NO. 27036

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, Cross-Appellee
v.
SHAUN LARKIN, Defendant-Appellee, Cross-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1825)

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

Plaintiff-Appellant State of Hawai'i (the State) appeals from the "Order Denying in Part and Granting in Part Defendant's Motion to Dismiss" (Order) entered on December 20, 2004, by the Circuit Court of the First Circuit (circuit court).[1] The State challenges the portion of the Order that granted the motion of Defendant-Appellee Shaun Larkin (Larkin) to dismiss Count IV of the indictment, which charged Larkin with securities fraud in violation of Hawaii Revised Statutes (HRS) §§ 485-25(a)(3) and 485-21(a)(2) (1993).[2] The Order also denied

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[1] Defendant-Appellee Shaun Larkin (Larkin) also appealed from the December 20, 2004 "Order Denying in Part and Granting in Part Defendant's Motion to Dismiss" (Order). Larkin appealed the portion of the Order which denied his motion to dismiss Counts I, II, and III of the indictment as a cross-appellant in No. 27036 and as an appellant in No. 27096. The two appeals were ordered consolidated under appeal No. 27036. Larkin's appeal from the Order as an appellant and cross-appellant was subsequently dismissed for lack of jurisdiction. Thus, only the appeal of Plaintiff-Appellant State of Hawai'i (the State) remains for our determination.

[2] During the time period the offense charged in Count IV was alleged to have occurred, Hawaii Revised Statutes (HRS) §§ 485-25(a)(3) and 485-21(a)(2) (1993) provided:

> **§ 485-25 Fraudulent and other prohibited practices.** (a) It is unlawful for any person, in connection with the offer, sale, or purchase (whether in a transaction described in section 485-6 or otherwise) of any security (whether or not of a class described in

Larkin's motion to dismiss Counts I, II, and III, which charged Larkin with second degree theft by deception, in violation of HRS § 708-831(1)(b) (Supp. 2006).[3]

Larkin's first motion to dismiss Count IV was denied by the circuit court, the Honorable Victoria S. Marks presiding. After obtaining new counsel, Larkin filed a second motion to dismiss Count IV and the other counts in the indictment. The circuit court, the Honorable Virginia Lea Crandall presiding, granted Larkin's motion to dismiss Count IV based on the following finding:

> 13. Upon review and consideration of the transcript of the grand jury proceedings and in consideration of the nature of the evidence presented relating to the registration issue versus the nature of the evidence presented relating to the fraudulent practices issue, the Court finds that the grand jury **may** have been mislead [sic] regarding the nature of the charge in Count Four and was prejudicial to the Defendant. See. State v. Joao, 53 Haw. 226 (1971).

On appeal, the State argues that the circuit court erred in: 1) overruling without cogent reasons a previous order

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section 485-4), in the State, directly or indirectly:

. . .

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]

§ 485-21 Criminal penalites. (a) Whoever violates this chapter shall be punished as follows:

. . .

(2) An offense in which the total value of all money and anything else of value paid or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to $5,000 but less than $100,000 shall be a class B felony as defined by the Hawaii Penal Code[.]

[3] HRS § 708-831(1)(b) (Supp. 2006) provides:

(1) A person commits the offense of theft in the second degree if the person commits theft:

. . .

(b) Of property or services the value of which exceeds $300[.]

by another judge denying Larkin's first motion to dismiss Count IV; and 2) dismissing Count IV based on its finding that grand jury testimony relating to securities registration may have misled the grand jury regarding the nature of the charge in Count IV and prejudiced Larkin. We agree with the State's second argument and therefore vacate the circuit court's dismissal of Count IV.

I.

Larkin met Nancy Lewis and Raymond Malinowski on a catamaran cruise. Larkin indicated that he was a successful day trader in stocks, that he made a lot of money for investors using off-shore accounts, and that he could do the same for Lewis and Malinowski. Lewis and Malinowski gave Larkin a total of $23,120 with the understanding that Larkin would invest the money in stocks for them. They also introduced Larkin to Edward Walsh, who gave Larkin $15,000 to invest in a company Larkin said he was starting.

Subsequently, Larkin told Lewis and Malinowski that he had used their money to buy stocks, and that the stocks were doing well. Lewis, however, became concerned after Larkin repeatedly failed to comply with Lewis's requests for documentation to verify Larkin's stock purchases. Eventually, Lewis, Malinowski, and Walsh asked for their money back. Although Larkin told them he would return their money, Larkin never did.

Lewis, Malinowski, and Walsh testified before the grand jury. In addition, the State called an attorney with the Securities Enforcement Division of the Department of Commerce and Consumer Affairs (DCCA) to testify about Hawai'i securities law. The attorney answered general questions about what constitutes a "security" and the circumstances under which a person dealing with securities would have to register with DCCA. The DCCA attorney identified HRS § 485-25 as the securities fraud provision of HRS Chapter 485, and she testified that it would violate HRS § 485-25 if someone obtained money from another with

a promise to double the return, but instead used the money for his own personal use without permission. The DCCA attorney further testified that Larkin was not registered to sell stock or to offer or receive investments for businesses in Hawai'i.

