NO. 26604

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
VINCE WILLIAM RAZO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 03-1-0293(2))

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant Vince William Razo (Razo) appeals from the Amended Judgment filed on May 24, 2004, in the Circuit Court of the Second Circuit (circuit court).[1] Razo was charged by indictment with Promoting a Dangerous Drug in the Second Degree (PDD2) for possessing at least one-eighth ounce of methamphetamine, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (1993) (Count 1); Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993) (Count 2); Promoting a Detrimental Drug in the Third Degree for possessing marijuana, in violation of HRS § 712-1249(1) (1993) (Count 3); and Attempted Promoting a Dangerous Drug in the First Degree (Attempted PDD1), for attempting to distribute at least one-eighth ounce of methamphetamine, in violation of HRS §§ 705-500 (1993) and 712-1241(1)(b)(ii)(A) (Supp. 2003) (Count 4). A jury found Razo guilty as charged on all counts.

[1] The Honorable Shackley F. Raffetto presided.

The Amended Judgment reflects that Count 1 was merged with Count 4 and that Razo was sentenced to concurrent terms of imprisonment of twenty years with a mandatory minimum term of five years on Count 4, five years on Count 2, and thirty days on Count 3.

On appeal, Razo claims that: 1) the jury instruction defining the Attempted PDD1 offense charged in Count 4 was erroneous; 2) there was insufficient evidence to sustain Razo's Attempted PDD1 conviction; and 3) the jury instruction defining the PDD2 offense charged in Count 1 was erroneous.[2] After careful review and consideration of the record and the briefs submitted by the parties, we hold as follows:

1. Razo argues that the Attempted PDD1 instruction was deficient in a number of respects. We conclude that the Attempted PDD1 instruction was not "prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002). With respect to the multiple deficiencies alleged by Razo, we either reject Razo's claim that the instruction was erroneous or conclude that any error did not affect Razo's substantial rights and was harmless beyond a reasonable doubt. Id.

The only contention raised by Razo that merits any discussion is Razo's claim that the Attempted PDD1 instruction was erroneous because it did not break the PDD1 offense into its

[2] On appeal, Defendant-Appellant Vince William Razo (Razo) did not challenge his convictions or the sentences imposed on Counts 2 and 3. We therefore affirm the Amended Judgment as to those counts without further discussion.

elements and required state of mind for each element. The circuit court's Attempted PDD1 instruction provided, in relevant part, as follows:

> A person commits the offense of attempted promoting a dangerous drug in the first degree if he intentionally engages in conduct, which under the circumstances as he believed them to be constitutes a substantial step in a course of conduct intended to culminate in its [sic][3] commission of promoting a dangerous drug in the first degree.
>
> A person commits the offense of promoting a dangerous drug in the first degree if he knowingly distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of 1/8th ounce or more containing methamphetamine or any of its respective salts, isomers and salts of isomers.
>
> There are two material elements of the offense of attempted promoting a dangerous drug in the first degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are; one, on or about . . . the defendant, Vince William Razo, intentionally engaged in conduct which, under the circumstances as he believed them to be, was a substantial step in a course of conduct intended to culminate in the commission of promoting a dangerous drug in the first degree and; two, that Vince William Razo intentionally attempted to distribute one or more preparations, compounds, mixtures, or substances of an aggregate weight of 1/8th ounce or more containing methamphetamine or any of its salts, isomers, and salts of isomers.

In defining the offense of PDD1, the circuit court's instruction tracked the statutory language for the PDD1 offense set forth in HRS § 712-1241(1)(b)(ii)(A). Razo, however, argues that the instruction did not accurately define the substantive PDD1 offense because the instruction did not separate the offense into its conduct, attendant circumstances, and state of mind components. Although we do not endorse the way in which the

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[3] Although the trial transcript uses the word "its," the word "his" appears in the written instructions that were provided to the jury for the trial judge's reading of the instructions and during the jury's deliberations.

circuit court's instruction defined the PDD1 offense,[4] in the context of this case, we conclude that any error was harmless beyond a reasonable doubt.

Razo's theory of defense at trial was that he was a methamphetamine addict and that the 25.9 grams of methamphetamine found in his backpack were for his personal use, and not for distribution. In accordance with this theory, Razo testified that the methamphetamine the police found in his backpack belonged to him and included about an ounce of methamphetamine which he had purchased a few days before from his supplier, that he purchased methamphetamine in ounce quantities to save money, that he was a heavy user of methamphetamine and planned to use the methamphetamine in his backpack, and that he was not a drug dealer. Razo also made clear that he was not contesting Counts 1 through 3, which charged him with unlawful possession of methamphetamine, drug paraphernalia, and marijuana, but was only contesting the Attempted PDD1 charge.

In light of Razo's testimony, there was conclusive evidence that Razo knew that there was methamphetamine in his backpack and that it weighed more than one-eighth ounce. Thus, the only portion of the PDD1 offense definition at issue in Razo's case related to the conduct element and its required mental state. As to this portion of the PDD1 offense definition,

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[4] A clearer way to define the offense of Promoting a Dangerous Drug in the First Degree (PDD1) would have been to break the offense down into its conduct and attendant circumstances elements and to describe the mental state applicable to each element. See State v. Wallace, 80 Hawai'i 382, 413, 910 P.2d 695, 726 (1999).

the jury was correctly instructed that the prosecution was required to prove that a person "knowingly distributes" one-eighth ounce or more of methamphetamine. The jury was further instructed that to prove Attempted PDD1, the prosecution had to prove that Razo "intentionally attempted to distribute" one-eighth ounce or more of methamphetamine. In Razo's case, any error in the circuit court's failure to break down the PDD1 offense definition into its elements and the mental state required for each element was harmless beyond a reasonable doubt.

2. Razo argues that his Attempted PDD1 conviction should be reversed because there was insufficient evidence to prove that he took a substantial step toward committing the offense of PDD1. In particular, Razo contends that there was insufficient evidence that he engaged in conduct that was "strongly corroborative" of his intent to distribute at least one-eighth ounce of methamphetamine. We disagree.

The prosecution adduced evidence that Razo possessed 25.9 grams of methamphetamine. The police also recovered two sizes of empty plastic packets, with the larger packets commonly used to distribute one-eighth to one-quarter ounce of methamphetamine and the smaller packets used to distribute one-half to one gram of methamphetamine. Numerous packets, easily more than twenty of each size,[5] were recovered. As part of his oral and written confessions to the police, Razo admitted that he had purchased ounce quantities of methamphetamine from his

[5] This estimate is based on our inspection of the trial evidence.

supplier seven times. Razo stated that he would pay $1,400 for a half-ounce of the methamphetamine and his supplier would "front" the other half-ounce, meaning that Razo would receive the other half-ounce on consignment and pay the supplier later. Razo stated that he had obtained the methamphetamine found in his backpack several days before it was seized by the police.

Police Officer Randy Esperanza (Officer Esperanza), a member of the Vice Narcotics Division, testified that an ounce of methamphetamine was "excessive" for a user and was more consistent with distribution. A typical methamphetamine user would not need to repackage the drugs and thus Razo's possession of a large number of plastic packets showed that he was a methamphetamine distributor. Officer Esperaza opined that the purpose of a supplier allowing a buyer to purchase drugs on consignment is to give the buyer a chance to make money and develop the buyer's own drug business. He further opined that Razo's ability to hold a steady job indicated that he was a distributor and not just a user.

When viewed in the light most favorable to the prosecution, State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981), it was reasonable for the jury to infer that: 1) Razo was a methamphetamine dealer; 2) Razo had purchased the methamphetamine found in his backpack with the intent to sell a portion to pay for the half-ounce that his supplier had fronted; 3) Razo intended to sell at least one-eighth ounce, given the amount of money he owed his supplier and the evidence regarding

the prices at which different quantities of methamphetamine were sold; and 4) Razo had obtained the methamphetamine and the empty plastic packets, as well as the digital gram scale and the measuring spoon seized by the police, as a substantial step in a course of conduct intended to culminate in the distribution of at least one-eighth ounce of methamphetamine. We conclude that there was sufficient evidence to support Razo's Attempted PDD1 conviction.

3. We agree with Razo that the circuit court's instruction defining the PDD2 offense charged in Count 1 was erroneous because it did not require the jury to find that Razo knew the substance he possessed was methamphetamine. This error, however, was harmless beyond a reasonable doubt. As previously noted, Razo testified at trial that he knew the substance found in his backpack was methamphetamine as he had purchased it from his methamphetamine supplier. Razo also essentially conceded his guilt on the PDD2 offense by maintaining that he possessed the methamphetamine for his own personal use, rather than for distribution. Accordingly, there was no reasonable possibility that any error in the circuit court's PDD2 instruction contributed to the jury's finding that Razo was guilty on Count 1. Cordeiro, 99 Hawai'i at 403, 56 P.3d at 705.

In any event, the Amended Judgment merged the PDD2 offense charged in Count 1 with the Attempted PDD1 offense charged in Count 4. We have already concluded that Razo's Attempted PDD1 conviction on Count 4 was valid. This renders

moot Razo's challenge to the validity of the circuit court's PDD2 instruction.

IT IS HEREBY ORDERED that the May 24, 2004, Amended Judgment filed in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 8, 2006.

On the briefs:

Karen T. Nakasone
Deputy Public Defender
for Defendant-Appellant

Peter A. Hanano
Deputy Prosecuting Attorney
County of Maui
for Plaintiff-Appellee

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge