

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27080

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
RICHARD J. BASUEL, 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. 02-1-2725)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Richard J. Basuel (Basuel) appeals from the Judgment filed on October 25, 2004, in the Circuit Court of the First Circuit<sup>1</sup> (circuit court). A jury found Basuel guilty of:

Eleven counts of Attempt to Evade or Defeat Tax (Counts I-XI), in violation of Hawaii Revised Statutes (HRS) §§ 231-34 (2001 Repl.), 702-221 (1993), 702-222 (1993), and 702-223 (1993);

Eleven counts of False and Fraudulent Statements (Counts XII-XXII), in violation of HRS § 231-36(b) (2001 Repl.); and

One count of Theft in the First Degree (Count XXIII), in violation of HRS §§ 708-830.5(1)(a) (1993), 708-830(2) (1993), 702-221, 702-222, and 702-223.

<sup>1</sup> The Honorable Michael D. Wilson presided.

The circuit court sentenced Basuel to five years of incarceration for each of Counts I-XI, three years of incarceration for each of Counts XII-XXII, and ten years of incarceration for Count XXIII, all terms to be served concurrently with each other. The court also fined Basuel \$60,000 (\$2,500 for each of Counts I-XXII and \$5,000 for Count XXIII).

On appeal, Basuel argues:

(1) The circuit court deprived him of his constitutional right to a fair and impartial jury by denying his oral motion for mistrial because (a) potential juror Hughes (Hughes), a former police detective, "poisoned" other potential jurors with his comment that 99% of all persons arrested by the police are guilty and (b) the Deputy Prosecuting Attorney (Prosecutor) bolstered Hughes' statement by saying he never knew a finer law enforcement officer in his whole career than Hughes.

(2) The circuit court erred by denying his oral motions for judgment of acquittal because the State did not prove beyond a reasonable doubt that he was guilty of the charges against him.

(3) The circuit court erred by sentencing him to ten years in prison because he was a non-violent offender and should have been sentenced to probation and because his conviction rested on his good faith reliance on an interpretation of a law. Further, the court erred by imposing upon him a \$60,000 fine with

no specific duration, in light of his indigent status. Lastly, Basuel argues that his fine violated the Excessive Fines Clauses contained in the Eighth Amendment to the United States Constitution and Article 1, § 12 of the Hawai'i Constitution.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Basuel's points of error as follows:

(1) The record on appeal does not demonstrate the potential jury pool was tainted by Hughes' comment, and, hence, the circuit court did not abuse its discretion in denying Basuel's motion for a mistrial. State v. Lagat, 97 Hawai'i 492, 495, 40 P.3d 894, 897 (2002); State v. Castro, 69 Haw. 633, 650, 756 P.2d 1033, 1045 (1988).

Basuel's counsel, not the Prosecutor, made the statement "All right. I wanna say something. Officer Hughes is one of the greatest police officers I ever met in my life. He helped the prisoners a lot and his opinions are his opinions." The State objected, and the circuit court sustained the State's objection.

(2) The circuit court did not err in denying Basuel's motions for judgment of acquittal. The circuit court could have reasonably concluded, based on the evidence in the record, that Basuel obtained or exerted control over the property of his customers by deception with intent to deprive them of their

property. Further, there was sufficient evidence that Basuel caused innocent or irresponsible persons to engage in theft, was complicit with respect to the result, and solicited his customers to commit theft.

With regard to Basuel's argument that, pursuant to HRS § 702-220 (1993), he was entitled to the defense of mistake of law, we agree with the State that the affirmative defense of mistake of law requires that a defendant prove he relied upon "an official statement of the law . . . contained in (1) [a] statute or other enactment; (2) [a] judicial decision, opinion, or judgment; (3) [a]n administrative order or administrative grant of permission; or (4) [a]n official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense." HRS § 702-220. Basuel only claims that he relied on tax law "experts," such as Rose, and not any official statement of the law.

(3) The circuit court did not err in sentencing Basuel to prison. State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995). When the circuit court imposed Basuel's prison sentence, it explained that it had reviewed HRS § 706-621 (1993) in determining whether to sentence Basuel to probation. The court noted that Basuel had violated a condition of his existing probation by committing the offenses in the instant case, which were similar to those he had initially committed, and

that Basuel apparently disagreed with our tax system and with the court's jurisdiction over him. Based on the foregoing, the circuit court determined that it would not be useful for Basuel to be on probation because clearly he would not be willing to follow the tax laws.

The circuit court explained that it considered HRS § 706-606 (1993) in determining its sentence of Basuel and found that incarceration was appropriate given Basuel's failure to follow clearly stated tax laws, which Basuel should have understood because of his previous tax-related convictions. The court questioned the sincerity of Basuel's argument that he had relied on the opinion of "experts" in developing his tax theory and called his behavior irrational. The circuit court further determined that Basuel did not deserve an extended term of imprisonment.

As to the \$60,000 fine imposed by the circuit court against Basuel, there is nothing in the record indicating that Basuel "is or will be able to pay the fine" or that the circuit court took "into account the financial resources of [Basuel] and the nature of the burden that its payment will impose," as required by HRS § 706-641(3)(a) and (4) (1993). State v. Gray, 77 Hawai'i 476, 478, 888 P.2d 376, 379 (App. 1995). Because the circuit court failed to comply with HRS § 706-641, we vacate the \$60,000 fine imposed against Basuel.

Therefore,

We vacate the part of the October 25, 2004 Judgment that orders Basuel to pay a fine of \$60,000.00, and we remand that part for further proceedings in conformity with this order. We affirm the remainder of the Judgment filed on October 25, 2004, in the Circuit Court of the First Circuit.


DATED: Honolulu, Hawai'i, February 23, 2007.

On the briefs:

Shawn A. Luiz  
for Defendant-Appellant.

Girard D. Lau,  
Deputy Attorney General,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge