

NOT FOR PUBLICATION

NO. 25023

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

STATE OF HAWAI'I, Plaintiff-Appellant, v.
TERRY S. OGIMACHI, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1670)

MEMORANDUM OPINION

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

Defendant-Appellant Terry S. Ogimachi (Ogimachi) appeals from the January 28, 2002 "Judgment Guilty Conviction and Sentence" (Judgment) entered in the Circuit Court of the First Circuit.¹ This Judgment reports that a jury found Ogimachi guilty as charged of Count I, Promoting a Dangerous Drug in the 1st Degree, Hawaii Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 2002) and Count II, Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a) (1993), and that the court sentenced Ogimachi on Count I to twenty (20) years of incarceration, with a mandatory minimum of three (3) years of imprisonment, and on Count II to five (5) years of incarceration, the two terms to be served concurrently, mittimus to issue immediately. We affirm.

POINT ON APPEAL

Ogimachi's sole point on appeal is that his defense

¹ The Honorable Derrick H. M. Chan presiding.

trial counsel "provided ineffective assistance in failing to argue for a not guilty verdict on the basis of a lack of fingerprint evidence tying [Ogimachi] to the contraband, the lack of ID found on any of the luggage, and the lack of contraband on [Ogimachi's] person[.]"

STANDARD OF REVIEW

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, citation, and brackets omitted).

When an ineffective assistance of counsel claim is raised, the defendant has the burden of establishing: 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.

State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001) (internal quotation marks and citation omitted).

"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, 1053 (1999) (internal quotation marks, citation, and ellipsis omitted).

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BACKGROUND

There is evidence of the following facts. In the early morning hours of July 20, 2001, Wackenhut security personnel at a Wai-kīkī hotel received a report that heavy and suspicious traffic was moving in and out of one of the rooms in the hotel. Security guards Captain Lee Burgwinkel (Burgwinkel), Lieutenant Joe Alisa (Alisa), Sergeant Ryan Robidart, Officer Robert Lanser, and Officer Sean Dougherty responded to the call.

Upon arriving at the room on the 32nd floor, the security guards heard a moaning sound emanating from behind the door. Burgwinkel knocked on the door and announced the presence of the security officers. A male voice responded, "Just wait a minute" and, for the next forty-five (45) seconds, Burgwinkel heard scuffling noise and the sound of "a bag being zipped and unzipped". Ogimachi answered the door, and Burgwinkel asked to speak to the registered guest of the room. Ogimachi told the security officers that he was not a registered guest but that his girlfriend was a registered guest² and he was allowed to be in the room. After Burgwinkel told Ogimachi that "he would be trespassed[,]" and asked to see some form of identification, Ogimachi replied that he did not have any.

Burgwinkel then asked Ogimachi if he had any belongings

² The registered guests were listed as Chandra Wolters and Tim Pirga. Hotel rule no. 4 states: "Only hotel registered guests allowed in the hotel room."

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in the room. Ogimachi responded that he had a "brown bag" (brownish/grayish bag). Burgwinkel asked if Ogimachi wanted to look through the brownish/grayish bag for identification, and Ogimachi started emptying its contents. While Ogimachi was in the process of emptying the brownish/grayish bag, a box of "Safeway brand white cheddar pasta shell sauce mix" (cheddar box) fell out of it. When the cheddar box hit the bed, "a Ziplock type bag and some crystallized substance" fell out. Upon seeing the white crystal substance in the Ziplock bag, Burgwinkel called the Honolulu Police Department. It was later determined that the crystallized substance contained methamphetamine, weighing 55.063 grams.

Alisa testified that he saw a scale on top of a table in open-view.

Before the police arrived, the five security officers continued to search the room. In all, the officers found four bags in the room--Ogimachi's brownish/grayish bag, a black bag, a red bag and a small "black pouch like -- like a fanny pack[.]" In the latter, Burgwinkel found "4- to 500 Ziplock baggies". The other bags contained miscellaneous personal items.

When Burgwinkel noted that the room's smoke detector alarm was covered with a plastic bag, Ogimachi stated that "he was cooking, and he didn't want the smoke alarm to sound."

Honolulu Police Officer Mark Matsusaka (Officer

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Matsusaka) arrived and recovered as evidence two bags containing a white crystalline substance that appeared to be, and was later confirmed as, crystal methamphetamine. In addition, Officer Matsusaka recovered a purple plastic scale and cover, Ogimachi's "brownish -- off-brown, grayish in color gym bag", the cheddar box, and the small black pouch containing "[s]mall manilla-type envelopes with numbers on them, handwritten numbers on them, as well as small plastic resealable Ziplock-type baggies, numerous amount of them."

Ogimachi testified that he lost his I.D. so he could not register at the hotel, he is a recovering drug addict, gambling is "what I kind of do for a living[,]" and the "moaning" heard by the security officers was from an X-rated video movie he was watching. He was sharing the hotel room with his "on-and-off-again girlfriend" and another friend, and several other people that he only knew by first name had been coming in and out of the room. He admitted ownership of the brownish/grayish bag but denied ownership of the other three bags and stated that he did not know who owned them. He testified that, at Burgwinkel's request, he took each item out of the black duffle bag and laid them on top of the bed. One of the items was the cheddar box. Burgwinkel "went through all the items including the empty duffle bag, and then he told [Ogimachi] to put everything back in. So that's what [Ogimachi] proceeded to do." In doing so, Ogimachi

"handled the [cheddar] box" and put it back "on top" in the black duffle bag. When, at Burgwinkel's request, Ogimachi emptied the contents of his brownish/grayish bag on the bed, Alisa looked through the black duffle bag and "found that cheddar cheese box or whatever and the open dope inside of it." Ogimachi testified that Alisa found the scale "underneath the bed[.]"

In support of Ogimachi's testimony, Ogimachi's counsel cross-examined two of the State's witnesses regarding the lack of any evidence of Ogimachi's fingerprints on any of the items recovered, including the cheddar box and scale. Officer Matsusaka testified that the cheddar box was not dusted for fingerprints because its cardboard surface was "not conducive to latent dusting for fingerprints" and the scale was not dusted for fingerprints because it was covered with a fine white powder, and dusting for fingerprints "may affect the condition of the scale as evidence."

In her closing argument, defense counsel's main arguments were as follows: (1) the drugs and the drug paraphernalia did not belong to Ogimachi; (2) the drugs were recovered from the black bag that did not belong to Ogimachi; (3) the security officers were lying when they testified that the crystal methamphetamine was in the brownish/grayish bag and not the black bag; (4) various facts and items of evidence supported arguments 1, 2, and 3; and (5) there were two registered guests

and several other people who had been actively coming in and out of the room who more likely owned the crystal methamphetamine and the drug paraphernalia. Defense counsel did not discuss the lack of any fingerprint evidence.

DISCUSSION

The Hawai'i Supreme Court has held that a defense attorney's informed, tactical decision at trial "will rarely be second-guessed by judicial hindsight." State v. Gomes, 93 Hawai'i 13, 20 n.5, 995 P.2d 314, 321 n.5 (2000) (citations and internal quotation marks omitted); see also Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993). "Lawyers require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case." State v. Samuel, 74 Haw. 141, 156, 838 P.2d 1374, 1382 (1992). In fact, "one of the legitimate interests in the criminal trial process is the right of defense counsel to make an appropriate judgment on the trial tactics and procedure to be employed in the defense of his client based upon his knowledge of the facts and law of the case[.]" State v. El'Ayache, 62 Haw. 646, 649, 618 P.2d 1142, 1144 (1980). The strategic and tactical decisions that should be made by defense counsel include "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227,

1247 (1998) (citations omitted).

In the case at hand, the decision by defense counsel not to focus on the lack of fingerprint evidence³ tying Ogimachi to the narcotics and paraphernalia, the lack of identification found on any of the luggage in the room, or the lack of evidence discovered on Ogimachi's person is the kind of tactical decision that generally will not be second-guessed on appeal. Id. at 40.

But even if this court was to review strategic decisions, viewed as a whole, defense counsel's election to concentrate on other facets of the case was well within the range of competence demanded of attorneys in criminal cases. Dan, 76 Hawai'i at 427. Officer Matsusaka's testimony as to why a dusting for fingerprints was not made significantly depreciated the credibility of an attack on the lack of fingerprint evidence. In addition, Ogimachi's testimony that he touched the cheddar box caused evidence of his fingerprints on the cheddar box to be irrelevant. In light of Ogimachi's admission that the brownish/grayish bag was his and the evidence that the cheddar box was in the brownish/grayish bag, the lack of identification found on any of the luggage in the room is similarly irrelevant. The lack of contraband on Ogimachi's person proves nothing.

³ We note that defense counsel raised the issue of fingerprint evidence, and the lack thereof, on at least six occasions in cross and re-cross examination.

