

NO. 28926

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
NICHOLAS KNAUF, IV, aka Nicholas Knauf,
Defendant-Appellant,
and
DAVID L. WOODARD, aka Robert Franklin,
aka Dawn Malufau, and FREDIE TYLER,
aka Freddie Tyler, Jr., Defendants

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APPELLATE COURT

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 06-1-0655)SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Nicholas Knauf, IV, also known as Nicholas Knauf (Knauf) appeals from the December 19, 2007 Judgment of Conviction and Sentence¹ entered in the Circuit Court of the First Circuit (circuit court).²

On April 4, 2006, the State of Hawai'i filed a complaint charging Knauf and David L. Woodard, also known as Dawn Malufau and Robert Franklin (Woodard), with one count each of Promoting a Dangerous Drug in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 712-1243 (Supp. 2007), and Unlawful Use of Drug Paraphernalia in violation of HRS § 329-43.5(a) (1993).³

¹ On January 11, 2008, the circuit court entered an Amended Judgment of Conviction and Sentence which corrected the numbering of the counts of conviction, but did not change the substance of the judgment against Knauf.

² The Honorable Dexter D. Del Rosario presided.

³ A third defendant, Freddie Tyler, also known as Freddie Tyler, Jr. was similarly charged, but the court subsequently granted a motion by the State for a nolle prosequi without prejudice as to those charges.

The charges stemmed from a March 26, 2006 incident on Smith Street in Honolulu. Honolulu police sergeant Albert Somera testified that he was monitoring the area with a video surveillance system when he observed two men, later identified as Knauf and Woodard, smoking from what appeared to be pipes. Sergeant Somera also testified that: (1) Knauf appeared to light his pipe twice, as did Woodard; (2) while other officers were dispatched to the scene, he continued to watch Knauf and Woodard; and (3) when the other officers arrived, Sergeant Somera observed Knauf toss the pipe with his left hand near a pillar. While being cross-examined about a video recording of the incident, Sergeant Somera acknowledged that Knauf tossing the pipe occurred in "a very brief moment . . . you cannot see his left hand, but it was a - it moved very quickly." A pipe was recovered near the pillar and was later found to contain .008 grams of a substance, of which some undetermined amount was cocaine base. Knauf was placed under arrest, and the officer who transported him to the police station testified that Knauf said, "Yes, I smoke crack, but that's not my pipe. I know all the drug dealers in town. If you help me out, I can help you out."

A jury found Knauf and Woodard⁴ guilty on all charges. The circuit court sentenced Knauf to five years of imprisonment with a mandatory minimum of five years for promoting a dangerous drug in the third degree, and five years of imprisonment for unlawful use of drug paraphernalia. The circuit court ordered

⁴ Woodard is not a party to this appeal. One of the officers who arrived at the scene testified that he observed Woodard toss something with his right hand toward Smith Street. Another officer went to that location and recovered a pipe which contained .027 grams of material, some undetermined portion of which was cocaine base.

the sentences to run concurrently, and waived all applicable fees.

Knauf raises the following points of error on appeal:

(1) "The trial court erred when it denied [Knauf]'s Motion for Judgment of Acquittal on the basis of a de minimis offense."

(2) "Insufficient Evidence Exists on the Record to Support [Knauf]'s Convictions."

(3) "The Court's Jury Instruction Was Prejudicial to [Knauf] as it did not Provide an Instruction on a De Minimis Infraction."

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 Knauf's points of error as follows:

(1) The circuit court did not err in denying Knauf's motion for a judgment of acquittal. Knauf contends that his conduct was de minimis because "the total weight of the substance was .008 grams and the weight of the illicit drug cocaine is unknown and was not established by the State[.]" Knauf joined in a pretrial motion to dismiss under HRS § 702-236 (1993) on the grounds that his conduct was de minimis, and the circuit court denied the motion. At trial, Knauf raised the issue again as part of his argument on his motion for a judgment of acquittal, which the circuit court also denied. Knauf appears to contend that the circuit court erred by not dismissing the complaint at

that point.⁵

We review the circuit court's denial of a motion to dismiss under HRS § 702-236 for abuse of discretion, State v. Ornellas, 79 Hawai'i 418, 423, 903 P.2d 723, 728 (App. 1995), and conclude that the court did not abuse its discretion in declining to dismiss the complaint. In evaluating a motion to dismiss under HRS § 702-236, the court must consider both the conduct alleged and the attendant circumstances. State v. Carmichael, 99 Hawai'i 75, 80, 53 P.3d 214, 219 (2002) (plurality opinion); cf. State v. Viernes, 92 Hawai'i 130, 135, 988 P.2d 195, 200 (1999). Sergeant Somera testified that Knauf appeared to light the pipe twice during the course of the incident, and that users of crack cocaine "light the crack cocaine and inhale the fumes or the vapors. . . . You inhale while the crack cocaine is being lit." These attendant circumstances support the reasonable inference that Knauf was engaging in precisely the conduct that is prohibited by HRS §§ 712-1243 and 329-43.5, and that he was doing so to an extent that could not be considered de minimis.

(2) Considering the evidence in the light most favorable to the State of Hawai'i, State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998), we conclude that there was substantial evidence supporting Knauf's convictions. Sergeant Somera's observations of the incident, together with the recovery of the pipe, the presence of cocaine base in the pipe, and

⁵ Knauf did not identify the denial of his pretrial motion to dismiss as a point of error, and accordingly we need not consider it. Hawai'i Rules of Appellate Procedure Rule 28(b)(4). In any event, we conclude that the circuit court did not abuse its discretion by denying the pretrial motion to dismiss, for the reasons set forth above with regard to the motion for a judgment of acquittal made at trial.

Knauf's statements to the police officer on the way to the police station, provide sufficient evidentiary support.

(3) The circuit court did not err by failing to instruct the jury with regard to a de minimis infraction. The determination of whether to dismiss a charge under HRS § 702-236 is for the court, not the jury, to decide. Ornellas, 79 Hawai'i at 423, 903 P.2d at 728; Viernes, 92 Hawai'i at 133, 988 P.2d at 198. The circuit court's comments in ruling on Knauf's motion for a judgment of acquittal do not appear, as Knauf suggests, to reflect a belief by the court that the de minimis issue was a jury question. Rather, the circuit court was responding to the factual arguments made by Knauf's counsel in the context in which they were made, i.e., a motion for a judgment of acquittal.

Accordingly, the December 19, 2007 Judgment of Conviction and Sentence entered in the Circuit Court of the First Circuit, as amended by the January 11, 2008 Amended Judgment of Conviction and Sentence, is hereby affirmed.

DATED: Honolulu, Hawai'i, January 23, 2009.

On the briefs:

Emmanuel G. Guerrero
for Defendant-Appellant.

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

Man L. E. Redtenbacher

Chief Judge

Corinne K. A. Watanabe

Associate Judge

Daniel R. Foley

Associate Judge