NO. 23950

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHERYL MCWHITE, also known as Cheryl Hannahs, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-01-0369)

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

Defendant-Appellant Cheryl McWhite, also known as Cheryl Hannahs (McWhite), appeals from the November 14, 2000 Judgment, entered in the Circuit Court of the First Circuit by Judge Marie N. Milks, upon a jury verdict, convicting McWhite as charged of Count I (Promoting a Dangerous Drug in the Third Degree), Count II (Promoting a Detrimental Drug in the Third Degree), and Count III (Theft in the Fourth Degree). We affirm, without prejudice to a subsequent proceeding pursuant to Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 based on two of the issues raised in this appeal.

BACKGROUND

There is evidence that on February 13, 2000, Wal-Mart Loss Prevention Officer Brett Reed (Reed) observed McWhite enter the Kunia Wal-Mart store, switch the price on a pair of sandals, purchase the sandals and a shirt, and then leave the store. Reed stopped McWhite, walked her to the security office and, to ensure

that she had no weapons, asked her to empty out her purse. McWhite complied with the request. The contents of McWhite's purse contained, among other items, (a) a small hand-rolled cigarette, (b) numerous one-inch by one-inch baggies, and (c) a pocketknife. Evidence showed that the cigarette weighed 0.355 grams and "[t]he vegetable matter from the cigarette was determined to be marijuana, and to contain tetrahydrocannabinol." Some of the baggies contained insufficient contents to be analyzed. Added together, the remainder of the baggies contained a net weight of 0.036 grams of methamphetamine.

The court denied McWhite's motion for a judgment of acquittal.

A.

Initially, McWhite was represented by Deputy Public Defender Thomas R. Waters (Waters). On May 10, 2000, Waters withdrew as counsel at McWhite's request because she said that Waters "breached his oath." Valarie A. Vargo (Vargo) was appointed as successor defense counsel. In a motion filed on June 29, 2000, Vargo (a) advised the court that McWhite asked Vargo to withdraw and (b) asked the court "to determine if there are legal grounds to allow her to withdraw as counsel[.]" After a hearing on July 28, 2000, the court entered an "Order Denying Counsel for Defendant's Motion to Withdraw as Counsel."

In this appeal, McWhite contends that she was the victim of the ineffective assistance of trial counsel.

> "In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided [was] within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and citation omitted).
>
> [T]he 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.
>
> Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of actual prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai'i 20, 27, 979 P.2d 1046, 1052-53 (1999) (ellipsis in original, citations and internal quotation marks omitted).

In light of the above precedent, we will examine McWhite's allegation that she was unduly prejudiced by defense counsel's various alleged errors or omissions.

1.

McWhite complains of trial counsel's alleged failure to investigate potential "state action" by Wal-Mart when it allegedly apprehended and arrested McWhite. McWhite's sole basis for this point is as follows:

> Despite these sure signs of pretext and obvious evidence of an illegal search and seizure, counsel did not follow-up to investigate Wal Mart's sophisticated loss prevention techniques, practices, and standards. Nor did counsel issue subpoena duces tecum to review Wal Mart's loss prevention training documents, or other records that would show whether a police training program was in place, in conjunction with Wal Mart and possibly other

> retailers, to curb shoplifting. Such a coordinated campaign is certainly plausible, if not probable.

Upon a review of the record and the precedent, we summarily conclude that this point is without merit.

2.

WcWhite complains of trial counsel's failure to file a motion to dismiss as to Count I on the basis that the 0.036 grams of methamphetamine found in McWhite's possession was a de minimus amount that was insufficient to cause any affect on the human body. The relevant precedent is State v. Balanza, 93 Hawai‘i 279, 1 P.3d 281 (2000); State v. Viernes, 92 Hawai‘i 130, 988 P.2d 195 (1999); and State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979). Upon a review of the record and the precedent, we conclude that this point is without merit.

3.

McWhite complains of defense counsel's failure to file an HRPP Rule 14 motion for relief from the allegedly prejudicial joinder of Counts I and II with "the unrelated theft charge under Count III[.]" The precedent is Balanza, 93 Hawai‘i at 288-89, 1 P.3d at 290-91. If defense counsel had made such a motion, the trial court would have been required to "weigh the possible prejudice to the defendant against the public interest in judicial economy." Id. at 289, 1 P.3d at 291. "One of the factors the trial court may consider in the . . . balancing is whether substantially the same witnesses would testify at the

separate trials if severance were granted." Id. citing State v. Miyazaki, 64 Haw. 611, 623, 645 P.2d 1340, 1349 (1982). Upon a review of the record and the precedent, we conclude that this point is without merit.

4.

McWhite complains of trial counsel's failure to request, and failure to object to the lack of, a jury instruction to cure the effect of the prejudicial joinder of Counts I and II with Count III. The Hawai‘i Supreme Court has stated:

> With respect to the adequacy of jury instructions, this court has explained:
>
> The trial court is the sole source of all definitions and statements of law applicable to an issue to be resolved by the jury. Moreover, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he or she shall state to them fully the law applicable to the facts. And faced with inaccurate or incomplete instructions, the trial court has a duty to, with the aid of counsel, either correct the defective instructions or to otherwise incorporate it into its own instructions. In other words, the ultimate responsibility properly to instruct the jury lies with the circuit court and not with trial counsel.

State v. Culkin, 97 Hawai‘i 206, 214-15, 35 P.3d 233, 241-42 (2001) (citation and brackets omitted). In light of the precedent that the ultimate responsibility to properly instruct the jury lies with the circuit court and not with trial counsel, we conclude that trial counsel's failure to request, and failure to object to the lack of, a jury instruction cannot be ineffective assistance of counsel.

5. and 6.

McWhite cites the following precedent:

> One of defense counsel's responsibilities is to advise the defendant on the question of whether or not he or she should testify. "It is primarily the responsibility of the defendant's counsel, not the trial judge, to advise the defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so." In the atypical case where the court may be obligated to examine a defendant's exercise of the right, its "role . . . is limited to making sure that the defendant understands his or her rights and ensuring that the defendant's final decision is made voluntarily, with no coercion or undue influence." Other than this, under our trial system, the court can have no discernible interest in the defendant's decision to testify.

State v. Silva, 78 Hawai‘i 115, 124, 890 P.2d 702, 711 (1995) (citations omitted, overruled on separate ground). McWhite complains that she was prejudiced by defense counsel's failure (1) to advise her of her right to testify and (2) to prepare her to testify in her own defense. We conclude that the record is not sufficiently developed to decide these issues.

7.

McWhite complains of trial counsel's failure to examine McWhite following the State's cross-examination of her. McWhite states that

> [c]ounsel should have conducted a redirect examination and attempted to rehabilitate [McWhite] for the jury. Counsel should not have left [McWhite] to wallow in the winds of self-incrimination. It was patently unreasonable for counsel not to redirect [McWhite] and attempt to rehabilitate her credibility before the jury.

Upon a review of the record, we conclude that this point is without merit.

B.

McWhite contends that the trial court reversibly erred when it failed to give a curative jury instruction to mitigate the prejudicial joinder of Counts I and II with Count III.

The jury was instructed that (a) Count I required proof beyond a reasonable doubt that McWhite knowingly possessed methamphetamine, (b) Count II required proof beyond a reasonable doubt that McWhite knowingly possessed marijuana, and (c) Count III required proof beyond a reasonable doubt that McWhite, with intent to defraud, altered the price tag on Wal-Mart's goods or merchandise valued not more than $100.

Instruction no. 4.06 of the Hawai‘i Standard Jury Instructions Criminal (1991), was not requested or given. It states as follows:

> The defendant is charged with more than one offense under separate counts of the indictment/complaint. Each count and the evidence that applies to that count is to be considered separately. The fact that you may find the defendant not guilty or guilty of one of the counts charged does not mean that you must reach the same verdict with respect to [any] [the] other count charged.

We do not know why the court, in this multiple count case, did not give this instruction. Nevertheless, we conclude in this case that when read and considered as a whole, the instructions given were not prejudicially insufficient, erroneous, inconsistent, or misleading.

CONCLUSION

Accordingly, we affirm the circuit court's November 14, 2000 Judgment convicting McWhite as charged of Count I (Promoting a Dangerous Drug in the Third Degree), Count II (Promoting a Detrimental Drug in the Third Degree), and Count III (Theft in the Fourth Degree). This affirmance is without prejudice to McWhite's right to pursue, in an HRPP Rule 40 post-conviction proceeding, her complaints that she was prejudiced by defense counsel's failure (1) to advise her of her right to testify and (2) to prepare her to testify in her own defense.

DATED: Honolulu, Hawai‘i, August 13, 2002.

On the briefs:

Joseph A. Gomes,
for Defendant-Appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge