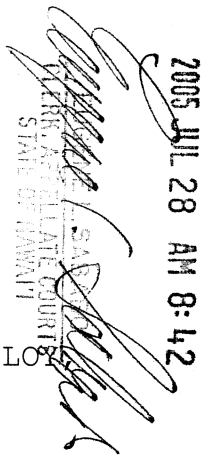
NOT FOR PUBLICATION

NO. 25322

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I



FILED

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KITTY L. ATCHLEY, also known as KITTY L. AH LOY,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 02-1-0197(3))

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

Defendant-Appellant Kitty L. Atchley (Atchley) appeals from the Judgment filed on August 13, 2002, in the Circuit Court of the Second Circuit (circuit court).[1] Atchley was a paralegal who operated a sole proprietorship known as Valley Isle Paralegal. She was not a licensed attorney and did not work under the supervision of an attorney. Between August and October of 2000, Atchley assisted Ellen and Richard Kamaka (the Kamakas) in obtaining an uncontested divorce, charging them approximately $300 for her services.

After a jury trial, Atchley was found guilty of practicing law without a license, in violation of Hawaii Revised

[1] The Honorable Joseph E. Cardoza presided.

Statutes (HRS) § 605-14 (1993).[2] Because Atchley had previously violated HRS § 605-14, she was subject to punishment for a misdemeanor. HRS § 605-17 (1993).[3] Atchley was sentenced to a one-year term of probation subject to conditions which included that she pay restitution to the Kamakas in the amount of $462.48[4] and perform 200 hours of community service.[5]

On appeal, Atchley argues that 1) HRS § 605-14 is unconstitutionally vague because it does not define what is meant by the "practice of law" and 2) the prosecutor engaged in misconduct in eliciting and the circuit court committed plain error in allowing testimony regarding Ellen Kamaka's conversation with a lawyer. After a careful review of the record and the

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[2] Hawaii Revised Statutes (HRS) 605-14 (1993) provides, in relevant part:

> It shall be unlawful for any person . . . to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person . . . is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States. . . . Nothing in sections 605-14 to 605-17 contained shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

[3] At the time Defendant-Appellant Kitty L. Atchley (Atchley) allegedly committed the offense in this case, HRS § 605-17 (1993) provided that the first violation of HRS § 605-14 was a violation, but that subsequent violations would constitute a misdemeanor. HRS § 605-17 was amended in 2001 and now provides that any violation of HRS § 605-14 is a misdemeanor. Atchley's prior violation of HRS § 605-14, for which she was fined $1,000, was reflected in a Judgment filed on August 10, 1999.

[4] Ellen Kamaka testified at trial that the Kamakas paid Atchley approximately $350. However, documents the Kamakas submitted at sentencing in support of their restitution claim showed that they paid Atchley approximately $300 for her services plus $160 for the cost of filing their divorce pleadings.

[5] Atchley's term of probation also initially included a condition that she serve 90 days in jail, which was stayed pending a compliance hearing. According to Atchley's brief, after a probation compliance hearing on May 1, 2003, the jail-term condition was removed.

briefs submitted by the parties, we conclude that Atchley's arguments have no merit.

I.

Atchley did not challenge the constitutionality of HRS § 605-14 on vagueness grounds in the court below. We agree with the State of Hawai'i (the State) that Atchley waived her right to raise this claim on appeal. State v. Ildefonso, 72 Haw. 573, 584-85, 827 P.2d 648, 655 (1992). But even if we consider her claim on the merits, Atchley is not entitled to relief.

In Fought & Co., Inc. v. Steel Engineering and Erection, Inc., 87 Hawai'i 37, 46, 951 P.2d 487, 496 (1988), the Hawai'i Supreme Court indicated that the phrase "practice of law," as used in HRS § 605-14, entails far more than appearing in court proceedings. The court cited the legislative history of HRS § 605-14 which reflected the legislature's recognition that

> the practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights . . . of such party, where such advice, drafting or rendition of services requires the use of any degree of legal knowledge, skill or advocacy.

Id. at 45, 951 P.2d at 495 (quoting Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661) (emphasis in original).