At the hearing on Larkin's second motion to dismiss Count IV, the defense called an expert in the area of securities law to comment on the DCCA attorney's grand jury testimony. The defense expert testified that the DCCA attorney's answers to questions regarding when a person needed to be registered with DCCA were generally "correct as far as . . . she goes," but did not account for circumstances and exceptions where registration would not be required. The defense expert testified that the DCCA attorney's affirmative answer to a hypothetical regarding whether an individual taking money with the promise of doubling the return on that investment was required to be registered was inaccurate. The defense expert stated that the question posed was not necessarily a registration question but was really a question directed at whether the anti-fraud provisions of the securities law had been violated.

II.

In dismissing Count IV, the circuit court did not find that the grand jury prosecutor had engaged in misconduct or that the DCCA attorney's grand jury testimony had been incorrect. Instead, the court found that considering the evidence presented relating to the registration issue versus the fraudulent practices issue, "the grand jury may have been mis[led] regarding the nature of the charge in Count Four." We believe the court meant that because of the number of questions the DCCA attorney was asked about registration, the grand jury may have been misled into believing that Count IV was based Larkin's failure to satisfy the DCCA's registration requirements, rather than on Larkin's engaging in fraud in connection with the offer, sale, or purchase of a security.

We conclude that the circuit court erred in dismissing Count IV based on its finding that the grand jury may have been

misled regarding the nature of the charge in Count IV. Before calling any witnesses, the prosecutor read Count IV of the proposed indictment to the grand jury. In reciting Count IV, the prosecutor advised the grand jury that Count IV alleged, in relevant part, that

> Shaun Larkin did directly or indirectly engage in any act, practice or course of business which operated or would operate as a fraud or deceit upon Nancy Lewis, Raymond Malinowski, and Edward Walsh, in connection with the offer, sale or purchase of any security in the State of Hawaii, in which the total value of all money and anything else of value paid or loss [sic] by Nancy Lewis, Raymond Malinowski and Edward Walsh, pursuant to the same scheme, plan or representations or the same entity, amounted to more than $5,000.00 but less than $100,000.00, thereby committing the offense of Securities Fraud, in violation of Sections 45-25(A)(3) [sic] and 45-21(A)(2) [sic] of the Hawaii Revised Statutes.[4]

(Emphasis added.) The grand jury was therefore aware that Larkin was being charged with fraud in connection with the offer, sale, or purchase of a security and that failure to register with DCCA was not an element of the Count IV offense. In addition, the only time the DCCA attorney was asked to opine on whether the anti-fraud statute, HRS § 485-25, was violated, the hypothetical situation presented was where an individual took money with the promise to double the return but instead failed to invest the money and used it for his own personal use without permission. The DCCA attorney was not asked whether failure to register with the DCCA would violate HRS § 485-25.

As noted, the circuit court did not find misconduct on the part of the grand jury prosecutor. Where prosecutorial misconduct is not involved, a defendant may not attack an indictment "on the ground of the incompetency of the evidence considered by the grand jury." State v. Chong, 86 Hawai'i 282, 288-89, 949 P.2d 122, 128-29 (1997). In this circumstance, the reception of illegal or incompetent evidence does not warrant the dismissal of the indictment where the remaining evidence,

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[4] The correct statutory citations were HRS § 485-25(a)(3) and HRS § 485-21(a)(2), which were set forth in the written indictment signed by the grand jury foreperson.

considered as a whole, is sufficient to warrant the indictment, unless the defendant can show that the improper testimony "clearly appears to have improperly influenced the grand jurors." State v. Scotland, 58 Haw. 474, 476-47, 572 P.2d 497, 498-99 (1977). Based on our review of the record, the DCCA attorney's testimony regarding registration did not improperly influence the grand jury and did not undermine the fundamental fairness and integrity of the grand jury process. Chong, 86 Hawai'i at 284, 949 P.2d at 124.

Even when prosecutorial misconduct is involved, "it should not be utilized as a stepping stone to dismissal of an indictment" unless the misconduct "is extreme and clearly infringes upon the [grand] jury's decision-making function." State v. Pulawa, 62 Haw. 209, 218, 614 P.2d 373, 378 (1980) (adopting the rule stated in State v. Schamberg, 370 A.2d 482, 485 (N.J. Super. Ct. App. Div. 1977)). Here, there was ample evidence independent of the DCCA attorney's testimony regarding registration that established probable cause to indict Larkin on Count IV. We conclude that even without the DCCA attorney's testimony regarding registration, the grand jury would have voted to indict Larkin on Count IV. See Hawai'i Rules of Penal Procedure Rule 52; Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (holding that the trial court did not have the authority to dismiss the indictment for prosecutorial misconduct where such misconduct did not prejudice the defendants).[5]

III.

We vacate the portion of the circuit court's December 20, 2004, Order that dismissed Count IV of the indictment, including paragraph number 13 of the Order. We remand the case

[5] In light of our decision, we need not address the State's claim that the circuit court abused its discretion in overruling without cogent reasons the previous order by another judge denying Larkin's first motion to dismiss Count IV.

for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, October 18, 2007.

On the briefs:

Mark Yuen
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellant,
Cross-Appellee

Michael J. Park
for Defendant-Appellee,
Cross-Appellant

Presiding Judge

Associate Judge

Associate Judge