

NOT FOR PUBLICATION

NO. 25582

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ANTHONY WILL, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 02-1-0190)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Anthony Will (Will) appeals from the Order of Resentencing entered on December 11, 2002 by the Circuit Court of the First Circuit (the circuit court).¹ The Order of Resentencing granted Will's Hawai'i Rules of Penal Procedure Rule 35 Motion for Reconsideration filed on July 26, 2002 and reduced Will's sentence for Robbery in the Second Degree from ten years' imprisonment to five years' probation.

Will contends that the circuit court: (1) plainly erred by allowing Will's trial counsel to waive Will's presence during the settlement of jury instructions, without first conducting an on-the-record colloquy with Will; (2) reversibly erred by refusing two jury instructions requested by Will; (3) erred by denying Will's motion for a mistrial after the complaining witness improperly mentioned during cross-examination that Will may have used drugs on the night of the events that led

¹ Judge Michael D. Wilson presided over the proceedings below.

to the charge against Will; and (4) erroneously excluded evidence of the complaining witness's prior petty misdemeanor conviction for assault in the third degree, which stemmed from a domestic violence incident between the complaining witness and his wife.

The record on appeal indicates that on July 24, 2002, following a May 23, 2002 jury verdict convicting Will of the lesser included offense of Robbery in the Second Degree,² the circuit court entered a Judgment, Guilty Conviction, and Sentence (the Judgment)³ that sentenced Will to ten years' imprisonment. On July 26, 2002, Will filed a Motion for Reconsideration of Sentence, requesting that his sentence be reduced, and on August 7, 2002, Will filed a Notice of Appeal from the Judgment (Appeal 1). On December 11, 2002, the circuit court granted Will's Motion for Reconsideration of Sentence and entered the Order of Resentencing that underlies this appeal. On January 9, 2003, Will filed a Notice of Appeal from the Order of Resentencing (Appeal 2), raising the same issues as in Appeal 1. On July 14, 2003, the Hawai'i Supreme Court entered a Summary Disposition Order in Appeal 1, affirming Will's conviction and sentence. Appeal 2 was assigned to this court on July 23, 2003.

In his opening brief, Will makes no argument about the Order of Resentencing. Instead, he raises the identical

² The record on appeal indicates that Defendant-Appellant Anthony Will was indicted for "committing the offense of Robbery in the First Degree, in violation of Section 708-840(1)(b)(ii) of the Hawaii Revised Statutes."

³ The Judgment, Guilty Conviction, and Sentence entered by the Circuit Court of the First Circuit on July 24, 2002 is erroneous to the extent that it states that the original charge against Will was "Robbery in the 2nd Degree."

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arguments that he raised in Appeal 1. On the merits, therefore, the Hawai'i Supreme Court's July 14, 2003 Summary Disposition Order is dispositive of this appeal.

Accordingly, we hereby affirm the Order of Resentencing filed on December 11, 2002.

As noted in footnote 3, however, the Judgment, Guilty Conviction, and Sentence entered by the circuit court on July 24, 2002 erroneously indicated that the original charge against Will was Robbery in the Second Degree, in violation of "§ 708-840(1)(b)(ii), H.R.S." This case is therefore remanded to the circuit court for the purpose of correcting the judgment, nunc pro tunc.

DATED: Honolulu, Hawai'i, September 16, 2004.

On the briefs:

Michael G.M. Ostendorp
and Shawn A. Luiz for
defendant-appellant.

Mark Yuen, deputy
prosecuting attorney, City
and County of Honolulu, for
plaintiff-appellee.