

NO. 23606

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

STATE OF HAWAII, Plaintiff-Appellee, v.
AUA PEDRO, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2013)

MEMORANDUM OPINION

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

Defendant-Appellant Aua Pedro (Pedro) appeals from (1) the April 13, 2000 Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Suppress Arrest, Statements, Identification and Evidence, entered by Circuit Court Judge Michael A. Town, and (2) the June 22, 2000 Judgment, entered by Circuit Court Judge Reynaldo D. Graulty, upon the jury's verdict, convicting Pedro as charged of Robbery in the Second Degree, Hawai'i Revised Statutes § 708-0841(1)(b), and sentencing Pedro to incarceration for ten years with a mandatory minimum of six years and eight months as a repeat offender.¹ We affirm.

¹ The June 26, 2000 Order Granting Motion for Sentencing of Repeat Offender noted that Defendant-Appellant Aua Pedro had previously twice been convicted of Promoting a Dangerous Drug in the Second Degree, Hawaii Revised Statutes § 712-1242(1)(c).

BACKGROUND

A Complaint filed on October 13, 1999, charged Pedro with having committed the offense of Robbery in the Second Degree, HRS § 708-841(1)(b), on September 30, 1999.

The April 13, 2000 Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Suppress Arrest, Statements, Identification and Evidence state the facts, in relevant part, as follows: On September 30, 1999, at approximately 11:25 a.m., a male pointed a gun at Ae Hyon Baek (Baek) while she was working at the O K Grocery store at 1104 Palama Street, Honolulu, Hawai'i, and demanded money. Baek gave the male approximately \$200 to \$300 in cash. As the male was leaving the store, he took a 24-pack of Budweiser beer with him.² Baek immediately called the police and, when they arrived, Baek described the male as "Samoan," wearing a red baseball cap and striped shirt.

The police investigating the robbery talked to Mac Collins (Collins). Collins knew Pedro and, at 11:15 a.m. on September 30, 1999, had watched him enter the O K Grocery store. Pedro was wearing a red baseball cap, striped shirt, and dark jeans, and had nothing in his hands. At approximately 11:25 a.m., Collins saw Pedro walking away from the O K Grocery store carrying a 24-pack of Budweiser beer. Collins and Pedro

² Ae Hyon Baek testified that the man also took her cordless phone.

exchanged greetings. Collins watched as Pedro went into the property of a green building on Kanoa Street. Collins was approached by police officers investigating the robbery. Collins told the officers that Pedro had just passed by carrying a 24-pack of Budweiser beer.

The police went looking for Pedro at Mayor Wright Housing, a project of the Hawai'i Housing Authority. Neighbors informed the police that Pedro liked to visit the residents of apartment 11A. As noted in the April 13, 2000 Findings of Fact:

20. Officer Hood knocked on the door of apartment 11A. A male opened the door. Officer Hood explained that a robbery had just occurred and they were looking for Aua Pedro who was possibly armed with a hand gun. Officer Hood asked if they could search the apartment for the Defendant. The male refused to let the officers into the apartment.

At approximately 12:00 noon, Wendall Chu (Chu) of the Hawai'i Housing Authority authorized the police to enter apartment 11A. At approximately 12:01 p.m., the police saw Pedro peering out of the second floor bedroom of apartment 11A. The police then entered apartment 11A, went to the second floor bedroom, and apprehended Pedro. By then, Pedro had changed clothes.

At approximately 12:15 p.m., in a drive-by field line-up of a group of shirtless men, including Pedro, Baek was between "32 and 40 feet" away from the people in the line-up, was not able to have a "clear view of" or "close look at" their faces, and was unable to identify any of them as the robber.

While the field line-up was being conducted, Stacy Kaialau (Kaialau) told the police that she was in apartment 11A when Pedro entered. Pedro requested a change of clothing and was carrying a 24-pack of Budweiser beer. Kaialau saw Pedro remove a handgun from his pants and place it in a blue backpack. Kaialau escorted a police officer into apartment 11A, and the police officer took possession of the backpack. Kaialau also voluntarily turned the 24-pack of Budweiser beer over to the police.

The backpack was searched pursuant to a search warrant. It contained a .22 caliber pellet pistol and clothing that matched the description given by Baek.

At approximately 1:49 p.m. on September 30, 1999, the police drove Collins to a field lineup consisting of "four . . . men standing at attention," and Collins identified Pedro as the person he had previously seen enter and depart from the O K Grocery store.

At the preliminary hearing on October 8, 1999, District Court Judge Tenney Z. Tongg presiding, Pedro was represented by Deputy Public Defender Carol Kunishima (DPD Kunishima). When the hearing began, DPD Kunishima requested a continuance because Pedro wanted an attorney named "Kawana" to be appointed to represent him. Pedro explained that

this's [sic] the first time I even been into this kind situation. You know, I -- that's why, 'cause I've been having some court cases with Mr. Kawana, and I think it's because I -- maybe I still represented by him, but then it's just that I didn't contact him since -- since I been in jail now.

The court asked, "All right. Well, Mr. Pedro, Mr. Kawana [represents] you on other matters. Is it court-appointed or are you retaining him?" Pedro responded, "He's a court-appointed." The court denied Pedro's request for a continuance.

At the preliminary hearing, Baek admitted her prior inability to be a hundred percent sure she could identify the robber but, subsequently, positively identified Pedro as the robber.

The court's October 22, 1999 Order Appointing Counsel appointed attorney Richard S. Kawana (Kawana) as counsel for Pedro.

At a pretrial hearing on March 23, 2000, Pedro told Circuit Court Judge Michael A. Town, "I want a new counsel, Your Honor." The following discussion then occurred:

[PEDRO]: . . . I asked him to subpoena my aunty to be here present. So that's the reason why --

. . . .

[PEDRO]: -- I want him to withdraw.

THE COURT: Let me explain to you why I didn't authorize your aunt to be subpoenaed

. . . .

THE COURT: So even if she had come in and testified, it was a waste [of] time. I want you to be clear about that. There was not consent to go in the home; the only consent was by Wendell Chu. So that even if the aunt had said you can't come in, Mr. Chu went in under authority of law.

At a pretrial hearing on April 3, 2000, Kawana told
Acting Circuit Court Judge Russell Blair:

[A]t this time, I'd like to file in open court a motion to
withdraw as counsel. Mr. Pedro and I have had irreconcilable
differences such that he refuses to talk with me or cooperate with
me in any respect and I can't see how we can go to trial with me
as his counsel.

Judge Blair then had the following conversation with
Pedro:

MR. PEDRO: . . . [B]ut I don't think I like to defend
myself. That's why I'm asking if I could have another appointed
attorney to represent me on . . . my case.

. . . .

MR. PEDRO: . . . I should have another attorney to
represent me because I was in conflict with [Kawana] here in my
interest.

THE COURT: That isn't an option. Your options are either
[Kawana] represents you and you talk to him and participate fully
with him in your defense or you represent yourself. Those are
your two choices. It seems to me that you are attempting to
circumvent Judge Town's ruling by refusing to cooperate with
[Kawana] and therefore precipitating a crisis,

You're going to get [Kawana] to represent you and you're
going to participate with him and assist him in your defense or
you're going to represent yourself.

On April 13, 2000, Judge Town entered the court's
Findings of Fact, Conclusions of Law and Order Denying
Defendant's Motion to Suppress Arrest, Statements, Identification
and Evidence.

The jury trial commenced on April 12, 2000. On
April 20, 2000, a jury found Pedro guilty. The June 22, 2000
Judgment followed.

DISCUSSION

A.

Pedro challenges parts of the conclusions of law (CsOL) of the April 13, 2000 Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Suppress Arrest, Statements, Identification and Evidence. With the parts challenged set out in bold print, those CsOL state, in relevant part, as follows:

CONCLUSIONS OF LAW

1. PROBABLE CAUSE EXISTED TO DETAIN THE DEFENDANT.

. . . .

In the instant matter, probable cause existed to locate and stop [Pedro]. . . . Based on the afore mentioned (sic) facts, officers had probable cause to locate and stop [Pedro].

. . . In the instant case the seizure was based upon a temporary detention of an individual to investigate a reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.

. . . .

2. THERE WAS NO SEARCH OR SEIZURE IN VIOLATION OF THE CONSTITUTION.

. . . .

In the instant case, the evidence was recovered pursuant to probable cause to search plus exigent circumstances, consent, and the "plain view" exception. . . .

In the instant case, [the police] believed they had located [Pedro] inside of apartment 11A When [the police] approached the residence and asked if [Pedro] was there the individuals inside of the residence were uncooperative. [The police] contacted Chu of the Hawaii Housing Authority in order to obtain consent to enter apartment 11A to search for an armed robbery suspect. Chu arrived and consent was given. It was at this point that [the police] looked up and saw [Pedro] looking out of the second floor bedroom window of apartment 11A. Upon recognizing [Pedro], [the police] immediately entered the residence. This immediate action was necessary to find the suspect, secure the weapon, prevent destruction of any evidence and check for additional victims. The police had no way of knowing if the occupants of apartment 11A were being uncooperative to hide [Pedro] or were being forced to deny police entrance at

gun point. For officer safety and the safety of others, police had to enter the residence. . . .

Additionally, officers had obtained the permission of the representative of the Hawaii Housing Authority to enter apartment 11A and search for an armed robbery suspect. Under the terms of the rental agreement, Mr. Chu had authority to consent to entry into the apartment unit. . . .

3. OBJECTS SIGHTED IN PLAIN VIEW MAY BE VALIDLY SEIZED WITHOUT A WARRANT.

. . . .

The police were lawfully on the property pursuant to consent and probable cause to search plus exigent circumstances. . . .

. . . .

4. PROBABLE CAUSE EXISTED FOR ISSUANCE OF A SEARCH WARRANT.

. . . .

In the instant case, a review of [police reports] and Kaiialau's taped statement provide more than enough probable cause to support the issuance of a search warrant. . . .

. . . .

. . . In the instant matter, [Pedro] could not have a reasonable expectation of privacy in a place where he was uninvited and had no ownership interest.

. . . .

5. THE IDENTIFICATION WAS RELIABLE.

. . . .

The Court concludes that Baek's identification of [Pedro] is reliable.

. . . The Court finds that the lineup was not impermissibly suggestive, and [Collins'] identification of [Pedro] reliable (sic).

. . . .

Under the totality of the circumstances, identification of [Pedro] was proper, reliable and did not result in a misidentification. Therefore, any identification of [Pedro], in court or otherwise, shall be permitted.

Regarding COL no. 1, Pedro argues that when the police detained him, they had neither probable cause nor a proper basis

to detain him. We disagree. When the police detained Pedro, an investigative stop was authorized because specific and articulable facts known to the police warranted a person of reasonable caution to believe that criminal activity involving Pedro was afoot. State v. Madamba, 62 Haw. 453, 456, 617 P.2d 76, 78 (1980).

Regarding COL no. 2, Pedro contends that there were no exigent circumstances to justify the warrantless search of apartment 11A. He argues that

[t]he responding police officers could have posted guards at the front and rear entry and exit points of apartment 11A in order to first secure a warrant. Because the police did not know the layout or number of persons in apartment 11A, they actually placed any occupants at greater risk. Their conduct could have created a hostage situation, rather than patiently waiting for [Pedro] to exit the premises or secure a warrant.

Pedro further argues that he "could not dispose of twenty-four cans of beer or a broken air pistol as would be possible in a case involving the destruction of drugs."

We conclude that exigent circumstances authorized the police to enter apartment 11A without a warrant and obtain custody of Pedro and the backpack. Before they entered apartment 11A, the police saw Pedro in apartment 11A. The police had information leading them to reasonably believe that Pedro had the beer and a gun. Not knowing why they had been denied entry into apartment 11A and being reasonably concerned about the safety of the occupants and the destruction or disposal of some or all of the evidence, the police were authorized to enter

apartment 11A without consent and apprehend Pedro. The backpack and the beer were turned over to the police by Kaialau and Pedro does not challenge her authority to do so. The police recovered the pistol in the backpack pursuant to a search warrant.

Regarding COL No. 3, we repeat what we have said above and agree with the conclusion that this was an emergency authorizing Chu to permit police entry into apartment 11A.

Regarding COL No. 4, Kaialau's information to the police that she saw Pedro place the handgun into the backpack generated probable cause for issuance of a search warrant authorizing a search of the backpack.

Regarding COL No. 5, Pedro contends that

[i]f [Baek] was unable to identify [Pedro] at the field line-up, it is unlikely that she could suddenly identify [Pedro] in court at the preliminary hearing without [Pedro] being the only person to choose among. A procedure such as this is so unnecessarily suggestive that its unreliability is easy to see.

Plaintiff-Appellee State of Hawai'i responds that Baek

explained that it was because she had been "32 and 40 feet" away from the line-up and had been "very scared" and worried about whether "these guys can see me" as she was driven by them. Baek's inability to identify [Pedro] at the field line-up was simply because she was too far away from [Pedro] at the time to get a close look at his face. (Record citations omitted.)

The following is the applicable rule of law:

When the defendant challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pre-trial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced with two questions: (1) whether the procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, and the elapsed time, the witness's identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the jury.

State v. Okumura, 78 Hawai'i 383, 391, 894 P.2d 80, 88 (1995)
(citations omitted).

We agree with the circuit court that the credibility of Baek's identification was an issue for the jury to decide. In fact, it was an issue expressly discussed by defense counsel in his closing argument to the jury.

B.

Pedro contends that the trial court abused its discretion when it failed to appoint new counsel for Pedro once irreconcilable differences had arisen between Pedro and Kawana, the counsel who was appointed by the court for him at his specific request. We disagree.

On March 23, 2000, Pedro filed his handwritten "Defendant's Motion to Have Counsel of Record Withdraw for Ineffective Assistance of Counsel for the Suppress Hearing." Pedro supported his motion with his handwritten affidavit stating that "at the Suppress Hearing, I was not allow [sic] by Counsel and by the Court to have my Aunt testify that Police did not have permission to enter her home." This motion was heard and orally denied by Judge Town on March 23, 2000.

In his April 3, 2000 Motion to Reconsider Denial of Motion for Withdrawal of Counsel, Kawana stated, in relevant part, as follows:

6. Because of the extreme hostility by [Pedro] to [Kawana], his filing of a complaint with the Office of Disciplinary Counsel against [Kawana], and his refusal to communicate with [Kawana], [Kawana] believes that good cause exists to grant this motion and to appoint new counsel for [Pedro] for trial during the week of April 10, 2000.

In his April 3, 2000 Motion to Withdraw as Counsel, Kawana declared, in relevant part, as follows:

2. There are irreconcilable differences between [Pedro] and [Kawana], to the point where [Pedro] will not speak to [Kawana] concerning any matters involved in the defense of his case, and counsel is therefore unable to represent [Pedro] now or at trial on the case;

3. [Pedro] had previously sought to have [Kawana] withdraw before motions judge Michael A. Town because of what he charged was a failure to call a witness to testify that [Pedro] felt was essential for the hearing on his motion to suppress; Judge Town denied the motion in part because the court believed that the witness was unnecessary and the matter of consent, to be testified about by the witness, had been decided in [Pedro's] favor by the Court[.]

This motion was heard and orally denied by Judge Town on April 3, 2000.

On April 4, 2000, Judge Town entered an Order Summarily Denying the Defendant's Motion to Reconsider Denial of Motion for Withdrawal of Counsel on March 23, 2000. On April 5, 2000, an amended order was entered. On April 18, 2000, Judge Town entered an Order Denying Defendant's Motion to Have Counsel of Record Withdraw for Ineffective Assistance of Counsel for the Suppress Hearing.

In State v. Char, 80 Hawai'i 262, 268-69, 909 P.2d 590, 596-97 (App. 1995), this court listed six requirements that must be satisfied before an indigent defendant is deemed to have

waived, by conduct, his or her right to the services of the public defender or court-appointed counsel. In the instant case, the question of waiver is not relevant because, at the jury trial, Pedro was represented by Kawana, his court-appointed counsel. Nevertheless, the following requirement "(3)" of Char's six requirements is relevant: "(3) the trial court did not abuse its discretion when it decided that a substitute court-appointed counsel was not warranted[.]" The answer to the question whether the trial abused its discretion when it decided that a substitute court-appointed counsel was not warranted depends on whether the reason or reasons for the substitution was or were sufficiently legitimate and meritorious considering the time left until the scheduled commencement of trial. In the instant case, the reasons given by Pedro and Kawana for wanting court-appointment of substitute counsel were neither legitimate nor meritorious because they (1) were announced within three calendar weeks prior to the commencement of the jury trial and (2) were caused solely by Pedro's unreasonable unhappiness with, and unreasonable refusal to talk to, Kawana. Therefore, the court did not abuse its discretion when it decided that a substitute court-appointed counsel was not warranted.

CONCLUSION

Accordingly, we affirm the circuit court's

(1) April 13, 2000 Findings of Fact, Conclusions of Law and Order

Denying Defendant's Motion to Suppress Arrest, Statements,
Identification and Evidence, and (2) June 22, 2000 Judgment.

DATED: Honolulu, Hawai'i, February 28, 2002.

On the briefs:

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for Defendant-Appellant. Chief Judge

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Associate Judge