

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26220

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MARTY JOSEPH MARTINS, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 03-1-0091)

MEMORANDUM OPINION

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Marty Joseph Martins (Martins) appeals from the Judgment entered on October 16, 2003 in the Circuit Court of the Fifth Circuit (circuit court).^{1/} A jury found Martins guilty of three counts of Attempted Assault in the Second Degree (Counts 1, 2, 3); two counts of Terroristic Threatening in the First Degree (Counts 4, 6); one count of Terroristic Threatening in the Second Degree (Count 5); one count of Attempted Assault in the Third Degree (Count 8); and two counts of Assault in the Third Degree (Counts 9, 10).

On appeal, Martins argues that (1) the circuit court erred in not instructing the jury as to what constitutes a "true threat," (2) the circuit court committed reversible error during

^{1/} The Honorable Clifford L. Nakea presided.

jury selection when it commented on Martins' forfeiture of counsel, and (3) Martins was not afforded the assistance of counsel.

I. BACKGROUND

The State of Hawai'i (the State) originally charged Martins in two separate cases: Cr. No. 02-1-0039 (originally filed on February 6, 2002 in District Court of the Fifth Circuit, but, after a preliminary hearing, committed to circuit court on February 12, 2002) and Cr. No. 02-1-0285 (indictment filed on November 18, 2002). The two cases were consolidated on December 20, 2002.

Martins' list of court-appointed private counsel is as follows:

- (1) Gilbert P. Kea (Kea)
Kea filed a Motion to Withdraw as Counsel in Cr. No. 02-1-0039 on June 28, 2002, stating irreconcilable differences and lack of confidence on Martins' part. Martins alleged, inter alia, that Kea had disregarded Martins' rights and had not been honest with him. Motion granted on July 2, 2002 and order filed on July 24, 2002.
- (2) Mark Zenger (Zenger)
Circuit court appointed Zenger to represent Martins in Cr. No. 02-1-0039 on July 11, 2002. At the July 18, 2002 hearing, Martins asked that Zenger be removed because Zenger was antagonistic and had lied to him. Motion granted on July 18, 2002.

- (3) Daniel Hempey (Hempey)
Circuit court appointed Hempey in Cr. No. 02-1-0039 on July 22, 2002. Hempey orally moved to withdraw on August 1, 2002, stating that he had irreconcilable differences with Martins and a conflict with Martins' personality.^{2/} Order granting Hempey's motion to withdraw filed on August 12, 2002.
- (3) Mark Zenger (Zenger)
At an August 8, 2002 hearing on Martins' request for counsel in Cr. No. 02-1-0039, the circuit court re-appointed Zenger. On August 20, 2002, Zenger filed a motion to withdraw as counsel at Martins' request; the circuit court denied the motion. At a September 5, 2002 hearing, Martins alleged, inter alia, that Zenger (1) was addicted to cocaine; (2) had handled the case with malice and incompetence; (3) was morally corrupt; and (4) had lied to Martins. Martins began holding a sign near the courthouse on a daily basis that read "Attorney Mark Zenger is dishonest." Order granting Zenger's motion to withdraw filed on September 27, 2002.
- (4) Caren Dennemeyer (Dennemeyer)
Dennemeyer appointed to represent Martins on October 24, 2002 in Cr. No. 02-1-0039 and on December 2, 2002 in Cr. No. 02-1-0285. On February 27, 2003, Martins orally moved to

^{2/} At the August 1, 2002 hearing, the circuit court admonished Martins:

THE COURT: -- okay. Mr. Martins, I -- we've had -- we've gone through three private attorneys, because of a conflict declared by the Public Defender's office, and you seem to have the same kind of conflict with all three. I'm not going to grant you any more free attorneys. So you have a choice of hiring an attorney or representing yourself.

. . . .

THE COURT: I've come to the conclusion that you've blown it. You've had that opportunity with three, and you just don't seem to be able to connect with anyone in the legal bar. So I don't think you're entitled to and exhausted, or exhaustless number of attorneys.

. . . .

THE COURT: You have forfeited your right to representation.

discharge Dennemeyer, alleging that Dennemeyer was not doing anything for him and lied constantly. Order granting the motion filed on February 28, 2003.

On March 3, 2003, the circuit court refused to appoint Martins a fifth attorney. On April 17, 2003, pursuant to Martins' motion, the circuit court dismissed both cases without prejudice under Hawaii Rules of Penal Procedure (HRPP) Rule 48; the circuit court filed its orders on April 22, 2003.

On April 21, 2003, the State charged Martins in Cr. No. 03-1-0091 via an eleven-count Indictment with four counts of Attempted Assault in the Second Degree (Counts 1, 2, 3, 8), in violation of Hawaii Revised Statutes (HRS) §§ 705-500 (1993) and 707-711(1)(d) (1993); three counts of Terroristic Threatening in the First Degree (Counts 4, 5, 6), in violation of HRS §§ 707-715 (1993) and 707-716(1)(d) (1993); one count of Intimidating a Witness (Count 7), in violation of HRS § 710-1071(1)(a) (1993); two counts of Assault in the Second Degree (Counts 9, 10), in violation of HRS § 707-711(1)(d) (1993); and one count of Terroristic Threatening in the Second Degree (Count 11), in violation of HRS §§ 707-715(1) (1993) and 707-717 (1993).

Martins appeared before the circuit court on April 29, 2003 for his arraignment and plea. The circuit court informed Martins of his right to an attorney, either court-appointed or privately retained, or to appear pro se. On May 7, 2003, the

Office of the Public Defender filed a Notice of Conflict, indicating that it could not represent Martins because one of Martins' complainants, Agenhart Puulei, was, at the time, a public defender client. The circuit court appointed Alfred B. Castillo, Jr. (Castillo) as counsel for Martins. On May 8, 2003, the circuit court set a trial date of June 17, 2003.

On May 14, 2003, Castillo appeared before the circuit court (with Martins present) and stated:

Your Honor, first of all, I think that Mr. Martins wants me to withdraw, but I don't find that there's any basis at this moment for me to withdraw from the case.

Secondly, in regard to what has happened within these past few days since I've been appointed to this case, Mr. Martins' inability to -- to obey the instructions of this Court. Last week he went to KEO [Kauai Economic Opportunity] and tried to file a complaint against me and other attorneys.

And from what happened today, his inability to assist me in -- in his defense, telling me that he knows certain laws which he wants to argue with me about.

On May 28, 2003, the circuit court held a hearing regarding Martins' motion for dismissal of Castillo. Martins accused Castillo of lying to the court during the May 14, 2003 hearing, stating: "I can't prove it. It's just me and him in the room. But when we left here, he had me arrested and apparently for calling him a liar. I don't know what he said I said to him. But the fact is I went to jail. And I did call him a liar, he was a liar." Castillo responded that as he and

Martins exited the courtroom from the last hearing, Martins called him, "You fuckin' asshole." Castillo told Martins to stay away, but Martins continued to follow Castillo. Castillo called the police, who arrested Martins. The circuit court granted Martins' motion and released Castillo as Martins' attorney:

THE COURT: . . . The court finds that Mr. Martins reciprocated in -- a situation in which he and Mr. Castillo finds himself, and therefore, Mr. Martins is not going to be appointed another court-appointed attorney.

THE COURT: He's [Castillo] released because of your conduct. And no one is going to be appointed for you.

The circuit court denied Martins' request for another court-appointed attorney and confirmed that Martins' trial date was set for June 17, 2003.

On June 17, 2003, the circuit court continued trial until August 11, 2003.

Jury trial commenced on August 11, 2003. Martins appeared pro se.

On August 12, 2003, after the State rested, the circuit court sua sponte dismissed Count 7 and reduced Count 8 to Attempted Assault in the Third Degree, Count 9 to Assault in the Third Degree, and Count 10 to Assault in the Third Degree. The jury found Martins guilty of Attempted Assault in the Second Degree (Counts 1, 2, 3); Terroristic Threatening in the First Degree (Counts 4, 6); Terroristic Threatening in the Second

Degree (Count 5); Attempted Assault in the Third Degree (Count 8); and Assault in the Third Degree (Counts 9, 10). The jury found Martins not guilty as to Count 11 (Terroristic Threatening in the Second Degree).

On October 16, 2003, the circuit court sentenced Martins: (1) as to Counts 1, 2, 3, 4, and 6, a term of imprisonment of five years as to each count, and (2) as to Counts 5, 8, 9, and 10, a term of imprisonment of one year as to each count. The circuit court ordered that all sentences run concurrently and that Martins pay restitution of \$84.51 to Grimaldi and a Crime Victim Compensation fee of \$700.00.

Martins filed the instant appeal on November 17, 2003.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO APPOINT COUNSEL FOR MARTINS.

Martins argues that the trial court abused its discretion when it denied his request to have counsel appointed for him, thereby violating his right to effective assistance of counsel guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution, and Article I, § 14, of the Hawai'i Constitution.

In Hawai'i, "an indigent defendant charged with a crime for which imprisonment is authorized has a right to the services of the public defender or court-appointed counsel." State v. Char, 80 Hawai'i 262, 267, 909 P.2d 590, 595 (App. 1995).

In criminal cases, an indigent defendant is deemed to have waived by conduct, his or her right to the services of the public defender or court-appointed counsel if the following six requirements are satisfied: (1) the defendant requested a substitute court-appointed counsel; (2) the defendant was afforded a reasonable opportunity to show good cause for a substitute court-appointed counsel; (3) the trial court did not abuse its discretion when it decided that a substitute court-appointed counsel was not warranted; (4) the requirements of State v. Dickson, 4 Haw. App. 614, 619-2[1], 673 P.2d 1036, 1041[-42] (1983),^[FN] were satisfied; (5) the defendant was given a clear choice of either continuing with present counsel or being deemed to have waived by conduct his or her right to counsel; and (6) the defendant refused to continue with present counsel.

^[FN] The trial court should first examine the particular facts and circumstances relating to the defendant, such as the defendant's age, education, mental capacity, background and experience, and his conduct at the time of the alleged waiver. This is necessary to allow the trial court to determine the level and depth to which its explanation and inquiry must extend.

Secondly, in order to fully assure that the defendant is informed of the risks of self-representation, the trial court should make him aware of the nature of the charge, the elements of the offense, the pleas and defenses available, the punishments which may be imposed, and all other facts essential to a broad understanding of the whole matter.

Finally, the trial court should inform the defendant: of his right to counsel, whether private or appointed; that self-representation is detrimental to himself; that he will be required to follow all technical rules and substantive, procedural, and evidentiary law; that the prosecution will be represented by able counsel; that a disruption of the trial could lead to vacation of the right to self-representation; and that if voluntary self-representation occurs, the defendant may not afterward claim that he had inadequate representation.

The trial judge is not required to give the defendant a short course in criminal law and procedure, since a defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself. However, the record should reflect some interchange on the above matters such as will indicate to a reviewing court that the defendant knew and understood the dangers and disadvantages of self-representation.

Those matters, which we shall call here "specific waiver inquiry" factors, provide a guideline for the trial court in dealing with a demand for waiver of counsel. The

record need not reflect a discussion between the court and a defendant illuminating every such factor. However, where the record fails to reflect that the trial court has sufficiently examined the defendant so as to establish that he is aware of the dangers and disadvantages of self-representation, or that the defendant has made a knowing and intelligent waiver, an appellate court will be hard-pressed to find that a defendant has effectively waived counsel. In such situations, the conviction of a *pro se* criminal defendant is vulnerable to reversal unless the record also contains overwhelming circumstantial evidence indicating that the requirements of a knowing and intelligent waiver have otherwise been met.

Id. at 268-69, 909 P.2d at 596-97 (citations omitted).

Therefore, all factors must have been met to conclude that Martins waived his right to counsel by conduct alone.

The circuit court had afforded Martins four court-appointed counsel in Cr. No. 02-1-0039 (one counsel was appointed twice) and one court-appointed counsel in Cr. Nos. 02-1-0039 and 02-1-0285 after these two cases were consolidated. These two consolidated cases were subsequently dismissed pursuant to HRP Rule 48. The instant appeal stems from a third indictment filed on April 21, 2003. Under this indictment, Martins was only afforded one court-appointed counsel before the circuit court concluded that he had forfeited his right to counsel. However, the circuit court failed to first determine whether the six requirements set forth in Char were satisfied before arriving at its conclusion. In this respect, the circuit court committed reversible error. Because we vacate and remand, Martins' other points on appeal are moot.


III. CONCLUSION

Therefore, we vacate the October 16, 2003 Judgment and remand this case to the Circuit Court of the Fifth Circuit for a new trial.

DATED: Honolulu, Hawai'i, October 4, 2006.

On the briefs:

Tae Won Kim
for Defendant-Appellant.


Presiding Judge

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for Plaintiff-Appellee.


Associate Judge


Associate Judge