

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27598

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
ALEJANDRO M. PEBENITO, Defendant-AppellantNORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 04-1-1532)SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Alejandro M. Pebenito (Pebenito) appeals from the Judgment of Conviction and Sentence filed on June 1, 2005 in the Circuit Court of the First Circuit<sup>1/</sup> (circuit court).

On August 5, 2004, the State of Hawaii (the State) charged Pebenito via a Complaint with two counts of Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (1993 & Supp. 2003) (Counts I & II), and one count of Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2006) (Count III). Counts I, II and III occurred on September 11, 2003, September 19, 2003, and July 28, 2004, respectively, and

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<sup>1/</sup> The Honorable Steven S. Alm presided.

alleged that Pebenito did knowingly distribute or possess the "dangerous drug methamphetamine."

A jury found Pebenito guilty as charged on all three counts. The circuit court entered its judgment on June 1, 2005. Pebenito, pro se, filed a Notice of Appeal on November 15, 2005.<sup>2/</sup>

On appeal, Pebenito argues: (1) the circuit court erred by denying his motion for a mistrial after defense counsel observed one of the police officers talking to a juror; (2) the circuit court erred by denying Pebenito's motion for a mistrial or, in the alternative, for a continuance when, during trial, the prosecutor became ill and another prosecutor took over the case; (3) the circuit court erred by denying Pebenito's motion for a mistrial after Officer Gabur violated a motion in limine by mentioning a prior drug transaction involving Pebenito; and (4) there was insufficient evidence to support a conviction and the

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<sup>2/</sup> Pebenito's trial counsel successfully withdrew from his representation of Pebenito on June 8, 2005. However, another attorney was not appointed until May 22, 2006. In criminal cases, Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b)(1) mandates that a notice of appeal should be filed within 30 days after the entry of judgment. The Hawai'i Supreme Court has made exceptions to this rule. One recognized exception excuses the failure to timely file a notice of appeal when filing of an untimely appeal was the result of counsel's failure to competently pursue the defendant's first appeal from a criminal conviction. State v. Knight, 80 Hawai'i 318, 323-24, 909 P.2d 1133, 1138-39 (1996). Here, the untimely filing of the notice of appeal was through no fault of Pebenito. As such, this court will hear Pebenito's appeal.

circuit court erred by denying Pebenito's motion for judgment of acquittal.

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 as raised by the parties, we conclude:

(1) The circuit court did not abuse its discretion in not declaring a mistrial. U.S. Const. amend. VI; Hawai'i Const. art. 1, § 14; State v. Yamada, 108 Hawai'i 474, 478, 122 P.3d 254, 258 (2005); State v. Keliiholokai, 58 Haw. 356, 357-58, 569 P.2d 891, 893-94 (1977); State v. Furutani, 76 Hawai'i 172, 180-81, 873 P.2d 51, 59-60 (1994); State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993); State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000); State v. Kanae, 89 Hawai'i 198, 202, 970 P.2d 506, 510 (App. 1998); State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000).

(2) There was sufficient evidence adduced at trial to support Pebenito's convictions. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

Therefore,

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The Judgment of Conviction and Sentence filed on June 1, 2005 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 26, 2007.

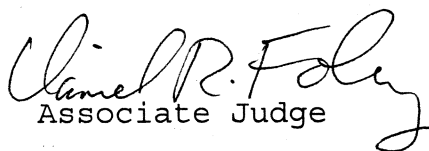
On the briefs:

Shawn A. Luiz  
for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge