

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26232

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
FAAMOMOI MASANIAI, Defendant-Appellant,
and

SHANE K. POWELL, also known as Shane Avilla, Defendant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2025)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Faamomoi Masaniai (Masaniai) appeals from the Judgment filed on October 22, 2003 in the Circuit Court of the First Circuit (circuit court).^{1/} Masaniai had been charged with Extortion in the First Degree, in violation of Hawaii Revised Statutes (HRS) §§ 707-765(1)(a) (1993) and 707-764(1)(a) (Supp. 2005), for allegedly obtaining or exerting control over the property or services of Lester Wilson (Lester), the value of which exceeded \$200 in total during any twelve-month period, with intent to deprive Lester of property or services, by threatening by word or conduct to cause bodily injury in the future to Lester or to any other person. A jury found Masaniai guilty of Attempted Extortion in the First Degree, in violation

^{1/} The Honorable Michael D. Wilson presided.

of HRS §§ 705-500 (1993), 707-765(1)(a), and 707-764(1)(a). The circuit court sentenced Masaniai to ten years of incarceration.

On appeal, Masaniai argues:

(1) He was denied effective assistance of counsel because:

(a) his attorney did not move for an examination of Masaniai to determine his fitness to proceed, pursuant to HRS § 704-403 (1993), even though Masaniai had (i) developed a pattern of failing to appear at his pre-trial proceedings, (ii) discharged his public defender after Masaniai breached the scope of representation, (iii) withdrawn his motion for a deferred plea, and (iv) acted out in a bizarre manner in court; and

(b) his attorney did not assert an involuntary intoxication defense at trial, even though (i) Masaniai's Presentence Diagnosis and Report (PSDR) contained evidence that he suffered from an addiction to Vicodin and alcohol and had a substance abuse problem and (ii) his family members had written letters to the circuit court seeking the court's help in having him treated for his substance abuse problem.

(2) The circuit court reversibly erred when it sentenced Masaniai to ten years in prison and (a) ignored Masaniai's PSDR, which was replete with evidence of Masaniai's addiction and its effect on his behavior; (b) ignored HRS § 706-606 (1993), which allowed the court to provide correctional

treatment and impose a just punishment; (c) ignored the allowance in HRS § 706-605.1 (Supp. 2005) for the imposition of intermediate sanctions, such as drug court or therapeutic residential programs; (d) ignored its authority to sentence Masaniai to probation, despite his manifest eligibility for this status; and (e) breached its duty to issue a just punishment when it allowed itself to be influenced by unproven claims that Masaniai had been involved in collateral assaults upon Lester and Lester's Wife.

Based on the foregoing, Masaniai asserts that his conviction should be reversed or, in the alternative, his prison term reduced to time served and he should be put on probation with residential substance abuse treatment as a major condition.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) Masaniai was not denied effective assistance of counsel, even though his attorney failed to move for an examination of Masaniai to determine his fitness to proceed, pursuant to HRS § 704-403. It was within the discretion of Masaniai's attorney to decide whether to make that motion. State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

(2) There was no evidence in the record on appeal that Masaniai's alleged lack of fitness to proceed was the result of

"a physical or mental disease, disorder, or defect" that incapacitated Masaniai from understanding the proceedings against him or assisting in his own defense. Further, Masaniai and/or his counsel provided cogent explanations in most cases for most of Masaniai's failures to appear or late appearances at court proceedings; Masaniai clearly and logically articulated reasons for dismissing his public defender; Masaniai's dialogue with the circuit court regarding his decision to withdraw his motion to defer demonstrated his ability to understand the court proceedings and assist in his defense; and there is no evidence in the record on appeal besides the State's argument at the July 24, 2003 hearing on the motion to reinstate Masaniai's bail that Masaniai acted out in a bizarre manner in court.

(3) In two Hawai'i cases in which defendants moved for mental examinations for fitness to proceed, the defendants' behavior, as observed by their respective attorneys, was much more indicative of a physical or mental disease, disorder, or defect than was Masaniai's behavior in the instant case. State v. Castro, 93 Hawai'i 454, 456 & 462, 5 P.3d 444, 446 & 452 (App. 2000) (Acoba, J. concurring), majority opinion confirmed in part and vacated in part and concurring opinion adopted, State v. Castro, 93 Hawai'i 424, 5 P.3d 414 (2000); State v. Madden, 97 Hawai'i 53, 58, 33 P.3d 549, 554 (App. 2001).

(4) There is no evidence in the record on appeal that Masaniai was taking or had been prescribed Vicodin at the time of any of his proceedings.

(5) Masaniai has not demonstrated that he was denied effective assistance of counsel because his attorney failed to investigate and assert a possible involuntary intoxication defense. All Masaniai offers on appeal in the instant case is mere speculation that he was addicted to alcohol and Vicodin. He does not explain how such addictions "preclude[d] or impaire[d] a voluntary act or a voluntary omission" on his part in the underlying incident, pursuant to HRS § 702-200 (1993). In addition, there is no evidence in the record on appeal that Masaniai was taking or had been prescribed Vicodin at the time of the incident or that Masaniai's alleged addictions caused him to involuntarily do or not do anything.

(6) Masaniai has not shown that his counsel was ineffective for failing to interview potential witnesses regarding whether Masaniai was involuntarily intoxicated at the time of the underlying incident. A defendant's speculation about the potential testimony of witnesses who were not called to testify at trial is insufficient to show ineffective assistance of counsel. State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32,

51 (1997). Further, "[i]neffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses." Richie, 88 Hawai'i at 39, 960 P.2d at 1247.

(7) Hence, Masaniai has failed to show "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. Wakisaka, 102 Hawai'i 504, 514, 78 P.3d 317, 327 (2003).

(8) The circuit court did not reversibly err when it sentenced Masaniai to ten years in prison rather than giving him a lesser sentence. The evidence in the record on appeal clearly shows that the circuit court did not ignore the evidence in the PSDR of Masaniai's drug addiction and its effect on his behavior or focus exclusively on Masaniai's use of force. When sentencing Masaniai, the circuit court acknowledged, among other evidence, various letters Masaniai's family members had written in support of Masaniai, the victim impact statement, and Masaniai's own letter to the court dated August 31, 2003. The circuit court had the discretion to sentence Masaniai as it did. State v. Pantoja,

89 Hawai'i 492, 497-98, 974 P.2d 1082, 1087-88 (App. 1999); see also HRS § 706-601 (1993 & Supp. 2005).

(9) It is not clear, based on the record on appeal, that the circuit court ignored the allowance in HRS § 706-605.1 for the imposition of intermediate sanctions when sentencing Masaniai. Regardless, according to § 706-605.1, whether a defendant is given an intermediate sentence is discretionary with the court. State v. Nunes, 72 Haw. 521, 524-25, 824 P.2d 837, 839 (1992).

(10) The circuit court did not ignore its legal duty to fit a just punishment to Masaniai's needs pursuant to Nunes, as Masaniai argues. Nunes is not applicable to the instant case. Id. at 523 & 525, 824 P.2d at 838 & 840.

(11) The circuit court did not ignore its authority to withhold imprisonment and sentence Masaniai to probation. Pursuant to HRS § 706-620 (Supp. 2005), the circuit court has discretion to impose probation, but is not required to do so.

(12) There is no evidence in the record on appeal that the circuit court allowed itself to be influenced during sentencing by unproven claims that Masaniai was involved in collateral assaults upon Lester and Lester's Wife.

Therefore,

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IT IS HEREBY ORDERED that the Judgment filed on October 22, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 27, 2006.

On the briefs:

Glenn D. Choy
for Defendant-Appellant.

Sonja P. McCullen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge