

NO. 26769

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JEFF QUEL, Defendant-Appellant

E.M. RIVARDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0546)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Jeff Quel (Quel) appeals from the Judgment entered on July 29, 2004, in the Circuit Court of the First Circuit (circuit court).¹ The jury found Quel guilty of Sexual Assault in the First Degree, in violation of HRS § 707-730(1)(a) (Supp. 2005),² for sexually assaulting the complaining witness (CW), who was Quel's niece by marriage. The CW was fourteen years old at the time of the alleged offense and turned eighteen years old eleven days after she testified at trial. The circuit court sentenced Quel to twenty years of

¹ The Honorable Karl K. Sakamoto presided.

² HRS § 707-730(1)(a) (Supp. 2005) provides in relevant part: "A person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]"

incarceration with a mandatory minimum of six years and eight months as a repeat offender.

On appeal, Quel appears to argue the following in his opening brief:

1. The circuit court abused its discretion by not dismissing Quel's indictment because the State of Hawai'i (the State) failed to disclose to the grand jury an alleged agreement the State had entered into with the CW. The alleged agreement was that the CW was promised that she would not be prosecuted for her admitted prior use and possession of drugs if she testified against Quel. Quel infers the existence of the alleged non-prosecution agreement based on a discussion, which involved the court, the CW, and the State, that was held at the beginning of trial, outside the presence of the jury.

2. The State should have provided counsel for the CW prior to her grand jury testimony, and the circuit court abused its discretion by not appointing counsel for the CW at trial to advise her about her right against self-incrimination.

In his reply brief,³ Quel raises the following additional arguments which were not presented in his opening brief:

³ After the opening brief for Defendant-Appellant Jeff Quel (Quel) was filed, his appellate counsel filed a "Motion to Withdraw as Counsel and Appoint Substitute Counsel." The motion was granted and new appellate counsel was appointed. Quel's new appellate counsel prepared the reply brief.

3. The circuit court erred in permitting the State to introduce evidence of his uncharged drug activities, namely, that Quel had given the CW crystal methamphetamine to smoke.

4. The circuit court erred in imposing a mandatory minimum sentence on Quel as a repeat offender and in running his sentence consecutive to a term of imprisonment imposed in another case.

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

1. It is well settled that the burden is on the appellant to show error by reference to matters in the record. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000). Quel claims that his indictment should have been dismissed because the State allegedly entered into a non-prosecution agreement with the CW which the State failed to disclose to the grand jury. However, no transcript of the CW's grand jury testimony or any other aspect of the grand jury proceedings were made a part of the record on appeal. Where the record is insufficient to show the alleged error occurred, the presumption that there was no error must prevail. Id. Quel has not met his burden of showing error with respect to his claim that the circuit court erred in failing to dismiss his indictment.

Moreover, even assuming, *arguendo*, that the State had entered into a non-prosecution agreement with the CW which was not disclosed to the grand jury, we conclude that there was no error in the circuit court's failure to *sua sponte* dismiss Quel's

indictment.⁴ The prosecution is not required to disclose all exculpatory evidence to the grand jury, but only evidence that is clearly exculpatory. State v. Bell, 60 Haw. 241, 243-45, 589 P.2d 517, 519-20 (1978); State v. O'Daniel, 62 Haw. 518, 521, 616 P.2d 1383, 1387 (1980). In addition,

the grand jury need not be advised of all matters bearing on the credibility of potential witnesses. Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way[.]

State v. Pulawa, 62 Haw. 209, 215, 614 P.2d 373, 377 (1980) (quoting United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979)).

The existence of an agreement by the State not to prosecute the CW for her prior drug use and possession would not have clearly exculpated Quel or provided him with a defense. The failure of the State to disclose such an agreement would not have resulted in the grand jury's being overreached or deceived in any significant way. In the context of this case, we conclude that disclosing to the grand jury that the State had entered into a non-prosecution agreement with the CW would not have affected the outcome of the grand jury's deliberations. Any failure to disclose the alleged non-prosecution agreement did not affect the integrity of the grand jury proceedings or warrant dismissal of the indictment. See Pulawa, 62 Haw. at 217-18, 614 P.2d at 378; United States v. Estacio, 64 F.3d 477, 481 (9th Cir. 1995).

⁴ Quel did not move to dismiss the indictment in the court below. We therefore only review his claim that the trial court erred in failing to dismiss his indictment for plain error. State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999).

2. We reject Quel's claim for relief based on his contention that the State should have provided the CW with counsel prior to her testifying before the grand jury and that the circuit court abused its discretion by not appointing counsel for the CW at trial to advise the CW about her right against self-incrimination. First, Quel does not have standing to assert any alleged violation of the CW's constitutional right to counsel. Freitas v. Administrative Director of Courts, 104 Hawai'i 483, 486, 92 P.3d 993, 996 (2004). Second, the circuit court offered to obtain a lawyer for the CW, but the CW told the court that she did not want to consult with a lawyer. Finally, Quel fails to show how the failure to obtain counsel for the CW at the grand jury proceedings or at trial resulted in unfair prejudice to Quel.

3. In his reply brief, Quel argues for the first time that the circuit court erred in: 1) permitting the State to introduce evidence of his uncharged drug activities; and 2) imposing his sentence. Neither of these alleged errors were set forth as points of error or even mentioned as error in Quel's opening brief. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) requires that the appellant's opening brief contain a concise statement of the points of error being raised on appeal. We decline to address the two new points of error that Quel raises for the first time in his reply brief. We deem Quel to have waived these two new points of error by failing to raise them in his opening brief. See HRAP Rule 28(b)(4) ("Points not

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presented in accordance with [HRAP Rule 28(b)(4)] will be disregarded."); Matter of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994).

IT IS HEREBY ORDERED that July 29, 2004, Judgment entered in the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

Shawn A. Luiz,
(Lane Y. Takahashi on
opening brief),
for Defendant-Appellant

Mark Yuen,
Deputy Prosecuting Attorney
City & County of Honolulu,
for Plaintiff-Appellee

Cornine K.A. Watanabe

Presiding Judge

James R. Foley

Associate Judge

Craig H. Nakamura

Associate Judge