

NO. 28468

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JOHN ROBERT DESA, JR., Defendant-Appellant

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E.M. RIMANDO
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STATE OF HAWAI'I

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 05-1-501)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant John Robert Desa, Jr., (Desa) appeals from the Judgment filed on March 7, 2007, nunc pro tunc to March 2, 2007, in the Circuit Court of the Third Circuit (circuit court).^{1/} Desa was charged by complaint with: 1) unlawful methamphetamine trafficking, in violation of Hawaii Revised Statutes (HRS) § 712-1240.6 (Supp. 2004)^{2/} (Count I);

^{1/} The Honorable Judge Glenn S. Hara presided.

^{2/} At the time of the offense alleged in Count I, HRS § 712-1240.6 (Supp. 2004) provided in relevant part:

(1) A person commits the offense of unlawful methamphetamine trafficking if the person knowingly manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense, one or more preparations, compounds, mixtures, or substances of methamphetamine, or any of its salts, isomers, and salts of isomers.

(2) The manufacture, distribution, or dispensing of or possession with intent to manufacture, distribute, or dispense one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more of methamphetamine, or any of its salts, isomers, and salts of isomers is a class A felony with a mandatory minimum prison term of five years;

(3) The manufacture, distribution, or dispensing of one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-eighth ounce of

(continued...)

2) promoting a dangerous drug in the third degree for possessing methamphetamine, in violation of HRS § 712-1243(1) (Supp. 2007)^{3/} (Count II); 3) promoting a detrimental drug in the third degree for possessing marijuana, in violation of HRS § 712-1249(1) (1993)^{4/} (Count III); and possessing with intent to use drug paraphernalia, in violation of HRS § 329-43.5 (1993)^{5/} (Count IV). A jury found Desa guilty as charged on all counts.

The circuit court determined that Count II was a lesser included offense of Count I and merged Count II into Count I for purposes of sentencing. The court sentenced Desa to concurrent terms of imprisonment of ten years with a mandatory minimum term of three years on Count I, thirty days on Count III, and five years Count IV.

^{2/}(...continued)

methamphetamine, or any of its salts, isomers, and salts of isomers is a class B felony with a mandatory minimum prison term of three years;

HRS § 712-1240.6 was repealed effective June 22, 2006, by 2006 Haw. Sess. L. Act 230, § 50.

^{3/} HRS § 712-1243(1) (Supp. 2007) provides:

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

^{4/} HRS § 712-1249(1) (1993) provides:

(1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount.

^{5/} HRS § 329-43.5 (1993) provides in relevant part:

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

I.

A.

In the morning on December 9, 2005, police officers executed a search warrant on an apartment unit occupied by Desa. Desa was the only person present in the unit. During the search, the police recovered: 1) three packets of crystal methamphetamine, with an aggregate weight of .4 grams; 2) a packet of marijuana; 3) an electric gram scale and a balance scale; and 4) a cut straw and several empty small zip packets.

At trial, Detective Ian Lee Loy testified that Desa stated that "he wasn't a big time dealer, just a small time dealer" and that Desa "wanted to cooperate and show me where his dope was." According to Detective Lee Loy, Desa led the detective to a closet and pointed to a shirt. The packets of methamphetamine and marijuana were found inside the pocket of the shirt. Detective Lee Loy testified that during an interview at the police station, Desa stated that he had purchased the methamphetamine the previous night for \$85.00 and later broke it down into three different bags. Desa repeated that he was not a big dealer and only sold drugs to "buy food and socks."

Desa testified in his own defense at trial. Desa stated that he did not live in the apartment unit where the drugs were found and only stored his tools there while working at the apartment complex. Desa testified that the police found the drugs in the shirt pocket on their own. Desa also testified that he told Detective Lee Loy that the shirt and the drugs did not belong to Desa, but probably belonged to one of the owners of the apartment complex, whom Desa named. Desa denied that the drugs found by the police were his drugs. Desa further denied telling Detective Lee Loy that Desa was a drug dealer or that Desa had purchased the methamphetamine the night before.

B.

The State contended at trial that Desa possessed with intent to distribute the .4 grams of methamphetamine recovered during the execution of the search warrant and that the .4 grams

of methamphetamine provided the basis for both the methamphetamine trafficking charged in Count I and the possession of methamphetamine charged in Count II. In closing argument, the State explained that Count I charged Desa with "being in possession of methamphetamine [found in the apartment] with the intent to distribute that methamphetamine."^{6/} The State further explained that "Count II is kind of a subset of Count I. Count I charges possession with intent to distribute. Count II just charges possession of the methamphetamine so, clearly, he's guilty of that, too."

Desa made an oral motion to require the State to elect to send either Count I or Count II to the jury. The circuit court denied this motion and instead instructed the jurors that they were to consider Count II "[i]f and ONLY IF you find the Defendant NOT GUILTY as to Count I." Contrary to the circuit court's instruction, the jury returned guilty verdicts on both Counts I and II.

II.

On appeal, Desa argues that the circuit court: 1) erred when it submitted Counts I and II to the jury; 2) plainly erred in failing to give a merger instruction regarding Counts I and II; 3) erred in denying his motion for judgment of acquittal or new trial based on the "inconsistent" jury verdicts on Counts I and II; and 4) erred in merging Count II into Count I after trial without "a lawful foundation." Desa requests that we vacate his convictions and remand for a new trial on all counts.

As explained below, we conclude that Desa was prosecuted and convicted with respect to Count I of a crime that does not exist--methamphetamine trafficking for possessing with intent to distribute less than one-eighth ounce of methamphetamine. Although Desa did not raise this issue as a

^{6/} With respect to the evidence supporting Count I, the State argued that Desa "was clearly in possession of the methamphetamine. It was in his apartment. It was in his possession. He knew where it was. He knew what it was, and he was there to sell it."

ground for his appeal, we conclude that Desa's conviction of a non-existent crime constitutes plain error. Thus, we reverse his conviction on Count I, and remand the case for sentencing on Count II. Desa did not raise any claim of error challenging his convictions and sentences on Counts III and IV, and we therefore affirm the Judgment as to those counts.

III.

A.

Count I charged Desa as follows:

On or about the 9th day of December, 2005, . . . [Desa] did knowingly manufacture, distribute, dispense, or possess, with intent to manufacture, distribute or dispense, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-eighth ounce of methamphetamine thereby committing the offense of Unlawful Methamphetamine Trafficking, in violation of Section 712-1240.6, Hawaii Revised Statutes, as amended.

Although Desa was broadly charged in Count I with the various possible means of committing methamphetamine trafficking, he was prosecuted on the theory that he possessed with intent to distribute the .4 grams of methamphetamine found during the execution of the search warrant.

HRS § 712-1240.6(1) defines unlawful methamphetamine trafficking to encompass manufacturing, distributing, and dispensing methamphetamine as well as possessing with intent to manufacture, distribute, or dispense methamphetamine. However, HRS § 712-1240.6 only punishes possessing with intent to manufacture, distribute, or dispense one-eighth ounce or more of methamphetamine; it does not punish possessing with intent to manufacture, distribute, or dispense less than one-eighth ounce of methamphetamine. HRS §§ 712-1240.6(2) and 712-1240.6(3).

HRS § 712-1240.6(2) provides that "[t]he manufacture, distribution, or dispensing of or possession with intent to manufacture, distribute, or dispense one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more of methamphetamine" is a class A felony. (Emphases added.) HRS § 712-1240.6(3) provides that "[t]he

manufacture, distribution, or dispensing of one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-eighth ounce of methamphetamine" is a class B felony. (Emphases added.) Conspicuously missing from HRS § 712-1240.6(3) is any reference to "possession with intent to manufacture, distribute, or dispense." HRS § 712-1240.6 does not provide for any offense below a class B felony. Thus, under the plain reading of the statute, only the possession of one-eighth ounce or more of methamphetamine can form the basis for a methamphetamine trafficking charge under HRS § 712-1240.6 where such possession is with the intent to manufacture, distribute or dispense. Possession of less than one-eighth ounce of methamphetamine does not provide the basis for a methamphetamine trafficking charge under HRS § 712-1240.6 regardless of the intent with which such methamphetamine was possessed.

Neither the State nor Desa apparently understood that HRS § 712-1240.6 does not make possession of less than one-eighth ounce of methamphetamine a chargeable offense under that statute. The State based its prosecution on Count I on evidence that Desa had possessed with the intent to distribute the .4 grams of methamphetamine recovered during the search. The trial evidence only showed that Desa possessed .4 grams of methamphetamine--far less than one-eighth of an ounce, and the State did not adduce substantial evidence that Desa manufactured, distributed, or dispensed methamphetamine on or about December 9, 2005. We conclude that there was insufficient evidence to support Desa's conviction on Count I and reverse that conviction.

The circuit court merged Count II into Count I before sentencing because it believed that Count II was a lesser included offense of Count I. The record shows that there was ample evidence to support the jury's guilty verdict on Count II, which charged Desa with knowingly possessing methamphetamine, in violation of HRS § 712-1243(1). Because we reverse Count I, we remand the case for sentencing and entry of judgment on Count II. Cf. State v Maddox, 116 Hawai'i 445, 456, 173 P.3d 592, 603 (App.

2007) (holding that remand for entry of judgment on a lesser included offense is an appropriate remedy where there is insufficient evidence to support the verdict on a greater offense but sufficient evidence to support a conviction on a lesser included offense); State v. Mueller, 102 Hawai'i 391, 397, 76 P.3d 943, 949 (2003); State v. Padilla, 114 Hawai'i 507, 517-18, 164 P.3d 765, 775-76 (App. 2007).

B.

We reject Desa's claims that the circuit court committed plain error in failing to give a merger instruction pursuant to HRS § 701-109 (1993) and that the "inconsistent" jury verdicts require invalidating the jury's verdicts on both Counts I and II. HRS § 701-109 permits the State to prosecute multiple offenses arising out of the same conduct; it only prohibits conviction of more than one offense arising out of the same conduct in certain specified circumstances. Padilla, 114 Hawai'i at 517, 164 P.3d at 775. The circuit court's instruction to the jury to consider Count II if and only if it acquitted Desa of Count I adequately addressed any concern over improper multiple convictions.

The jury's failure to heed the circuit court's instruction in finding Desa guilty of both Counts I and II does not warrant invalidating the jury's verdicts on both counts. The jury's guilty verdicts on Counts I and II were not factually inconsistent. See Briones v. State, 74 Haw. 442, 457, 848 P.2d 966, 976 (1993) (noting that the guilty verdicts were inconsistent because they could only have been based on inconsistent and irreconcilable factual findings). Given the way that the case was argued by the State, the jury's verdicts on Counts I and II reflected the logical conclusion that because Desa knowingly possessed methamphetamine with the intent to distribute it, he must have also knowingly possessed the methamphetamine. After the verdicts were returned, the jury was polled and verified that it had found Desa guilty of both Counts I and II. Desa did not raise his claim that the jury's verdicts

were "inconsistent" until after the jury was discharged, and thus, he waived that claim. See United States v. Howard, 507 F.2d 559, 562 (8th Cir. 1974);^{2/} McCoy v. State, 645 S.E.2d 728, 731 (Ga. Ct. App. 2007).

More importantly, the only inference favorable to the defense that can be drawn from the alleged inconsistency in the verdicts is that perhaps the jury intended to find Desa not guilty of Count I. Given the court's instruction, the jury's guilty verdicts on both Counts I and II do not cast any doubt on the validity of the jury's verdict on Count II. Our decision to reverse Count I removes any possible prejudice from the jury's failure to comply with the court's instruction.

IV.

We reverse the March 7, 2007, Judgment of circuit court as to Count I, affirm the Judgment as to Counts III and IV, and remand the case for sentencing and entry of judgment as to Count II.

DATED: Honolulu, Hawai'i, October 29, 2008.

On the briefs:

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^{2/} In Howard, 507 F.2d at 560-61, the court affirmed convictions on the greater charges when jury returned guilty verdicts on both the greater charges and the corresponding lesser included offenses, even though the jury was instructed, just as in Desa's case, only to return verdicts on the lesser included offenses if they found the defendant not guilty of the greater offenses. The court relied on the defendant's failure to object before the jury was discharged and the fact that the jury poll had confirmed the jury's guilty verdicts on the greater charges. Id. at 562-63.