

NO. 23733

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CYNTHIA MOORE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE THIRD CIRCUIT, PUNA DIVISION
(Report No. G-22578)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Cynthia Moore (Moore) appeals from the August 15, 2000 judgment entered by the District Court of the Third Circuit (the district court), per diem Judge K. Napua Brown presiding, convicting and sentencing her for the offense of Terroristic Threatening in the Second Degree, a violation of Hawaii Revised Statutes (HRS) § 707-717 (1993). Pursuant to HRS § 707-717(2), this offense is a misdemeanor, which, pursuant to HRS § 706-663 (1993), is punishable by a sentence of imprisonment for a term not to exceed one year. We vacate the judgment and remand for a new trial.

A.

The State of Hawai'i concedes in its answering brief, and the transcripts confirm, that although Moore appeared before the district court several times pre-trial and for trial, the district court never advised her of her right to a jury trial.

Additionally, the district court never obtained a waiver by Moore of her right to a jury trial.

In State v. Ibuos, 75 Haw. 118, 857 P.2d 576 (1993), the Hawai'i Supreme Court vacated a family court judgment that convicted the defendant of abuse of a family or household member, a misdemeanor, because the defendant had never been informed of his right to a jury trial. The supreme court reasoned as follows:

Hawai'i Rules of Penal Procedure (HRPP) Rule 5(b)(1) requires that "the court shall in appropriate cases inform the defendant that he [or she] has a right to jury trial in the circuit court or may elect to be tried without a jury in the district court." "Appropriate cases" arise whenever the accused has a constitutional right to a jury trial. In Hawai'i, a statutory right to a jury trial arises whenever a criminal defendant can be imprisoned for six months or more upon conviction of the offense. HRS § 806-60. Because a person convicted of the offense of Abuse of a Family or Household Member, a misdemeanor, may be imprisoned for up to one year, (see HRS § 706-663 (Supp. 1992)), the court had a duty to inform Ibuos of his right to trial by jury in order to ensure a knowing and voluntary waiver of that right. Failure to obtain a valid waiver of Ibuos's fundamental right constitutes reversible error.

A knowing and voluntary waiver of the right to trial by jury must come directly from a defendant, either in writing or orally. . . . The necessity for colloquy between the court and a defendant is especially apparent in light of the importance we place on the personal nature of a defendant's right to a jury trial. . . . Because the record is silent as to any colloquy between the court and defendant, counsel's waiver of her client's right in this instance was, therefore, invalid, violating Ibuos's right to trial by jury under the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution.

Id. at 120-21, 857 P.2d at 577-78 (citations and footnote omitted).

In State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982), the Hawai'i Supreme Court noted that under the United States Constitution, the right to a jury trial exists only when an offense is "serious," rather than "petty[.]" Id. at 375, 641 P.2d at 979. In determining whether an offense is serious or petty, two criteria are relevant:

The first is whether the offense is by its nature serious. If so, the size of the penalty that may be imposed is only of minor relevance, and the right of trial by jury attaches. See *Callan v. Wilson*, 127 U.S. 540 (1888). If the offense is not by its nature serious, however, the magnitude of the potential penalty set for its punishment becomes important, since it is an indication of the ethical judgments and standards of the community. *District of Columbia v. Colts*, 282 U.S. 63 (1930). 51 Haw. at 614-15, 466 P.2d at 424.

See *Territory v. Taketa*, 27 Haw. 844 (1924); *Ex Parte Higashi*, 17 Haw. 428 (1906). See also *Frank v. United States*, 395 U.S. 147 (1969).

The Supreme Court [of the United States] has generally considered a sentence of six months to be an acceptable dividing line between serious and petty offenses.

Id. (citations and internal brackets omitted).

In this case, Moore was convicted of a misdemeanor punishable by imprisonment not exceeding one year. Under federal constitutional or Ibuos standards, therefore, the district court reversibly erred when it failed to engage in a colloquy with Moore to ensure that she understood her fundamental right to a jury trial and was knowingly and voluntarily waiving that right.

B.

Moore maintains, and we concur, that the district court appears to have analyzed the evidence and her motion for judgment

of acquittal against the elements for the offense of Reckless Endangering in the Second Degree, which Moore had been arrested for, rather than Terroristic Threatening in the Second Degree, the offense she was ultimately charged with committing. However, the record indicates that there was sufficient evidence adduced at trial to support a conviction on the Terroristic Threatening charge. Therefore, double jeopardy principles should not bar a retrial in this case.

C.

In light of the foregoing discussion, we vacate the August 15, 2000 judgment entered by the district court and remand for a new trial.

DATED: Honolulu, Hawai'i, May 1, 2002.

On the briefs:

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State of Hawai'i, for
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