

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27065

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
CHARLES B. MILLER, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-2253)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe, and Nakamura, JJ.)

Defendant-Appellant Charles B. Miller (Miller) appeals from the Judgment filed on December 17, 2004, in the Circuit Court of the First Circuit (the circuit court)¹ in Criminal No. 99-2253.² Miller was indicted and charged with two counts of sexually assaulting a five-year-old girl (hereinafter referred to as "Minor"). Count 1 charged Miller with first degree sexual assault, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993),³ for subjecting Minor to sexual

¹ The Honorable Virginia Lea Crandall presided.

² In a separate appeal docketed as No. 27064, Defendant-Appellant Charles B. Miller appeals from a December 17, 2004, Judgment entered by the Circuit Court of the First Circuit in Criminal No. 01-1-0350.

³ At the time of the charged offense, Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993) provided, in relevant part:

(1) A person commits the offense of sexual assault in the first degree if:

. . . .

(b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]

penetration by placing his mouth on her vagina. Count 2 charged Miller with third degree sexual assault, in violation of HRS § 707-732(1)(b) (1993),⁴ for subjecting Minor to sexual contact by placing his hand on her vagina. A jury found Miller guilty as charged on both counts.

After Miller's trial but before he was sentenced, the Hawai'i Supreme Court decided State v. Mueller, 102 Hawai'i 391, 76 P.3d 943 (2003). In Mueller, the court held that evidence Mueller had subjected the minor complainant to cunnilingus without penetrating the complainant's vulva was insufficient to convict Mueller of first degree sexual assault. Id. at 392-93, 76 P.3d at 944-45. Evidence of sexual penetration had not been adduced at Miller's trial. Based on Mueller, the circuit court vacated the jury's guilty verdict against Miller on Count 1 for first degree sexual assault and entered judgment on the lesser included offense of third degree sexual assault. Miller was sentenced to concurrent terms of five years of imprisonment on Counts 1 and 2.

⁴ At the time of the charged offense, HRS § 707-732(1)(b) (1993) provided:

(1) A person commits the offense of sexual assault in the third degree if:

. . . .

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

On appeal, Miller argues that his right to effective assistance of counsel was violated because his trial counsel failed to: 1) move for a voluntariness hearing before or during trial with respect to a recorded statement Miller made to the police; 2) object to the prosecutor's use of the statement to impeach Miller's testimony in cross-examining Miller; and 3) object to the admission of an exhibit showing that Miller had waived his constitutional rights prior to making the statement. We disagree with Miller and affirm his convictions.

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

Miller failed to meet his burden of proving that he was denied his right to the effective assistance of counsel. We review claims of ineffective assistance of counsel to determine whether, "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases."

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994)

(internal quotation marks, citation, and brackets omitted).

[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 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. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

Miller failed to show that his trial counsel provided ineffective assistance in failing to move for a voluntariness hearing before or during trial. The State of Hawai'i (the State) did not offer Miller's statement during its case-in-chief and

only sought to use the statement to impeach Miller after Miller testified on direct examination. The record reflects that Miller was properly advised of his Miranda rights and that he waived those rights before making his statement to Detective David Do (Detective Do). In addition to his Miranda rights, Miller was advised that he would be questioned about a sexual assault that occurred at a specified address and that if he decided to answer questions, he still had the right to stop answering at any time. Miller signed a waiver of rights form and admitted that he and Detective Do had gone over the form together. Miller further admitted that he "chose" to make a statement to Detective Do. Miller's statement was tape recorded and was apparently exculpatory. Miller was provided with a copy of the tape recording and transcript of his statement in discovery and listed both on his trial exhibit list. Miller did not suggest during his testimony that his statement was involuntary or coerced in any way.

The record shows that Miller's statement was clearly voluntary and that any challenge to its voluntariness would have been futile. Under these circumstances, we conclude that Miller has failed to meet his burden under either prong of the two-part test for ineffective assistance of counsel. Miller has not shown that his trial counsel's failure to move for a voluntariness hearing was due to counsel's lack of skill, judgment, or diligence. Richie, 88 Hawai'i at 39, 960 P.2d at 1247. Nor has Miller shown that his counsel's failure to move for a

voluntariness hearing resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. Id.

We also reject Miller's claim that his trial counsel provided ineffective assistance in failing to object to the prosecutor's use of Miller's statement for purposes of impeachment and in failing to object to the admission of Miller's waiver of rights form. Miller does not offer any valid basis on which an objection to these matters could have been raised. We therefore conclude that Miller failed to meet his burden of showing that his trial counsel's failure to object to these matters constituted ineffective assistance of counsel. Id.

IT IS HEREBY ORDERED that the Judgment filed on December 17, 2004, in the Circuit Court of the First Circuit in Criminal No. 99-2253 is affirmed.

DATED: Honolulu, Hawai'i, January 30, 2007.

On the briefs:

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Attorney for Plaintiff-Appellee

James A. Burns
Chief Judge

Corinne Ke Wataxale
Associate Judge

Craig H. Nakamura
Associate Judge