

NO. 26022

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

MATTHEW CLEMENT, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2005 NOV 22 AM 9:45

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 02-1-0038 (Cr. No. 99-0376))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Matthew Clement (Clement) appeals from the "Order Denying Petition to Vacate, Set Aside, or Correct Judgment" filed on July 17, 2003 in the Circuit Court of the First Circuit (circuit court).^{1/}

A jury found Clement guilty of Murder in the Second Degree, Burglary in the First Degree, and Place to Keep Firearm. Clement discharged his trial attorney and hired attorney Myles Breiner (Breiner) to represent him at sentencing and on a Motion for New Trial. In his Motion for New Trial, Clement contended his conviction was the result of the ineffective assistance of his trial attorney because his trial attorney, among other things, failed to investigate, consult with Clement during pretrial proceedings, and meet with Clement to prepare for the trial. The circuit court denied Clement's Motion for New Trial.

^{1/} The Honorable Sandra A. Simms presided.

Clement appealed to the Hawai'i Supreme Court (No. 23643), and Breiner continued to represent Clement during the appeal. Clement argued on appeal that the circuit court erred by: (1) denying his motion to suppress evidence (in which Clement had argued there was a lack of probable cause for issuance of the search warrant); (2) admitting hearsay statements made by the deceased victim, Eleanor Wimberly (Wimberly), through the testimony of Police Officer Gooch; (3) admitting hearsay statements made by Wimberly through the testimony of Wimberly's boyfriend, Duane Sato (Sato); (4) precluding Clement from questioning Sato regarding Sato's alleged possession of a firearm one month prior to Wimberly's death; (5) conducting the colloquy required under State v. Tachibana, 79 Hawai'i 226, 900 P.2d 1293 (1995), after the defense had rested; and (6) denying Clement's Motion for New Trial.

On November 30, 2001, the Hawai'i Supreme Court issued a Summary Disposition Order, affirming Clement's conviction. The supreme court held: (1) the circuit court properly denied Clement's motion to suppress evidence because the affidavit of Detective Hee, made in support of the search warrant, established probable cause and Clement failed to demonstrate any basis for his allegation that Detective Hee intentionally omitted information that would cast doubt on the existence of probable cause; (2) in light of the testimony of Steven Gileece, an

acquaintance of Clement, the circuit court's admission of hearsay statements by Wimberly through the testimony of Officer Gooch did not unfairly prejudice Clement; (3) the circuit court's admission of hearsay statements by Wimberly through Sato's testimony was proper under Hawaii Rules of Evidence (HRE) Rule 804(b)(5); (4) the circuit court properly precluded Clement, based upon HRE Rule 802, from questioning Sato regarding Sato's alleged possession of a firearm one month prior to Wimberly's death; (5) Clement's contention that the circuit court erred in conducting the Tachibana colloquy after the defense rested was without merit; and (6) because the circuit court lacked jurisdiction to entertain Clement's untimely Motion for New Trial, the supreme court could not review the merits of his claims.

On May 24, 2002, Clement filed a "Petition to Vacate, Set Aside, or Correct Judgment Pursuant to Rule 40, [Hawai'i Rules of Penal Procedure (HRPP)]" (Petition). Breiner represented Clement throughout the proceeding on the Petition. Clement argued that his conviction was the result of the ineffective assistance of his trial counsel because his trial counsel (1) failed to timely investigate Clement's case, interview witnesses, and prepare offers of proof; (2) failed to consult with Clement regarding the results of counsel's investigation and the risks and benefits of pursuing or foregoing

each of the tactical options afforded by the discovered facts; and (3) failed to meet with and prepare Clement for trial.

Clement requested an evidentiary hearing, which request the circuit court granted. Clement did not testify at the July 15, 2003 evidentiary hearing. Breiner informed the circuit court during the evidentiary hearing that he had had difficulty reaching Clement's trial counsel and had not subpoenaed trial counsel to appear and testify at the hearing.^{2/} Breiner told the circuit court that if the circuit court would continue the hearing, he would attempt to subpoena trial counsel. The circuit court declined Breiner's offer. On July 17, 2003, the circuit court filed its order denying the Petition, and Clement timely appealed.

On appeal, Clement asserts that this court should find that his trial counsel was ineffective, vacate the order denying his Petition, and remand for a new trial. In the alternative, Clement asserts that this court should vacate the order denying the Petition and remand with instructions to the circuit court to hold an new evidentiary hearing on the Petition and to enter findings of fact and conclusions of law. Clement argues that (1) the record shows his conviction was the result of the ineffective assistance of his trial counsel because his trial counsel failed

^{2/} The evidentiary hearing consisted entirely of argument; no evidence was offered by Clement.

to investigate Clement's case, to consult with Clement during pretrial proceedings, and to meet with Clement to prepare for the trial; and (2) the circuit court erred during the evidentiary hearing because the circuit court should have continued the evidentiary hearing so that Breiner could subpoena trial counsel as a witness who would provide testimony in support of Clement's claim of ineffective assistance of counsel.

The proper standard for claims of ineffective assistance of counsel on appeal 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).

General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for *benefitting* the defendant's case and it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then it will be evaluated as information that an ordinarily competent criminal attorney should have had.

Id. (ellipses and brackets omitted; emphasis in original)

(quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)). "[M]atters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (internal quotation marks and citation omitted; emphasis in original).

When reviewing a claim of ineffective assistance of counsel, this court looks at whether defense counsel's assistance was within the range of competence demanded of attorneys in criminal cases. The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 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. To satisfy this second prong, the defendant needs to show a possible impairment, rather than a probable impairment, of a potentially meritorious defense. A defendant need not prove actual prejudice.

State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003) (internal quotation marks, citations, and footnote omitted).

Clement did not subpoena his trial counsel to appear at the evidentiary hearing. Clement chose not to appear and offered no evidence. There is no indication that Clement's trial counsel was aware of the hearing or its date and time, and trial counsel was therefore not "given the opportunity to explain his reasons" for his pre-trial conduct, as required by Matsuo v. State, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989).

The circuit court did not abuse its discretion in not continuing the evidentiary hearing to allow Breiner to subpoena Clement's trial attorney when Breiner had made no attempt to subpoena Clement's trial attorney prior to the hearing.

"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 1279,

1281 (1993). "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, 878 (2000) (internal quotation marks, citation, and brackets omitted).

The circuit court did not err in finding that "there is no actual evidence of specific errors or omissions in the conduct or [trial counsel] that resulted in the withdrawal or substantial impairment of a meritorious defense for Mr. Clement."

Therefore, the "Order Denying Petition to Vacate, Set Aside, or Correct Judgment" filed on July 17, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 22, 2005.

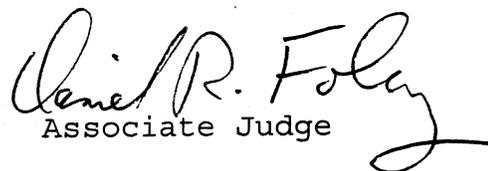
On the briefs:

Peter Van Name Esser
for Petitioner-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Acting Chief Judge


Associate Judge


Associate Judge