NO. 28085

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DAVID MERKEL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CRIMINAL NO. 04513492 (1P104-17741))

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant David W. Merkel (Merkel) appeals from the Judgment filed on June 28, 2006 in the District Court of the First Circuit (district court).[1]

The State of Hawai'i (State) charged Merkel with two counts of harassment involving Virginia and Elizabeth Merkel in violation of Hawaii Revised Statutes (HRS) § 711-1106 (Supp. 2004), and one count of resisting arrest in violation of HRS § 710-1026(1)(a) (Supp. 2004). The State misidentified Merkel's daughter's name, and as a result the harassment charge involving Elizabeth Merkel was dropped at the start of the trial. After a bench trial, the district court acquitted Merkel of the harassment charge involving Virginia Merkel, but found Merkel guilty of resisting arrest. The district court sentenced Merkel to a one-year term of probation, a 20-day term of imprisonment, a $250 fine, a $75 probation fee, a $55 fee to the Criminal Injury Compensation Fund, and anger assessment and treatment.

On appeal, Merkel argues:

(1) The district court erred in denying Merkel's motion to continue the trial after Merkel complained that he was under the influence of painkillers at the start of trial and

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[1] The Honorable Lawrence R. Cohen presided.

because his father had recently passed away,

(2) The district court erred, in the alternative, in failing to *sua sponte* stay proceedings and order a psychiatric evaluation pursuant to HRS § 704-404 (Supp. 2005) "based on the effects of [Merkel's] medically prescribed medications, the emotional impact of [Merkel's] father's death and [Merkel's] physical and mental conditions of post-traumatic stress disorder, chronic pain and chronic depression[,]"

(3) There was insufficient evidence to support the conviction because Merkel's actions constituted "mere non-submission" and because Merkel did not intend to hurt the police officers and thus did not possess the requisite mens rea, and

(4) The court erred in failing to dismiss the case as *de minimis* because Merkel did not intend to or actually hurt anyone, and because he believed he was being wrongfully arrested for harassment and was eventually acquitted of that charge.

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced, we resolve Merkel's points of error as follows:

(1) The district court did not abuse its discretion when it denied Merkel's motion to continue trial, which was made on the morning that trial was scheduled to commence (May 5, 2006). A "motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion." State v. Lee, 9 Haw.App. 600, 603, 856 P.2d 1279, 1281 (1993) (citation omitted).

Courts "generally view with disfavor requests for a continuance made on the day set for trial or very shortly before," id. (quoting 3A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 832 (2d ed. 1982)) (internal quotation marks omitted), because attorneys "cannot reasonably expect a court to alter its

calendar, and disrupt a scheduled trial to which witnesses have been subpoenaed and to which the adverse party is ready, simply by the filing by counsel of a last minute motion for continuance." Id. at 603-04, 856 P.2d at 1282 (citing United States v. Chapel, 480 F.Supp. 591, 594 (D.P.R. 1979)).

In State v. Lee, the defendant moved for a continuance alleging he was "too distraught to be able to effectively assist in his own defense" because he had been arrested for another offense the morning of his trial. 9 Haw.App. at 601, 856 P.2d at 1281. This court found that the trial court's denial of the motion to continue was not improper where the defendant did not bring the motion until the day of trial, fifty-four days after his arraignment, and where witnesses summoned had been waiting all morning to testify when defense counsel moved to continue the trial. Id. at 604, 856 P.2d at 1282.

In this case, Merkel's motion for continuance was similarly not brought until the day of trial, more than one year after Merkel's original arraignment. Several witnesses for the State were waiting to testify that morning. There had been several prior continuances in the case resulting from Merkel's failure to appear at scheduled times. The court had also accommodated Merkel's needs by setting trial dates around his travel and family commitments. Merkel protested moving forward with the trial not only because of the alleged effects of a medication which he did not normally take, but also because he claimed that his attorney was not prepared, and because it wasn't "really a good time" for trial.[2] However, as we note below, the district court questioned Merkel to ensure that he understood the nature of the proceedings, and Merkel's answers were responsive and appropriate. Given all of these circumstances, the district

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[2] Merkel did not advise the court on May 5, 2006 that he was suffering from post traumatic stress disorder or depression. It was not until he testified on the last day of trial, June 27, 2006, that he referred to those conditions.

court did not abuse its discretion in denying Merkel's motion for a continuance.

(2) The district court did not abuse its discretion by failing to *sua sponte* stay the proceedings and appoint an examiner, pursuant to HRS § 704-404. State v. Castro, 93 Hawai'i 424, 426, 5 P.3d 414, 416 (2000). That statute provides a framework to ensure that a defendant is competent to stand trial and states in relevant part:

> (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder or defect of the defendant will or has become an issue in the case, the court may immediately suspend all proceedings in the prosecution. . . .
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> (2) Upon suspension . . . the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant.

HRS § 704-404(1) and (2).

Although use of the term "may" in HRS § 707-404 suggests that the decision to appoint examiners is discretionary, our Supreme Court has adopted the following analysis by then-Judge Acoba in State v. Castro, 93 Hawai'i 454, 462, 5 P.3d 444, 452 (App.) (Acoba, J., concurring), vacated in part, 93 Hawai'i 424, 5 P.3d 414 (2000).

> [T]he balance of the pertinent statutory language suggests that only some rational basis for convening a panel is necessary to trigger the court's appointive power. . . . Hence, the court is duty bound to *sua sponte* convene such a hearing if it itself has or is presented with rational basis [sic] for believing that the physical or mental defect of a defendant will become an issue on the question of fitness or responsibility.

In determining competency the trial court must determine "whether the defendant either (1) lacks the capacity to understand the proceedings against him or her; or (2) lacks

capacity to assist in his own defense." State v. Janto, 92 Hawai'i 19, 28 n.3, 986 P.2d 306, 315 n.3 (1999).

The record here does not reflect "some rational basis" for the district court to order an examination by a psychiatrist. When Merkel asked for a continuance, he was not arguing that he was mentally incapacitated, but rather that he was under the temporary influence of pain killers, and that it was not "really a good time" to proceed with trial. The temporary influence of such medications on its own does not amount to a claim of mental incapacity for the purposes of HRS § 704-404. A mental examination by a psychiatrist would have been inappropriate, since Merkel's alleged impairment resulted from the voluntary ingestion of a medication with temporary side effects rather than a mental incapacitation affecting his ability to fully participate in the adversarial system.

Moreover, Merkel's interactions with the court on the morning of May 5, 2006 show that he in fact understood the proceedings and was able to aid in his own defense. In his colloquy with the court, Merkel indicated that he did understand the charges and their repercussions, and was eager take the stand on his own behalf. His answers to the court's questions were responsive and appropriate. Merkel's understanding of the proceedings was further reflected by his informing the court that the prosecution was confused about his daughter's name, leading to one charge of harassment against Merkel being dropped. Moreover, at no point did Merkel's counsel claim to have any problems communicating with her client or assert that her client was unable to assist in his defense. Considering all these circumstances, the district court did not abuse its discretion by failing to stay the proceedings on the morning of May 5, 2006 and appoint an examiner, pursuant to HRS § 704-404.

Nor was there anything in the subsequent proceedings in the case which should have caused the district court to stay the

proceedings so Merkel could be examined. Because the trial could not be completed on May 5, 2006, it was continued to June 22 and 27, 2006. Merkel did not testify until June 27th. As Merkel concedes in his opening brief, there is nothing in the record to suggest that Merkel was in any way impaired by medication on June 22 or 27, 2006. Although Merkel testified on June 27th that he suffered from post traumatic stress disorder and depression, there is nothing about that testimony that raised any "rational basis" for questioning Merkel's competency to stand trial.

(3) Viewing the evidence in the light most favorable to the State, State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998), there was substantial evidence supporting Merkel's conviction. Three witnesses testified that Merkel pushed, kicked, bit at and hit a police officer. Merkel braced himself against the wheel and his wife, and grabbed at anything he could to stay in the car. He pulled the door shut when an officer tried to open it. He tried to pull the pepper spray out of an officer's hand. It took three officers to remove Merkel from the car. Merkel's behavior can hardly be said to be "mere non-submission," but rather rose to the level of "forcible resistance that involves some substantial danger to the person." Commentary to HRS § 710-1026.

Additionally, there was substantial evidence supporting the district court's conclusion that Merkel had the required intent to prevent the effectuation of his arrest by way of the threat and use of physical force. HRS § 710-1026(1)(a). In response to Honolulu Police Department (HPD) Officer JW Carrell, III's requests to step out of the car, Merkel repeatedly stated his intent to prevent the arrest in saying, "fuck you, I'm not going," yelling, "I have my rights," and holding the car door closed. Merkel also used and threatened to use force in preventing the arrest by grabbing at the wheel and his wife and anything he could to stay in the car, flailing his arms, kicking

and pushing officers away, biting at Officer Carrell, and hitting HPD Officer Elizabeth Rockett.

(4) The trial court did not abuse its discretion in failing to dismiss the charge against Merkel as *de minimis*, pursuant to HRS § 702-236(1)(b) (1993). State v. Ornellas, 79 Hawai'i 418, 423, 903 P.2d 723, 728 (App. 1995). The drafters of the Model Penal Code, upon which the Hawaii Penal Code is based, intended *de minimis* dismissal as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications." State v. Sorge, 591 A.2d 1382, 1385, (N.J. Super. Ct. Law Div. 1991). Merkel's conduct here -- biting and kicking at officers, and actually hitting one officer -- threatened public safety within the meaning of HRS § 710-1026, and it is not absurd to apply the statute to such conduct. Moreover, Merkel's subjective belief that he was being wrongfully arrested and his later acquittal are irrelevant to his resisting arrest charge and thus are improper grounds for a *de minimis* dismissal. State v. Kachanian, 78 Hawai'i 475, 485-86, 896 P.2d 931, 941-42 (App. 1995).

Accordingly, the Judgment filed on June 28, 2006 in the District Court of the First Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, October 25, 2007.

On the briefs:

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Mar E. Recktenwald
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Craig H. Nakamura
Associate Judge