NO. 24235

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DONNA BROOKS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 00-1-2339)

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

Defendant-Appellant Donna Brooks (Donna) appeals from the Judgment entered on April 25, 2001, following a jury trial, by the Circuit Court of the First Circuit (the circuit court), the Honorable Dexter D. Del Rosario presiding, convicting and sentencing her for assault in the third degree, a violation of Hawaii Revised Statutes § 707-712(1)(a) (1993). The charge against Donna stemmed from a July 25, 2000 incident in which Donna allegedly hit her step granddaughter (Granddaughter) after Granddaughter refused to put on her seatbelt.

Donna's sole argument on appeal is that the circuit court wrongly allowed Granddaughter to testify at trial without conducting a pre-trial hearing to determine Granddaughter's competency to testify. Donna's sole justification for orally requesting the pre-trial competency hearing was that

Granddaughter was seven years old at the time of the incident and eight years old at the time of trial and had not made "any written statement or verbal statement that was recorded in any manner and it was through the mother in which the statements were prepared to the police officer . . . to the treating physician." In denying Donna's request, the circuit court stated, in relevant part, as follows:

> The [c]ourt is going to treat this as in effect a Motion for Discovery because what the defense seeks to have is to compel the child witness to give sworn testimony. In effect, it is a motion to depose by using the [c]ourt.
>
> And, the defense has not provided any legal authority to take the deposition of a child witness on the sole basis of the age, and, the fact that the child witness has not presented any prior statements.
>
> The [c]ourt also notes under [Hawaii Rules of Evidence] Rule 601[,[1]] the general rule of competency, every witness is competent to be a witness except as provided and then sets forth the exception that is lack of personal knowledge[[2]] and the ability to understand oath or affirmation.[[3]]

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[1]/ Hawaii Rules of Evidence (HRE), Rule 601 (1993) states, "Every person is competent to be a witness except as otherwise provided in these rules."

[2]/ HRE Rule 602 (1993) states, in relevant part:

> **Lack of personal knowledge.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' [sic] own testimony.

[3]/ HRE Rule 603.1 (1993) states:

> **Disqualifications.** A person is disqualified to be a witness if the person is (1) incapable of expressing oneself so as to be understood, either directly or through

(continued...)

> And, there has been no assertion by defense that this witness either lacks personal knowledge or was unable to tell the difference between a truth and a lie.
>
> The [c]ourt also notes under Rule 7 of the Rules of the Circuit Courts regarding form of motion states all motions except when made during a hearing or trial shall be made in writing.
>
> And, with respect to facts, if a motion requires consideration of facts not appearing record, it shall be supported by affidavit.
>
> In addition, where a motion involves a question of law, it shall be accompanied by a memorandum in support of the motion.
>
> So, although this motion is made orally, the [c]ourt believes that it should be at least supported by statement of facts and supported by the law that would, as applied to those facts, would support granting the relief sought.
>
> In this case the defense has not asserted any or sufficient factual legal basis to have this hearing.
>
> I should note that in the course of this witness's testimony should an issue a rise [sic] as to the competence hearing, the defense is free to request a Voir Dire of the witness, is free to state their objections and is free to move to strike any testimony or witness should it become apparent during the trial that this witness is disqualified from testifying.
>
> Based on the record at this time there is insufficient basis to give a hearing for the sole purpose of determining whether she is or is not. The record is too void of any facts and law to support the position.
>
> To hold otherwise is that in every single case defense age case hold a hearing and, in fact, have a deposition.
>
> The [c]ourt is not aware of any law to support that position, and, at this time will deny the request.

(Footnotes added.)

[3/](...continued)
interpretation by one who can understand the person, or (2) incapable of understanding the duty of a witness to tell the truth.

A trial court's decision not to conduct a hearing to determine whether a witness is competent to testify is judged on appeal under the "right/wrong" standard. State v. Kelekolio, 74 Hawai‘i 479, 527, 849 P.2d 58, 79-80 (1993). Based on our review of the record, we conclude that the circuit court's denial of Donna's oral request for a pre-trial competency hearing was correct.

In Kelekolio, the supreme court vacated the defendant's conviction because at trial the complaining witness showed an inability to understand her obligation to tell the truth, not because she had the IQ of a four- to seven-year old:

> In the present case, the trial court either made no finding of competency or adjudged the complainant to be competent *sub silentio.* However, our *de novo* review of the record persuades us that there was an inadequate showing of competency for the following reasons: (1) when asked whether lying was good or bad, the complainant responded, "Good"; (2) the complainant was unable to identify Kelekolio, who was present in court, although she repeatedly referred to him in her testimony by name; and (3) the complainant did not appear to understand the meaning of particular sexual and other terms (*i.e.*, "rape" and "kidnap") that she employed in her testimony.
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> . . . .
>
> . . . [T]he question of testimonial competency must be determined on a case by case basis. We merely hold, on the record before us, that (1) the issue of the complainant's competency to testify was reasonably called into question; and (2) the trial court committed plain error in failing to engage in an independent inquiry and make an express finding as to whether the complainant was competent to testify before allowing her substantive testimony to be exposed to the jury.

Kalekolio, 74 Hawai‘i at 528-29, 849 P.2d at 80.

No such concerns were raised about Granddaughter at the time Donna requested a pre-trial competency hearing. Moreover, at trial, Granddaughter appeared to understand the questions asked of her, answered questions articulately, and seemed to understand the difference between truth and falsehood. Furthermore, no request was made to have Granddaughter voir dired.

Affirmed.

DATED: Honolulu, Hawai‘i, January 30, 2003.

On the briefs:

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