

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27875

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DANIEL VESPER, III, Defendant-Appellant

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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 04-1-2430)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Nakamura, and Fujise, JJ.)

In this appeal from a judgment entered by the Circuit Court of the First Circuit (the circuit court)¹ on March 28, 2006, Defendant-Appellant Daniel Vesper, III (Vesper) challenges the part of the judgment² that convicted and sentenced him for Attempted Murder in the First Degree, in violation of Hawaii Revised Statutes (HRS) §§ 705-500(2) (1993),³ 707-701(1)(b) (1993

¹ The Honorable Virginia Lea Crandall presided.

² Defendant-Appellant Daniel Vesper, III (Vesper) has not appealed from the parts of the judgment entered by the Circuit Court of the First Circuit on March 28, 2006 that convicted and sentenced him for Promoting a Dangerous Drug in the Third Degree, Unlawful Use of Drug Paraphernalia, Robbery in the First Degree, Robbery in the Second Degree, and Unauthorized Control of Propelled Vehicle.

³ Hawaii Revised Statutes (HRS) § 705-500(2) (1993) provides:

Criminal attempt. . . .

. . . .

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

& Supp. 2004),⁴ and 706-656 (1993 & Supp. 2006).⁵

⁴ At the time Vesper was indicted, HRS § 707-701(1)(b) (1993 & Supp. 2004) provided as follows:

Murder in the first degree. (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

. . . .

(b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;

. . . .

(2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

⁵ HRS § 706-656 (1993 & Supp. 2006) provides now, as it did when Vesper was indicted, in relevant part, as follows:

Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

(1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.

As part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

If the court imposes a sentence of life imprisonment without possibility of parole pursuant to section 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of

(continued...)

Vesper argues that: (1) during closing arguments, "the deputy prosecuting attorney (the DPA) made blatant appeals to the jurors' emotions[,] " thereby engaging in prosecutorial misconduct that deprived Vesper of his constitutional right to a fair trial; (2) the circuit court abused its discretion in allowing Plaintiff-Appellee State of Hawai'i (the State) to introduce evidence that police officers in the Crime Reduction Unit were seeking to arrest Vesper for the offenses of Criminal Property Damage, Unauthorized Control of Propelled Vehicle, and Robbery; (3) the record lacks substantial evidence to support Vesper's conviction because the State failed to prove that Vesper knew that the complainant was a law enforcement officer; and (4) Vesper's sentence is illegal because the circuit court failed to comply with the mandates of HRS § 706-656.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the case law and statutes relevant to the arguments advanced and the issues raised, we conclude as follows:

(1) The statements made by the DPA during his closing argument were reasonable inferences from the evidence adduced at trial and did not rise to prosecutorial misconduct. State v. Klinge, 92 Hawai'i 577, 592, 994 P.2d 509, 524 (2000).

(2) The circuit court did not abuse its discretion in admitting evidence of Vesper's wanted status. Such evidence was relevant and probative of Vesper's knowledge that the complainant was a police officer, and the probative value of the evidence was not outweighed by its prejudicial effect. State v. Renon, 73 Haw. 23, 31-32, 828 P.2d 1266, 1270 (1992); see also Hawaii Rules of Evidence Rules 401, 402, 403, and 404.

⁵(...continued)

twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(3) There was substantial evidence adduced at trial to allow the jury to reasonably infer from Vesper's conduct and the surrounding circumstances leading to the charge of Attempted Murder in the First Degree against Vesper that Vesper knew the complainant was a police officer. State v. Agard, 113 Hawai'i 321, 324, 151 P.3d 802, 805 (2007); State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996).

(4) The judgment entered by the circuit court did not comply with HRS § 706-656 because it failed to "order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute [Vesper's] sentence [for Attempted Murder in the First Degree] to life imprisonment with parole at the end of twenty years of imprisonment[.]"

Therefore, we: (1) affirm the part of the judgment that convicted Vesper of Attempted Murder in the First Degree; (2) affirm the part of the judgment that convicted and sentenced Vesper for Promoting a Dangerous Drug in the Third Degree, Unlawful Use of Drug Paraphernalia, Robbery in the First Degree, Robbery in the Second Degree, and Unauthorized Control of Propelled Vehicle; (3) vacate the part of the judgment that sentenced Vesper for Attempted Murder in the First Degree; and (4) remand this case to the circuit court for entry of an amended judgment that complies with HRS § 706-656.

DATED: Honolulu, Hawai'i, July 5, 2007.

On the briefs:

Jeffrey A. Hawk
(Hawk, Sing & Ignacio)
for defendant-appellant.

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