NO. 25020

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
JOHN A. ISHIKAWA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1134)

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

Defendant-Appellant John A. Ishikawa (Defendant or Ishikawa), appeals from the Judgment entered on March 22, 2002, in the Circuit Court of the First Circuit, convicting him of Promoting a Dangerous Drug in the Third Degree, Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2002)[1], and sentencing him to five years' incarceration with a mandatory minimum of thirty days. We affirm.

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[1] Hawaii Revised Statutes § 712-1243 (1993 & Supp. 2002) provides, in relevant part, the following:

> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> . . . .
>
> (3) Notwithstanding any law to the contrary, except for first-time offenders sentenced under 706-622.5, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less that thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

POINTS OF ERROR ON APPEAL

Ishikawa asserts that the court reversibly erred: (1) in admitting Plaintiff-Appellee State of Hawai‘i's (the State) exhibit no. 2, the packet of methamphetamine, into evidence; (2) in denying his request, made immediately prior to the selection of the jury, for a change of court-appointed counsel; and (3) in denying his motion for a continuance of the trial when his request for a change of court-appointed counsel was denied.

BACKGROUND

On May 23, 2001, a Grand Jury Indictment charged Ishikawa with Promoting a Dangerous Drug in the Third Degree, HRS § 712-1243, as follows:

> On or about the 11th day of November, 1999, to and including the 12th day of November, 1999, in the City and County of Honolulu, State of Hawaii, JOHN A. ISHIKAWA did knowingly possess the dangerous drug methamphetamine, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of [HRS § 712-1243].

On January 7, 2002, when Deputy Public Defender Mia Oana (defense counsel or Miss Oana) was asked by Judge Richard K. Perkins if Ishikawa was ready for trial, the following colloquy ensued:

> [DEFENSE COUNSEL]: I believe my client has an issue he wants to bring up to the Court. You can just say it out loud.
>
> THE DEFENDANT: At this point I need to have another representation. I would like another Public Defender.
>
> THE COURT: Why, Mr. Ishikawa?
>
> THE DEFENDANT: For my best interests. I'm not being represented properly.
>
> THE COURT: What is it that you think should be done that has not been done?

THE DEFENDANT: I'm sorry?

THE COURT: What is it that you want [defense counsel] to do that she hasn't done?

THE DEFENDANT: Everything, everything that I have brought up is in her words that irrelevant. It has no -- she doesn't even take into consideration the things I'm saying.

THE COURT: Well, sometimes that's because they are irrelevant. I mean, you know, if you want to be your own lawyer, you have that option. You have a Constitutional right to represent yourself, if that's what you want. But if you want to -- this is the rule. You have a Court appointed attorney. Then if you want to change the Court appointed attorney, you need to give me legally sufficient reasons to do that. It can't be that you just feel like you don't like her. I mean you've got to give me --

THE DEFENDANT: No, no. It's not a personal matter. It is being represented to my best interests, is what I'm saying.

THE COURT: Well, okay. The rule is that you got to give me legitimate reasons to discharge her so that you can get another Court appointed attorney. If you can't give me legitimate reasons or sufficient reasons, whatever you want to call them, then you have a choice. And I'll tell you whether you've given me sufficient reasons or not.

If you haven't, I will say, Mr. Ishikawa, you have two choices. You can stay with Miss Oana, or you represent yourself. That's the law. So and representing yourself is -- can be very detrimental to the result that you want in this case. And I'm assuming that you want a favorable result.

MS. MOOK: Excuse me, Your Honor. Can I --

THE COURT: No. Not now. So Mr. Ishikawa, I need to know specific reasons. I mean you can't just tell me she's not working in your best interests. That's not sufficient. I can't determine from what [sic] whether she's doing anything wrong.

THE DEFENDANT: I can't have my girl friend --

MS. MOOK: Explain for me [sic].

THE DEFENDANT: -- explain for me?

MS. MOOK: He has a hard time putting things into words. I've been -- he's been explaining to me the situation that --

THE COURT: Okay. All right. Ma'am, would you step forward. And give us your name.

MS. MOOK: My name is Cheryl Mook, I'm Mr. Ishikawa's friend. Okay. Mr. Ishikawa feels that --

THE COURT: Swear her in.

THE CLERK: Raise your right hand.

Cheryl Mook was called as a witness by and on behalf of Ishikawa and, after having been first duly sworn, testified as follows:

> MS. MOOK: According to Mr. Ishikawa, he feels that from [the] get go her attitude in regards to the charges that were brought against him is correct. I mean and he feels he hasn't -- he's not guilty of these charges. So he wants better -- he wants to be reassured that he will be -- his best interests is at heart.
>
> And her attitude has been that it would be a character or kind of conflict between his word and the officer's word. And the things that he's brought up to her, he feels that she hasn't even explained it right to him, or even -- he doesn't really understand what's going on. That's the bottom line.
>
> He doesn't know -- like when we were out there she was telling him something about a witness and whatever. But the thing is he doesn't really understand. He has -- just understanding what she's saying. And in his eyes, he feels that she already assumed that he's guilty of these charges. That's what he's saying.
>
> THE COURT: Okay. I still haven't heard anything in particular that is of sufficient reason for me to discharge Miss Oana and get you a new lawyer. I mean sometimes a case is such that a lawyer can't do very much. But if he wants to go to trial, then the lawyer will take him to trial. I mean that's just how it is.
>
> And this may be a case like that. You've got to tell me or convince me that this is not a case like that by giving me specifics. And I haven't heard any specifics.
>
> MS. MOOK: Okay. To me he feels like the attitude has been that he's already guilty of whatever he's being charged with. That's what he feels and that's how he feels he's not being represented in his best interests.
>
> THE COURT: Do you want to add anything else?
>
> MS. MOOK: First of all, I know for certain that he doesn't understand whatever is going on. He didn't understand from [the] get go. He's been having a hard time -- you know, I guess interact with her and even get on that first level of understanding, like what he's gonna -- what he's gonna be going through, the process and whatever, yeah.
>
> THE COURT: Okay. Anything else.
>
> MS. MOOK: No. That's all I can say.
>
> THE COURT: Thank you very much.
>
> Mr. Ishikawa, do you have anything to add? And frankly, I have not heard sufficient reasons to discharge Miss Oana at this point. So, if you have anything else you want to tell me, now's the time to do it.

THE DEFENDANT: (Shakes head.)

THE COURT: Okay. I am denying your request to discharge Miss Oana. She's your lawyer, or you represent yourself. Do you feel you can represent yourself?

THE DEFENDANT: No.

THE COURT: All right. Then you will stay with Miss Oana. Is that right?

THE DEFENDANT: It seems like I have no choice.

THE COURT: Well, you have a choice. But and if you want me to -- your options are right now to represent yourself. And as I indicated earlier, you have a right to do that, or to stay with Miss Oana as your attorney. And let me just tell you that you can plead not guilty, guilty, or nollo contendere in this case. Those are the three options for pleas.

What is the drug in this case?

MR. KOENIG [Prosecutor]: Methamphetamine, Your Honor.

THE COURT: All right. The State's gonna have to prove beyond a reasonable doubt that you possessed methamphetamine and that you did so knowingly. There may be defenses that could be raised in your case, reasonable doubt, mistake of fact or law, alibi, duress, deminimus [sic], entrapment, no intent or knowledge.

If you are convicted, this is a class C felony. It carries a maximum penalty of five years in prison and a $10,000 fine. Plus, because it's methamphetamine, you cannot get probation if you are convicted. The Court must sentence you to prison with a mandatory minimum of from 30 days to two and a half years. Probation is not possible.

Now, you have a Constitutional right to be represented by a lawyer in your case, whether you believe you are guilty or not guilty. You can hire your own lawyer. Or if you cannot afford to hire a lawyer, the Court will appoint and pay a lawyer to represent you.

The lawyer can research the law applicable to your case; conduct an investigation into your case and explore all the defenses that you might have; gather evidence that might help you; interview witnesses and arrange to have them appear and testify in Court for you; file motions that could help your case; plea bargain with the prosecutor on your behalf; help you prepare yourself for court hearings and trial and sentencing, if you are found guilty, including helping you decide whether to testify and explaining how what you say might help or hurt your case.

If you represent yourself without a lawyer, the judge cannot and will not help you. And you will be required to follow all the technical rules and the substantive procedural and evidentiary law applicable to your case.

Have you ever studied the law Mr. Ishikawa?

THE DEFENDANT: No, sir.

THE COURT: The prosecutor's a licensed attorney. Mr. Koenig has been practicing for several years. He's gone to law school, passed the bar. And he's experienced in trying cases just like yours.

Now, acting as your own lawyer is detrimental to you and could substantially hurt your chances of obtaining a favorable result in this case. If you represent yourself, you cannot claim later on that you did not have adequate representation.

Do you have any questions about what I have just told you?

THE DEFENDANT: I have no questions.

THE COURT: All right. So your options are right now to represent yourself, or to have Miss Oana represent you. What is it gonna be?

THE DEFENDANT: To me I have no choice. I would have to go with --

THE COURT: All right. Then fine.

THE DEFENDANT: I don't agree to it. But that's the choices I have.

THE COURT: I understand that. And all of this is on the record. If I made a mistake in doing this, you can appeal it later on. But as far as I'm concerned, what you've said is not enough to fire her or get you a new Court appointed attorney.[2]

Judge Perkins then asked defense counsel whether or not she was ready for trial. The response was an oral motion for a continuance. The basis for this motion was as follows:

[DEFENSE COUNSEL]: . . . It appears after further discussion that there is a need to subpoena the records of the police officers involved in this case as part of our defense.

THE COURT: What are you looking for?

[2/] In violation of Hawai‘i Rules of Appellate Procedure Rule 28(b)(10) (Supp. 2003), Defendant-Appellant John A. Ishikawa (Ishikawa) placed in the appendix of his opening brief copies of three unsigned letters allegedly sent to his defense counsel in this case. In his opening brief, Ishikawa states that his "position is more clearly set forth in Ms. Mook's letters of 9/5/01 and 10/18/01, along with [Ishikawa's] letter of 10/19/01. Copies obtained from [Ishikawa's] personal records have been attached as **Appendix 1**. Unfortunately, this information was not made available to the trial court before it denied the motion for new counsel." (Emphasis in original.) These letters are not a part of the record on appeal. Orso v. City & County of Honolulu, 55 Haw. 37, 514 P.2d 859 (1973).

> [DEFENSE COUNSEL]: Looking for any instances of false reporting and/or aggressive behavior.
>
> THE COURT: Do you have any evidence that this sort of information exists?
>
> [DEFENSE COUNSEL]: No, I do not, Your Honor.

The prosecutor objected to the continuance and noted the following:

> The case was originally set for trial the week of October 8th, and [Ishikawa] didn't show up for a trial call on October 2nd. And he was bench warranted on that day. The bench warrant was then set aside. And we were set again for trial this week. Last Thursday, January the 3rd, there was a trial call before Judge Sakamoto. And this was not raised at that time.
>
> I have been in contact with Miss Oana regarding how to deal with this case. Drug Court, plea agreement, those sorts of things. She has reported to me that her client was not interested in those things. And we were ready to go to trial today.
>
> . . . I had to make special arrangements for one of my officers, who is in training, so that he can come and testify tomorrow . . . .
>
> Furthermore, we have a chain of custody witness, . . . who is no longer with HPD [Honolulu Police Department]. . . . She now lives in Texas. But she happens to be present in Hawai‘i until . . . January 30th. So if this case gets continued to when she's not here anymore, the State is gonna have to fly her back from Texas. Also, she's gonna be unavailable during the whole of the winter olympics because she's planned to go there.

Defense counsel replied as follows:

> Your Honor, I do understand the State's position. I think the Court can gather that communication between myself and my client has been poor and part of the reason for this last minute request. It is part of my client's defense, and it is to ensure that he does have a fair trial, Your Honor. And so we do again urge this Court to grant his motion for a continuance in order to allow us to get these matters to put forth a better defense.

Judge Perkins denied defense counsel's motion for a continuance and proceeded to start the trial that afternoon. In her opening statement, defense counsel argued as follows:

> The evidence will show that on the evening of November 11th, into the early morning hours of November 12th, 1999, Sergeant Lum Lee found a small ziploc packet on the ground, and not on John Ishikawa's person.

> The evidence will also show that John Ishikawa's fingerprints were not on that bag. And you will see that John Ishikawa did not hold the bag. John Ishikawa did not touch the bag. And the bag was never in John Ishikawa's possession. All John Ishikawa wanted to do that evening is cooperate with Sergeant Lum Lee. And all he met with that evening, you will see, is resistance, harsh words, and false accusations.

As its first witness, the State called the arresting officer, retired Honolulu Police Officer Darrel W. Lum Lee (Officer Lum Lee). Officer Lum Lee had been with the police force for over 28 years and was a "field training supervisor." He testified that while on duty at about 11:15 p.m. on November 11, 1999, he observed Ishikawa parked in a small old Toyota in the front of a Goodwill Store. When Ishikawa drove off, Officer Lee "noticed that the seat belt buckle was being dragged outside the door" and he decided to "catch up to him and . . . let him know that his buckle is hanging out the door." After driving awhile, Ishikawa pulled into a parking lot of an apartment building and turned off his car lights. Officer Lum Lee drove past and then stopped and waited. When Ishikawa drove back onto the street, the headlights of his car were off. Officer Lum Lee then proceeded to pull Ishikawa over.

Officer Lum Lee "called in the traffic stop, gave the license number and location, and requested that one of [his] FTO [field training officer] units come the area." Before any other officer arrived, Officer Lum Lee exited his vehicle, told Ishikawa "about his seat belt buckle hanging out the door and driving around with his headlights off[,]" and asked Ishikawa for his driver's license and the car's registration. Ishikawa responded that he did

not have a driver's license and the car did not belong to him so he did not know the location of the paperwork. While Ishikawa was complying with Officer Lum Lee's order to exit the vehicle and stand on the sidewalk, Officer Lum Lee "was looking into the vehicle to make sure that there was a key in the ignition and it wasn't a stolen vehicle that wasn't reported. [He] was also calling in information on the vehicle to the dispatcher on . . . [his] portable radio in [his] hand."

When Ishikawa gave Officer Lum Lee the name and phone number of the alleged owner of the car, the officer telephoned this person. Officer Lum Lee testified that while he used the phone, the following occurred:

> Yes, sir. I had [Ishikawa] standing just on the sidewalk, just on the other side of his vehicle. I guess he didn't notice that I was watching him. And I noticed that he raised his right hand up. He had a plaid shirt. It's what I would call like a lumberjack shirt, which had a pocket in front here. He put his middle finger, index finger, into the pocket, brought something out, which I noticed was a clear bag, about an inch square. Made a quick flip like this. And then went toward his mouth to look like he was lighting a cigarette.

Officer Lum Lee testified that Ishikawa did not have a cigarette and identified State's exhibit no. 2 as the packet he witnessed Ishikawa discard. The following is the relevant part of the prosecutor's direct examination of Officer Lum Lee concerning the chain of custody:

> Q. And who was it that recovered that packet for submission into evidence for HPD?
>
> A. Eventually it was Officer Kalahui, Derrick Kalahui.
>
> Q. Kalahui, okay.
>
> A. Yes, sir.

Q. And you saw Officer Kalahui take that into custody in order to put it into evidence?

A. Yes, sir. I did.

On cross-examination, Officer Lum Lee testified that after observing Ishikawa toss the "plastic -- self sealing plastic - clear plastic bag" to the ground, Officer Lum Lee used his flashlight to look at the item on the ground, but did not recover it. Soon thereafter, Officer Kalahui and Officer Chong arrived with their recruit. The following is the relevant part of the cross-examination.

Q. Now, when Officer Kalahui arrived, you instructed him to pick up the plastic bag?

A. I appraised him of what I had seen and told Officer -- his recruit to go and recover it.

Q. And how long was it from the time you saw - you say you saw Mr. Ishikawa throw the bag to the ground until Officer Kalahui arrived?

A. I'd say within minutes, ma'am.

Q. Five minutes, ten minutes?

A. Less than five.

Q. So let me just get this clear. You say you saw Mr. Ishikawa throw the bag to the ground.

A. Uh-huh.

Q. And within five minutes from that time, Officer Kalahui and his recruit arrived?

A. Yes, ma'am.

Q. And it wasn't Officer Kalahui, but it was his recruit that recovered the bag from the ground.

A. Picked it up. Yes, ma'am.

Q. Do you know what the recruit's name was?

A. Huggins.

On redirect, Officer Lum Lee testified that after the packet was tossed on the ground, it was in no danger of being tampered with. When the other officers arrived, Officer Lum Lee told them where the packet was so they could recover it. Officer Lum Lee further testified, in relevant part, as follows:

> Q. You saw [Officer Huggins] hand [the packet] to Kalahui?
>
> A. Yes, sir. When Officer Huggins went to recover the bag, he was in view of Officer Kalahui. This is part of his FTO requirements. He has to observe everything the recruit does.
>
> Q. Did you see Officer Huggins do anything to the bag, like tamper with its contents, or try and take anything out, or try and add anything in, or anything of that nature?
>
> A. No, sir. He just picked it up and looked at the contents and handed it to Officer Kalahui.
>
> Q. And Officer Kalahui is the person who was then in charge of putting it through the evidence room and sending it on to be tested; is that correct?
>
> A. Yes, sir.

Officer Derrick Kalahui (Officer Kalahui) was the State's next witness. He testified that he was called to the scene of the arrest on the night in question, but did not have a recruit with him. Officer Kalahui stated that he and Recruit Joshua Huggins, who was with Officer David Chong, were instructed to take control of the item Officer Lum Lee had pointed out. Officer Kalahui described the item as "a translucent bag containing white crystallized substance" and further testified, in relevant part, as follows:

> Q. Did you see the item in place at the scene?
>
> A. No, I did not.
>
> . . . .

Q. Who handed you the item?

A. Officer David Chong.

The prosecution then offered State's exhibit no. 2 into evidence.[3] Defense counsel objected, arguing that no clear chain of custody had been established. The court sustained Ishikawa's objection and would not admit exhibit no. 2 into evidence.

Defense counsel asked Officer Kalahui if he was aware of how long Officer Chong had been in possession of the packet. Officer Kalahui responded in the negative.

After Officer Kalahui left the stand, the prosecution continued to establish its chain of custody with testimony from the Police Evidence Custodian who received the evidence from Officer Kalahui and held the evidence for the chemist.

After lunch recess, the court and counsel discussed the court's ruling regarding the admissibility of exhibit no. 2. The prosecution argued that the rule regarding chain of custody is that "all possibilities of tampering with an exhibit need not be negated . . . . (Chain of custody is sufficiently established where it is reasonably certain that no tampering took place, with any doubt going to the weight of the evidence[.]" State v. Mitchell, 88 Hawai‘i 216, 229, 965 P.2d 149, 162 (App. 1998) (quoting State v. DeSilva, 64 Haw. 40, 41, 636 P.2d 728, 730 (1981) (citations omitted)). *See also* State v. Vance, 61 Haw. 291, 304, 602 P.2d

[3/] The deputy prosecuting attorney did not offer the evidence sheet, State's exhibit no. 1, into evidence because, he said, "I'm just using it for purposes of identification."

933, 942 (1979) (citing DeSilva for the same proposition); State v. Antone, 62 Haw. 346, 351, 615 P.2d 101, 106, (1980) (stating the same). The prosecution also discussed Vance, 61 Haw. at 304, 602 P.2d at 942, and Antone, 62 Haw. at 351, 615 P.2d at 106.

The prosecution advised the court that Officer Lum Lee was ready to take the stand again to clarify whether he or Officer Kalahui made the mistake.

Defense counsel argued that Antone was distinguishable and that there was a blank period during which the evidence was transferred between officers that may have been as long as an hour-and-a-half. The court asked defense counsel if there was any evidence of tampering. The following colloquy ensued between defense counsel and the court:

> [DEFENSE COUNSEL]: Well, Your Honor, without being able to question Officer Huggins or Officer Chong, it's --
>
> THE COURT: Okay. Well --
>
> [DEFENSE COUNSEL]: -- about tampering. I think the lack -- the State not being able to show that the item was not tampered with and cannot account for the time period from Officer Huggins to Officer Chong's interaction with this bag is you can draw an inference that tampering could have occurred.
>
> THE COURT: This is the -- this is after reviewing the cases maybe I was a little bit too strict on this chain of custody issue. What the cases say is that one, the issue's a discretionary call for the trial court. And it says - the language is repeated over and over again. I don't know where it originates. They cite [State v. DeSilva, 64 Haw. 40, 41, 636 P.2d 728, 730 (1981)].
>
> But it says: "The Court has not been so strict as to require that all possibilities of tampering be negated. We require only that it be established that it is reasonably certain that no tampering took place, with any doubt going to the weight of the evidence. Hence, we have observed that even where there has been the possibility that others may have had access to the exhibit, there exists the reasonable certainty that tampering was not occurring." Again, citing [DeSilva].

And this comes from [State v. Nakamura, 65 Haw. 74, 82, 648 P.2d 183, 188 (1982)]. And, you know, when I see -- when I take a look at the evidence, I believe that the prosecution has a -- has passed the foundational threshold, that it probably is at this point a question of weight for the jury. So I don't think I can sustain an objection on chain of custody grounds at this point.

So you're going to have to make your argument about they haven't shown us that Officer Chong did not place the -- or tamper with it, or do something to it. You're going to have to argue that to the jury as a matter of weight rather than as a matter of admissibility.

[DEFENSE COUNSEL]: Judge, at a minimum, would this Court consider giving counsel the opportunity to research this matter and submit a memorandum to the Court regarding this?

THE COURT: It's a discretionary call. I mean it's a -- the rule seems to me -- and the printout here covers many cases. I don't know if it's all the cases but -- that deal with the chain of custody issue here. And they say you got to be reasonably certain there was no tampering. We have from Mr. Lum Lee his observations about the discarding of it by defendant. Nobody touched it until Huggins picked it up.

Huggins gave it to somebody. He thought it was Kalahui. But I guess it was Chong first. But on the same night it went to Kalahui, he got it. It looks the same now as it looked then. So to me, you know, unless there's specific evidence that somebody changed the little rock-like substance -- and I don't think you're saying that. I don't think that's your defense.

Your defense is he never had it in the first place. It's somebody else's. It was there and the cops -- or either that or the cops are blaming him or planted it on him or something. Then you're not saying that the rock that was in there was exchanged and another one put in. I mean I don't hear that. I know you're saying you don't have any evidence and you don't have the opportunity to cross Chong about it. But I think the bottom line is the State has adduced enough evidence to take it -- to admit it.

[DEFENSE COUNSEL]: Can I just put on the record that I don't think the State has met the burden of reasonably -- reasonably certain that no tampering took place, given the fact that they can't account for this long period of time between where Officer Lum Lee says Officer Huggins recovered the evidence from the ground and from where Officer Kalahui says he recovered the evidence from Officer Chong. Because there is a substantial period of time that elapsed between that, between Officer Lum Lee's testimony about the recovery and the recovery by Officer Chong about it.

THE COURT: Okay. That's on the record. Anything else?

[PROSECUTOR]: No, Your Honor. With that, I think that I'm going to not call Officer Lum Lee.

After the prosecution rested, the court denied Ishikawa's motion for a judgment of acquittal.

Thereafter, Ishikawa testified that on November 11th, around 10:00 p.m., he was at Goodwill donating some furniture from one of his friends and unsuccessfully looking for "the drop box, the donation box." He denied turning off the car's headlights. On direct examination, he further testified, in relevant part, as follows:

> Q. Now, after the officer asked you to produce certain documents, what did you do?
>
> A. First thing I told him was I didn't have a valid driver's license, and that the car wasn't mine. And I couldn't find the proper paperwork for the car.
>
> Q. And what did the officer do?
>
> A. His behavior was totally uncalled for.
>
> Q. When you say uncalled for, what happened?
>
> A. He was yelling at me, and calling me -- saying things like I was lying. He was going on and on.
>
> Q. And how did you feel at this point?
>
> A. I felt I couldn't understand what he was -- why all this was coming on to me.
>
> Q. So what did you do in response?
>
> A. He kept asking me the same things. And I took it as threatening. As he demanded that I -- if I couldn't show or prove that about the car, that he was gonna arrest me.
>
> Q. So what did you do to help the officer find out . . . who the car belonged to?
>
> A. I had him call my girl friend's house to verify who was the owner of the car.
>
> . . . .
>
> A. At that point, he asked me to step out of the car. And which I did. I was standing in back of my car on like the sidewalk area.
>
> . . . .

Q. Now, during the time you stood at the sidewalk with Officer Lum Lee, did Officer Lum Lee ever approach you and ask you a question about a plastic bag?

. . . .

A. He said he observed me throwing this bag, or discarding this bag.

. . . .

Q. And did you throw it on the ground?

A. No. Definitely no.

Q. Did you in fact see a plastic bag?

A. No. Until -- until he produced it in front of me.

. . . .

Q. How long was Officer Lum Lee in the back of you?

A. A minute or so.

Q. And . . . after that minute or so is when he came in front of you with that bag?

A. Uh-huh.

. . . .

Q. Did you know what was in that ziploc bag?

A. No.

Q. Do you know where that bag came from?

A. No, I don't.

Q. Did you have that bag in your possession?

A. No, I didn't.

On cross examination, Ishikawa testified, in relevant part, as follows:

Q. Do you remember if your seat belt was dangling outside the door?

A. No, it wasn't.

. . . .

Q. Do you remember if your headlights were on?

A. My headlights were on.

. . . .

Q. . . . Now, did you know Sergeant Lum Lee before that day?

A. Never.

Q. Never had any run-ins with him?

A. Never.

Q. When you were growing up maybe? Bad blood between your family and his?

A. Not that I know of.

. . . .

Q. Did he ultimately give you a citation for not having a seat belt?

A. No.

Q. Did he give you a citation for driving without your headlights on?

A. No.

. . . .

A. That night. Before they took me down to the police station, I believe I had four citations.

Q. What were those citations?

A. Driving without license, no insurance, no registration, and no safety check.

During its deliberations, the jury communicated the following question to the court: "Did Sgt Lum Lee or any of the other officers present on the night of 11-12 Nov. know Mr. Ishikawa beforehand[?]" In its response, the court asked the jury to "rely on [its] recollection of the evidence presented at trial."

On January 9, 2002, the jury found Ishikawa guilty as charged. On March 22, 2002, Judge Perkins sentenced Ishikawa to incarceration for five years with a mandatory minimum of thirty days.

RELEVANT STANDARDS OF REVIEW

Admissibility of Evidence

Different standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court. Kealoha v. County of Hawaii, 74 Haw. 308, 319, 844 P.2d 670, 676, *reconsideration denied*, 74 Haw. 650, 847 P.2d 263 (1993).

Abuse of Discretion

"Generally, to constitute an abuse[,] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai‘i 282, 287, 12 P.3d 873 (2000) (citations omitted).

DISCUSSION

(1)

Ishikawa argues that the court reversibly erred in admitting State's exhibit no. 2, the packet of methamphetamine, because the State failed to establish a sufficient chain of custody.

"The requirement of authentication or identification as a

condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Hawai‘i Rules of Evidence Rule 901(a). "Essential for the introduction of real evidence, as a foundational requirement, is that a sufficient chain of custody be established." Nakamura, 65 Haw. at 81, 648 P.2d at 188.

In Vance, the Hawai‘i Supreme Court stated that "where an exhibit is a drug or chemical in the form of a powder or liquid which is readily susceptible of adulteration or substitution, courts tend to be strict in requiring that a chain of custody be established which minimizes the possibility of any tampering of the exhibit." Vance, 61 Haw. at 303, 602 P.2d at 942.

"It is well settled that when the State is charged with tampering with the evidence, '[i]t is not necessary to negate all possibilities of tampering with an exhibit, it being sufficient to establish only that it is reasonably certain that no tampering took place, with any doubt going to the weight of the evidence.'" Mitchell, 88 Hawai‘i at 228, 965 P.2d at 161.

Officer Lum Lee testified that he saw Ishikawa throw the packet and saw Recruit Huggins pick up the packet, look at its contents, and hand it to Officer Kalahui. Citing Officer Kalahui's testimony that he received the packet from Officer Chong, Ishikawa argues as follows:

> In this case the State could not explain the whereabouts of a

> small plastic bag for almost two hours.[4] The recovering police officer does not know whether it was opened or not. The first officer on the scene claims it was picked up five minutes after it fell to the ground. He identified at least two different officers who supposedly picked the bag off the ground. While there was no direct evidence that Officers [Lum Lee], Huggins, Chong or Kalahui placed methamphetamine into the plastic bag in question, a more reliable chain was needed in light of the grave consequences to the defendant, who maintained his innocence.

(Footnote added.)

Ishikawa is not arguing that the packet was not in police custody after it was picked up. The inconsistency in the evidence concerns which police officers had custody of the packet after it was picked up by Recruit Huggins until it was turned over to Officer Kalahui. That inconsistency does not support a tampering argument. It does not constitute failure to sufficiently establish reasonable certainty that no tampering took place. Any remaining doubt goes to the weight of the evidence.[5]

Ishikawa offers no theory or evidence of tampering. There is no evidence suggesting impropriety, motive to tamper, false reporting or aggressive behavior on the part of the officers who had possession of the packet. The discrepancy between Officer Lum Lee's and Officer Kalahui's recollections about the identity of the officer who gave the packet to Officer Kalahui does not suggest

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[4/] During trial, defense counsel stated that the time the evidence was missing was "an hour and a half difference at most."

[5/] Under these facts and due to the limited time frame in question, there are a finite number of possible scenarios for which tampering could have occurred. Any allegation of tampering would almost certainly have to suggest that it was one or more police officers who behaved improperly and illegally because Officer Lum Lee testified that the location was secure while the evidence waited to be picked up and we have no reason to believe that was not the case.

that the evidence was planted, tampered with or that the police officers at the scene had a motive to tamper with the evidence.

The record does not indicate "bad blood" or any history of interaction between the police and Ishikawa. The testimony of Officer Lum Lee and Officer Kalahui that they had never met Ishikawa prior to the night of the arrest is uncontested. Ishikawa had no prior convictions.

We conclude that the evidence supports the court's decision to admit State's exhibit no. 2 into evidence.

(2)

Ishikawa argues that the trial court erred in denying his request for a change of appointed counsel and violated his right to counsel as guaranteed by Article I § 14[6] of the State of Hawai'i Constitution and Amendment VI to the U. S. Constitution[7].

"[T]here is no absolute right, constitutional or otherwise, for an indigent to have the court order a change in court-appointed counsel." State v. Torres, 54 Haw. 502, 504, 510 P.2d 494, 496 (1973) (citations omitted). Whether a change in counsel should be permitted rests in the sound discretion of the trial court. State v. Ahlo, 2 Haw. App. 462, 469, 634 P.2d 421,

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[6/] Article I, section 14 of the Hawai'i Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance fo counsel for the accused's defense. . . . The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment."

[7/] The sixth amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

426 (1981), *cert. denied*, 456 U.S. 981, 102 S. Ct. 2252, 72 L.Ed.2d. 858 (1982). A trial court's decision in this regard will not be overturned on appeal unless, "there [has been] an abuse of discretion that prejudiced the defendant by amounting to an unconstitutional denial of the right to effective assistance of counsel." Torres, 54 Haw. at 505, 510 P.2d at 496.

The Hawai‘i Supreme Court has instructed that when an indigent defendant requests that his or her appointed counsel be replaced, the trial court has a duty to conduct a "penetrating and comprehensive examination" of the defendant on the record, in order to ascertain the bases for the defendant's request. State v. Kane, 52 Haw. 484, 487-88, 479 P.2d 207, 209 (1971) (citation omitted). This inquiry is necessary to protect "the defendant's right to effective representation of counsel[,]" id., and must be sufficient to enable the court to determine if there is good cause to warrant substitution of counsel. Brown v. Craven, 424 F.2d 1166, 1169-70 (9th Cir. 1970); People v. Marsden, 2 Cal.3d 118, 84 Cal.Rptr. 156, 159-60, 465 P.2d 44, 47-48 (1970).

There is no mechanical test for determining whether good cause exists which would warrant the appointment of substitute counsel for an indigent defendant, and each case must therefore be evaluated on its particular circumstances applying an objective standard. Commonwealth v. Nicolella, 307 Pa.Super. 96, 100, 452 A.2d 1055, 1057 (1982); McKee v. Harris, 649 F.2d 927, 932 (2d Cir.

1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (rejecting defendant's suggestion that good cause be determined solely according to the subjective standard of what defendant perceives since applying such a standard would convert the requirement of good cause into an empty formality and entitle defendant to demand reassignment of counsel simply on the basis of a "breakdown in communication" defendant himself or herself adduced).

Ishikawa further argues that this was his "first request for new appointed counsel" and "no prejudice would have resulted from any attendant delay," should his motion have been granted. Ishikawa ignores the timing of his request and cites State v. Char, 80 Hawai‘i 262, 909 P.2d 590 (App. 1995), in support of his argument that he should have been awarded his first request for substitute counsel because Char had requested his fourth substitute appointed counsel before he was deemed to have waived his right to appointed counsel. In Char, however, the trial court failed to afford Char reasonable opportunity to show good cause for substitute court-appointed counsel before granting Char's fourth appointed counsel's request to withdraw, ordering her to act as stand-by counsel, and stating, "as far as I'm concerned you have given up your right to counsel, Mr. Char." Id. at 265, 909 P.2d at 593.

Ishikawa contends that

> [h]is inability to explain the specifics of his 'best interests' and the reasons that he feels he is 'not being represented properly' illustrates his inability to represent himself. While Appendix A [see fn. 2 supra] should also have been brought to the trial court's attention, it is manifestly unfair to expect of a defendant who cannot represent himself, a fact-specific motion for new counsel.

We disagree. No defendant who fails to show good cause has a right to a change of court-appointed counsel.

The court engaged in a lengthy discussion with Ishikawa about what was required to substitute new counsel and explained the possible pleas, the charges, possible sentences, the burden of proof, possible defenses, the difficulties associated with representing oneself, and the fact that he could retain his own counsel. The court gave Ishikawa and his girlfriend, Ms. Mook, ample opportunities to speak and state the grounds for his request.

It appears that the reason why Ishikawa wanted a replacement was his loss of trust in defense counsel because "he feels that [defense counsel] already assumed that he's guilty of these charges." That is not a good cause for a change. We agree with the following precedent:

> This Court has long recognized that certain restraints must be put on the reassignment of counsel lest the right be "manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." Therefore, "(i)n order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict." The question therefore boils down to whether [the defendant] demonstrated good cause for the substitution of assigned counsel.
>
> The grounds that [the defendant] raised for substitution of counsel were that [defense counsel] had "prejudged" him and informed him that his chances of acquittal were slim. In addition, [the defendant] suggests that [defense counsel] actually discussed with the prosecutor the fact of [the defendant's] guilt. [The defendant]

argues that, regardless of whether these allegations are true, the resulting loss of trust wrought a "fundamental disruption of the integrity of the attorney-client relationship." Thus, the argument goes, there was a "complete breakdown in communication" which warranted the eleventh-hour substitution, despite the potential for delay and disruption of the ongoing trial. We find these contentions to be meritless.

. . . .

In the first place, we cannot agree with the [defendant's] suggestion that good cause is to be determined solely according to the subjective standard of what the defendant perceives. While loss of trust is certainly a factor in assessing good cause, a defendant seeking substitution of assigned counsel must nevertheless afford the court with legitimate reasons for the lack of confidence. Indeed, a purely subjective standard would convert the requirement of good cause into an empty formality, since the defendant would be entitled to demand a reassignment of counsel simply on the basis of a "breakdown in communication" which he himself induced. As the district court stated, "It is true that the request for new counsel put a strain on the attorney-client relationship. However, to find that this alone amounts to a breakdown in communication that justifies appointment of new counsel after the commencement of a trial grants unrestrained power to the defendant to discontinue the trial." We decline to endorse such an interpretation of good cause.

[The defendant's] asserted reason for his loss of trust that counsel had prejudged him and provided a pessimistic forecast does not rise to the level of good cause for substitution of counsel. As the district court stated, "The mere fact that appointed counsel makes such statements simply cannot constitute 'good cause' for requesting new counsel. If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice." The starting point for effective representation is a realistic assessment of the prospects of success in light of the risks of failure. It is precisely this balancing process which leads many defense lawyers to advise their clients to enter plea negotiations. As Judge (now Chief Justice) Burger has stated:

> A lawyer has a duty to give the accused an honest appraisal of his case. This is commanded in part because without it the accused cannot make an informed judgment as to whether he should enter a plea of guilty a course of action frequently to the advantage of an accused. The constitutional right to counsel does not mean counsel who will be optimistic in his private appraisal of the evidence and his advice to the accused. Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.

Moreover, that a criminal defendant views this sort of frank advice as prejudgment of guilt does not thereby convert good representation into good cause. For example, in United States v. Gutterman, . . . the defendant sought new counsel because his assigned attorney would not subpoena certain witnesses and had recommended that the defendant plead guilty. As to the latter point, the defendant advised this Court in now-familiar language, "Mr. Packer (the defense attorney) last night told me that he thought the Government

> had too much evidence against me, he was going to advise me to plead guilty. If I am going to plead guilty, I might as well defend myself." The Court rejected both reasons for reassignment of counsel, stating that an indigent defendant "must accept such counsel as the court assigns unless he can furnish a better reason for requiring a change than he has given here" ("The fact that (the defendant's) counsel 'didn't think he had a chance of beating the thing' is not a reason" for substitution of appointed counsel.). Under these circumstances, we do not think that [the defendant's] dissatisfaction with his counsel constituted good cause for assignment of a new attorney.

McKee v. Harris, 649 F.2d 927, 931-33 (2d Cir. 1981) (citations omitted; footnote omitted). A similar conclusion was reached in State v. LaGrand, 152 Ariz. 483, 486, 733 P.2d 1066, 1069, *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987).

(3)

"A motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion." State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1379, 1281 (1993) (citing State v. Gager, 45 Haw. 478, 488, 370 P.2d 739, 745 (1962)). "[C]ourts generally 'view with disfavor requests for a continuance made on the day set for trial or very shortly before.'" Lee, 9 Haw. App. at 603-04, 856 P.2d at 1181-82 (citing 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 832 at 263 (1982) (citations omitted)). "A denial of a continuance is not *per se* a denial of a constitutional right to counsel, but the appellate court should scrupulously review the record to determine whether, under all the circumstances, there was an abuse of discretion that prejudiced the defendant by amounting to an unconstitutional denial of the right to effective assistance of counsel. Torres, 54 Haw.

at 505, 510 P.2d at 496 (citing Avery v. Alabama, 308 U.S. 444, 446-47, 60 S.Ct. 321, 84 L.Ed. 377 (1940)); Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S. Ct. 1975, 26 L. Ed.2d 419 (1970).

Ishikawa argues that the trial court abused its discretion when it refused to continue the trial after denying his request for change of court-appointed counsel. We disagree. Prior to the request for continuance Ishikawa was unable to show good cause to substitute his appointed counsel. Similarly, he was unable to show good cause for a continuance.

Further, Ishikawa's motion for continuance was not made until the day of jury selection; two hundred and twenty-eight days after his indictment. Ishikawa's case was not complicated. Ishikawa and his counsel had ample time to prepare for trial. The diligence of the party requesting the continuance was taken into consideration when the court asked defense counsel what she was looking for and followed by asking whether she had any evidence of false reporting and/or aggressive behavior. Defense counsel replied in the negative. There was no improper conduct or lack of cooperation by the prosecutor and the effect of granting a delay would have been costly to the State and the judiciary. There was no sudden exigency, new evidence or unforseen circumstance that warranted granting continuance at the last minute. The court's denial of the continuance was not an abuse of discretion.

CONCLUSION

Accordingly, we affirm the Judgment, Guilty Conviction and Sentence entered on March 22, 2002.

DATED: Honolulu, Hawai‘i, August 25, 2003.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge