in a quandry [sic], okay. Do we move to continue or do we proceed? And this is the thinking at that point. Again, maybe this is another Rule 40.
>
> I did not move for a continuance at that point because here's what's going to happen is my thinking, judge, is that, well, let's go ahead with this trial, let's go ahead with the trial. If he's acquitted, great, we don't waste this jury, so that we get another jury a month or so after his sentence. By the way, he's going to be sentenced May 15th. That's why we don't have him here today.
>
> But basically the testimony, the offer would have been that my client didn't know. All his actions, no intent, no knowledge, nothing like that. And so if he gets acquitted and if Anderson gets acquitted in this present trial, great, we don't have to deal with two juries, right, 'cause this one's already been empanelled [sic], great cost, great expense, let's go through with it. If he's convicted, and we really thought we were going to win, but he was convicted, then, well, let's get that jury, the second jury that the motion to continue would have gotten anyway. I hope I made that clear, judge.

Anderson's attorney decided not to request a continuance prior to trial because he believed he "had a friendly witness who was going to come in and exonerate [Anderson] in all

respects." At trial, when Fenderson invoked his right not to testify, Anderson's attorney decided to proceed in the interests of efficiency. This decision did not, without further explanation, have any tactical basis designed to benefit Anderson.

The second part of the test on ineffective assistance of counsel requires Anderson to show the withdrawal or substantial impairment of a potentially meritorious defense.

The jurors were given an instruction on accomplice liability; thus, the jury may have convicted Anderson as Fenderson's accomplice. The trial judge pointed out in his Conclusion of Law number six:

> 6. There was ample evidence that Defendant Anderson acted at least as an accomplice to Robbery in the Second Degree during the flight of Easu Fenderson and as an accomplice to Unauthorized Entry Into Motor Vehicle with regard to the actions of Easu Fenderson.

Regarding accomplice liability, HRS § 702-222 (1993) states:

> **§702-222 Liability for conduct of another; complicity.** A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the intention of promoting or facilitating the commission of the offense, the person:
>
> (a) Solicits the other person to commit it; or
>
> (b) Aids or agrees or attempts to aid the other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do; or
>
> (2) The person's conduct is expressly declared by law to establish the person's complicity.

If Fenderson testified that "Anderson had nothing to do with his robbery of Roberson," Fenderson's testimony would have established a potentially meritorious defense by showing Anderson's lack of intent to commit a robbery.

As the State points out, Anderson's characterization of what he believes Fenderson would have said is based solely on speculation. There is no admissible evidence in the record indicating whether Fenderson's testimony would have been favorable to Anderson.

> [E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim.

State v. Reed, 77 Hawai‘i 72, 84, 881 P.2d 1218, 1230 (1994) (internal quotation marks omitted), rev'd on other grounds, State v. Balanza, 93 Hawai‘i 279, 1 P.3d 281 (2000).

In Reed, Reed's counsel failed to call several police officers as witnesses who, as Reed asserted, would have testified that Reed was the target of a sting operation in retaliation for an unrelated incident. Id. The Hawai‘i Supreme Court concluded that because nothing in the record indicated what the officers would have testified to, failure to call the officers did not deny Reed effective assistance of counsel. Id. But a mere assertion of expected testimony may in some cases be sufficient. Reed found ineffective assistance of counsel where counsel failed to call a particular witness:

> If, as Reed alleges, Williams would have testified that Wardell used coercive tactics to get Reed to sell him cocaine, that testimony would have bolstered Reed's entrapment defense and possibly raised at least some doubt about the credibility of Wardell's testimony. His counsel's failure to interview Williams and to subpoena her to testify, therefore, would amount to constitutionally ineffective assistance.

Id. at 87, 881 P.2d at 1233 (emphasis added).

In Silva, the Hawai‘i Supreme Court found ineffective assistance of counsel where counsel failed to subpoena a witness whose testimony could have significantly bolstered Silva's testimony. 75 Haw. at 442-43, 864 P.2d at 594. The Silva court reasoned "the jury could very well have concluded that the defense had opted not to call Lincoln because his testimony would not have corroborated Silva's version of the incident." Id. at 443, 864 P.2d at 594.

Here, nothing in the record other than Anderson's counsel's assertion at the hearing on the Motion and his declaration attached to the Motion details Fenderson's purported testimony. Because we have a mere assertion as to Fenderson's testimony, there is not sufficient evidence in this record to demonstrate ineffective counsel.

Because Anderson alleges facts that if proven would entitle him to relief and the claim is not patently frivolous, we affirm the Judgment without prejudice to a subsequent HRPP Rule 40 petition on ineffectiveness of counsel. See, Silva, 75 Haw. at 439, 864 P.2d at 592-93.

B. The Untimely Motion

Anderson contends his attorney's failure to file his Motion within the ten-day deadline constitutes ineffective assistance of counsel.

Hawai'i Rules of Penal Procedure Rule 29(c)[4] requires that a motion for judgment of acquittal be made within ten days after discharge of the jury. Hawai'i Rules of Penal Procedure Rule 33[5] requires a motion for new trial to be made within ten days after the verdict. Hawai'i Rules of Penal Procedure Rule 45(b)[6] does not allow the court to enlarge the ten-day period in either rule.

The jury rendered its verdict and was discharged on March 17, 2000. Anderson filed his Motion eighteen days later on April 4, 2000. Because Anderson's Motion was untimely, the

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[4]HRPP Rule 29(c) provides in pertinent part:

Rule 29. MOTION FOR JUDGMENT OF ACQUITTAL.

. . . .

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 10 days after the jury is discharged or within such further time as the court may fix during the 10-day period.

[5]HRPP Rule 33 provides in pertinent part:

Rule 33. NEW TRIAL.

The court on motion of a defendant may grant a new trial to him or her if required in the interest of justice. . . . A motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period.

[6]HRPP Rule 45(b) provides in pertinent part:

Rule 45. TIME.

. . . .

(b) Enlargement. . . . [T]he court may not extend the time for taking any action under Rules 29, 33, 34 and 35 of these rules . . . , except to the extent and under the conditions stated in them.

circuit court was without jurisdiction to entertain the Motion. See Reed, 77 Hawai‘i at 83, 881 P.2d at 1229.

At the April 25, 2000, hearing on the Motion, Anderson's counsel stated:

> Yes, your honor, first off the bat I have to apologize and I have to agree that the rule does state, at least for the motion for judgment of acquittal, that there is that 10-day limit. For some reason in my mind I had 15 days stuck in my head and -- but I would ask this Court to nonetheless consider it and perhaps find some reason to at least hear that part.

The untimeliness of the Motion had no obvious basis for benefitting Anderson. Nor did the untimeliness of the Motion result in the withdrawal or substantial impairment of a potentially meritorious defense except as it may have pertained to Fenderson's testimony.

IV. CONCLUSION

We affirm the May 15, 2000, Judgment of the circuit court without prejudice to a subsequent HRPP Rule 40 petition on ineffectiveness of counsel.

DATED: Honolulu, Hawai‘i, March 15, 2002.

On the briefs:

Tae Chin Kim
for defendant-appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge