

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29113

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

STATE OF HAWAI'I, Plaintiff-Appellee,
vs.
BENJAMIN RIVERA, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 07-1-0112)

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SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Benjamin Rivera, Jr., (Rivera) appeals from the Judgment entered on January 3, 2008, by the Circuit Court of the First Circuit (circuit court).^{1/} After a jury trial, Rivera was found guilty of second-degree methamphetamine trafficking, in violation of Hawaii Revised Statutes (HRS) § 712-1240.8 (Supp. 2008).^{2/} The circuit court sentenced Rivera to ten years of imprisonment, with a mandatory minimum term of one year.

On appeal, Rivera contends that: 1) the circuit court erred in failing to properly instruct the jury on the procuring agent defense; and 2) there was insufficient evidence to sustain his conviction.^{3/} We affirm.

^{1/} The Honorable Richard K. Perkins presided.

^{2/} HRS § 712-1240.8 provides in relevant part:

(1) A person commits the offense of methamphetamine trafficking in the second degree if the person knowingly distributes methamphetamine in any amount.

HRS § 712-1240 (1993) provides that the term "'[t]o distribute' means to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same."

^{3/} Due to a miscalculation by trial counsel, Rivera's notice of appeal was not timely filed. However, the appellate courts have overlooked such error in similar circumstances, and thus we will proceed to address the merits of Rivera's appeal. See State v. Irvine, 88 Hawai'i 404, 407, 967 P.2d 236, 239 (1998); State v. Knight, 80 Hawai'i 318, 323, 909 P.2d 1133, 1138 (1996).

II.

A.

At trial, the circuit court instructed the jury on the procuring agent defense as follows:

A buyer or an agent of a buyer of an illicit drug cannot be found guilty of distributing the drug because the act of "buying" falls outside the definition of "to distribute." Accordingly, it is a defense to both Methamphetamine Trafficking in the Second Degree and Imitation Controlled Substance that the defendant acted exclusively as a procuring agent for the buyer and not as, or on behalf of, the seller.

The burden is on the prosecution to prove beyond a reasonable doubt that the defendant acted, not exclusively as a procuring agent for the buyer, but as, or on behalf of, the seller. If the prosecution does not meet its burden, then you must find the defendant not guilty.

(Emphasis added).^{4/}

On appeal, Rivera contends that the use of the term "exclusively" rendered this instruction defective because the use of that term could have misled the jury into believing that the defense "was limited to one agent" and applicable only to Jolo, and not to Rivera, "based on [the defense's] exclusive nature." In other words, the instruction could have misled the jury into believing that the procuring agent defense only applied if Rivera was acting "solely at Officer Usis's request, rather than at the behest of Officer Usis and Jolo." We disagree.

The circuit court's instruction was an accurate formulation of the procuring agent defense as articulated by the Hawai'i Supreme Court. The supreme court has described the defense as follows: "[U]nder the procuring agent defense, one who acts merely as a procuring agent for the buyer is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable." State v. Davalos, 113 Hawai'i 385, 387, 153 P.3d 456, 458 (2007) (internal quotation marks omitted) (quoting State v. Balanza, 93 Hawai'i

^{4/} The quoted material is from the written instructions provided to the jury. The transcript of the circuit court's oral instructions contains minor differences in punctuation.

sufficient evidence from which a reasonable jury could have found that Rivera was, at minimum, acting on behalf of the seller Ernesto.

III.

We affirm the January 3, 2008, Judgment entered by the circuit court.

DATED: Honolulu, Hawai'i, April 28, 2009.

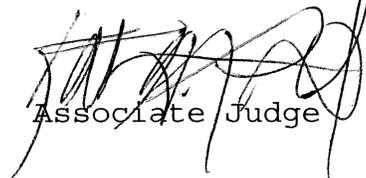
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Presiding Judge


Associate Judge


Associate Judge