In determining whether a statute is impermissibly vague, we consider judicial decisions clarifying or narrowing the statute. Wainwright v. Stone, 414 U.S. 21, 22-23 (1973); State v. Wees, 58 P.3d 103, 107 (Idaho 2002). A defendant raising a

vagueness claim is assumed to have knowledge of court decisions interpreting the statute. Winters v. New York, 333 U.S. 507, 514-15 (1948). Atchley is therefore chargeable with knowledge of the Fought decision.

To prevail on her vagueness claim, Atchley must show that HRS § 605-14, as applied to her conduct, was unconstitutionally vague. State v. Marley, 54 Haw. 450, 457-58, 509 P.2d 1095, 1101-02 (1973); State v. Kuhia, 105 Hawai'i 261, 272, 96 P.3d 590, 601 (2004). In Atchley's case, the evidence showed that in return for a fee, Atchley assisted the Kamakas in preparing and filing form pleadings in the Kamakas' uncontested divorce action. In the course of preparing the forms, Atchley answered the Kamakas' questions and provided explanations on a variety of topics, including: 1) how granting Ellen Kamaka (Ellen) sole as opposed to joint custody of the Kamakas' two children would affect the rights of Richard Kamaka (Richard) to see his children; 2) whether child support payments would be made by Richard through the Child Support Enforcement Agency or directly to Ellen; 3) whether Ellen was eligible for alimony and whether alimony payments would be taxable; 4) how the divorce would affect Ellen's medical coverage under Richard's insurance plan; 5) whether Richard or Ellen would be named as the plaintiff; and 6) the procedures the Kamakas needed to follow to secure a divorce decree. Without the Kamakas' knowledge or

consent, Atchley completed certain forms and submitted a letter to the court falsely asserting that Ellen refused to submit financial statements. The Kamakas did not carefully review the documents Atchley filed, but accepted Atchley's assurances that "she knew what she was doing" and would "take care of everything."

In light of Atchley's extensive involvement in preparing the Kamakas' divorce pleadings and her providing the Kamakas' with legal advice, we conclude that HRS § 605-14, as applied to her conduct, was not unconstitutionally vague. In particular, the statute's prohibition against the unlicensed "practice of law" and court decisions interpreting that phrase gave Atchley fair warning that her conduct was illegal. State v. Richie, 88 Hawai'i 19, 31-32, 960 P.2d 1227, 1239-40 (1998). Our conclusion is supported by decisions in other jurisdictions which, under analogous circumstances, have rejected claims that statutes prohibiting the unlicensed practice of law were unconstitutionally vague. E.g., Monroe v. Horwitch, 820 F. Supp. 682, 686 (1993) ("The preparation of documents in simple divorce actions unequivocally constitutes the practice of law."); Wees, 58 P.3d at 108.

II.

In addition to seeking a divorce, the Kamakas were experiencing financial difficulties when they went to see

Atchley. Ellen testified that in the context of discussing something related to bankruptcy, Atchley indicated that the Kamakas could call an attorney named Scott Holmes (Holmes). Ellen further testified that she later called Holmes. The State sought to establish that Holmes did not give the Kamakas any advice about their divorce. The State elicited testimony from Holmes that he had a short phone conversation with Ellen about a bankruptcy and that he would not have given the Kamakas advice about their divorce. Atchley did not object to the evidence regarding Ellen's conversation with Holmes.

We reject Atcheley's claim that the prosecutor engaged in misconduct in eliciting and the court committed plain error in allowing testimony regarding Ellen's conversation with Holmes. Any attorney-client privilege relating to Ellen's conversation with Holmes was for Ellen, and not Atchley, to assert. Hawaii Rules of Evidence (HRE) Rule 503. Because Atchley did not object, there is no record of whether Ellen had previously waived or would have waived any privilege she had. Moreover, other than indicating that Ellen called Holmes with regard to a bankruptcy, neither Ellen nor Holmes revealed the details of their conversation. The key aspect of Holmes' testimony was that he would not have given the Kamakas any legal advice about their divorce. This portion of Holmes' testimony

was not privileged. Under these circumstances, Atchley is not entitled to any relief under the plain error standard of review.

III.

IT IS HEREBY ORDERED that the August 13, 2002, Judgment filed in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 28, 2005.

On the briefs:

Christopher M. Dunn,
for defendant-appellant.

Dorothy Sellers and
Kimberly Tsumoto,
Deputy Attorneys General,
for plaintiff-appellee.

James S. Burns
Chief Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge