

NO. 22761

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

STATE OF HAWAII, Plaintiff-Appellee, v.
KERMIT RYDELL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(TAG NO. 37489 LNR)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Kermit Rydell (Rydell) appeals, *pro se*, the April 20, 1999 judgment of the district court of the first circuit and the court's June 22, 1999 denial of his motion for new trial.¹ On appeal, Rydell contends, *inter alia*, that he did not waive his right to counsel. We agree. The record in this case fails to establish that Rydell knowingly and intelligently waived his right to counsel. "Since the right to counsel is fundamental in our judicial system, where a defendant elects to appear *pro se*, the record must indicate that he was offered counsel but that he voluntarily, knowingly, and intelligently rejected the offer and waived that right." State v. Dickson, 4 Haw. App. 614, 619, 673 P.2d 1036, 1041 (1983)

^{1/} The Honorable Barbara P. Richardson presided over Defendant-Appellant Kermit Rydell's (Rydell) bench trial and his motion for new trial.

(citations omitted). Accordingly, we vacate the judgment of the district court and remand for a new trial.

I. Background.

On September 24, 1997, a State Department of Land and Natural Resources enforcement officer issued a citation to Rydell, charging him with a failure to obey boating rules of the road, in violation of Hawaii Administrative Rules (HAR) § 13-244-2 (1994).² Before the bench trial started, Rydell was

^{2/} Hawaii Administrative Rules (HAR) Rule 13-244-2(a) (1994) provides that "[p]ersons operating vessels on inland waters shall comply with the U.S. Coast Guard Navigation Rules, . . . which by reference are incorporated in this chapter."

Rydell was cited with violating Rules 2,6 and 7 of the United States Coast Guard Navigation Rules. Rule 2 provides:

Responsibility

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

Rule 6 provides, in essential part:

Safe Speed

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

(continued...)

orally charged as follows:

[Prosecutor]: On or about the 26th (twenty sixth) day of July, 1997, in the City and County of Honolulu, State of Hawaii, [Rydell] did fail to obey the rules of the road while operating a vessel on inland waters by failing to proceed at a safe speed in noncompliance with U.S. Coast Guard Navigation Rules, thereby vio -- thereby committing the offense of Failure to Obey Rules of the Road in violation of Section 13-244-2, small a in parenthesis, of the [HAR].

The citation was issued after a boating accident in which Rydell's sailboat ran into a catamaran in the Ke'ehi Small Boat Harbor.

On March 24, 1999, Rydell appeared for trial with his court-appointed attorney. The attorney, Randall I. Shintani (Shintani), informed the court that Rydell wished to proceed *pro se*, but with Shintani as standby counsel.³ After the colloquy

^{2/}(...continued)

Rule 7 provides, in essential part:

Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

^{3/} Originally, Rydell proceeded *pro se*. He was then represented by the Office of the Public Defender. Due to a "conflict of interest," the court on July 17, 1998 appointed new counsel. The court appointed Emmanuel G. Guerrero (Guerrero). On October 15, 1998, Rydell moved to have Guerrero withdraw as counsel due to "irreconcilable differences" and a resulting discharge of counsel. The court granted the motion and appointed Randall I. Shintani (Shintani) as counsel for Rydell. On November 12, 1998, Rydell moved the court to allow Shintani to withdraw as counsel and for appointment of new counsel. According to Shintani's declaration, the motion was brought because "there are certain defenses which [Rydell] wishes to present which Declarant

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that follows, the court allowed Rydell to proceed *pro se*, but denied his request for standby counsel.

THE COURT: Okay. All right. [Rydell], this is your -- your option. You can either have -- you can -- if you no longer want the services of [Shintani], that's your prerogative. You -- you can go *pro se*, in which case the Court is gonna' dismiss [Shintani]. However, if you -- if you want to go *pro se*, but have him here as your counsel, then the Court doesn't understand what your -- what the reason is for your motion to have him with -- relieved of his duties to defend you.

[RYDELL]: My understanding, Your Honor, is that under the court rules in a case like this, if I'm going to proceed *pro se*, that an attorney can stand by to -- to advise me on terms of Rules of the Court or matters in law not dealing with representation.

THE COURT: Well, this is [Shintani's] time that we're talking about. You are -- have been given counsel.

[RYDELL]: Okay.

THE COURT: You don't want his counsel.

[RYDELL]: Your Honor, we . . .

THE COURT: If you either want his counsel or you don't want his counsel.

[RYDELL]: I don't want his counsel.

^{3/}(...continued)

is not experienced with[.]” At that time, Rydell sought to present the defense of diplomatic immunity pursuant to an alleged treaty between a purported “Kingdom of Enenkio Atoll” (apparently, Wake Atoll), which Rydell claimed to represent as “State Secretary,” and a purported “Kingdom of Hawaii.” The court denied the request. Hence, Rydell’s motion to proceed *pro se* with standby counsel, made at the March 24, 1999 bench trial, was his second motion involving Shintani.

THE COURT: Okay.

[RYDELL]: We have -- there's nothing personal against -- against [Shintani] or -- or . . .

THE COURT: Then, the Court is going to relieve [Shintani] of his duties because the Court is paying -- or the Public Defender's Office is paying for his services.

[RYDELL]: I understand.

THE COURT: So, if you do not want his services, the Court is not gonna' have him stay here and accumulate hours that are gonna' be charged to the Public Defender's Office. Okay. So, is that what you want to do? You want to relieve him of his duties to . . .

[RYDELL]: I want to proceed pro se, ma'am.

THE COURT: Pro se.

[RYDELL]: Yes ma'am.

THE COURT: All right. Thank you, Mr. Tani -- [Shintani] then.

For the balance of the trial, Rydell proceeded *pro se*. On the third day of the trial, April 20, 1999, the court found Rydell guilty as charged and fined him \$250.00. The judgment was entered at the same time.

On May 11, 1999, Rydell filed an untimely motion for new trial and appointment of counsel. At a hearing held on June 22, 1999, the court denied the motion on the merits.⁴

On July 15, 1999, Rydell filed a notice of appeal from the April 20, 1999 judgment⁵ and the June 22, 1999 denial of his motion for new trial.

^{4/} Hawai'i Rules of Penal Procedure (HRPP) Rule 33 (1999) provides that "[a] motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period. The finding of guilty may be entered in writing or orally on the record." Rydell's motion for new trial was filed eleven days after the deadline. The court was without jurisdiction to hear Rydell's HRPP Rule 33 motion. State v. Meafou, 67 Haw. 41, 45, 677 P.2d 459, 462 (1984).

^{5/} Rydell's July 15, 1999 notice of appeal from the April 20, 1999 judgment was untimely. Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b) (1999) ("In a criminal case, . . . the notice of appeal by a defendant shall be filed in the . . . district court within 30 days after the entry of the judgment or order appealed from."). The filing of his motion for new trial did not toll the thirty-day deadline for appeal of the court's judgment, because his May 11, 1999 motion for new trial was untimely under HRPP Rule 33 ("A motion for new trial shall be made within 10 days after verdict or finding of guilty"). HRAP Rule 4(b) provides, in pertinent part:

If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 30 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.

However, "[t]his court and the Hawai'i Supreme Court have seen fit in criminal cases to relax the deadline for filing a notice of appeal where justice so warrants." State v. Ahlo, 79 Hawai'i 385, 392, 903 P.2d 690, 697 (App. 1995) (internal quotation marks and citations omitted) (in a case in which the deadline to appeal the trial court's judgment passed while the defendant's trial counsel was in the process of moving the court to withdraw as counsel). In the especial light of the basis for our disposition of this case, infra, justice requires that we overlook Rydell's dereliction. To do otherwise would "lead to harsh and unjust results." Id.

II. Discussion.

A. *Rydell did not knowingly and intelligently waive his right to counsel.*

"In Hawai'i, . . . an indigent defendant charged with a crime for which imprisonment is authorized⁶ has a right to the services of the public defender or court-appointed counsel. Article I, § 14, Hawai'i State Constitution; HRS § 802-1 (1993)." State v. Char, 80 Hawai'i 262, 267-68, 909 P.2d 590, 595-96 (App. 1995) (citation and original footnote omitted; footnotes added). Accordingly, "[c]ourts are most solicitous to assure an accused adequate legal representation and guardingly indulge in a strong presumption against waiver of this fundamental right." Wong v. Among, 52 Haw. 420, 424, 477 P.2d 630, 633 (1970) (citation omitted).

"The trial court is initially charged with the function of assuring that the defendant's waiver of counsel is made knowingly and intelligently and that the record is complete so as to reflect that waiver." Dickson, 4 Haw. App. at 619, 673 P.2d at 1041 (citations omitted). Whether a trial court fulfilled this function is a question reviewed "under the de novo, or

^{6/} HAR Rule 13-242-13 (1994) provides that "[p]ursuant to section 200-25, Hawaii Revised Statutes (HRS), any person violating any of these rules, shall be fined not more than \$1,000 or imprisoned not more than one year or both[.]"

HRS § 200-25 (1993) was amended effective June 16, 1997, 1997 Haw. Sess. L. Act 204, § 2 at 394, and provides, in relevant part, that, "[a]ny person violating this part, or any rule adopted pursuant to this part, shall be fined not less than \$50 and not more than \$1,000 or sentenced to a term of imprisonment of not more than thirty days, or both, for each violation[.]" HRS § 200-25 (Supp. 2000).

right/wrong standard." State v. Dowler, 80 Hawai'i 246, 250, 909 P.2d 574, 578 (App. 1995) (citation omitted). Certain guidelines govern the trial court's fulfillment of that function:

In *State v. Dickson*, 4 Haw. App. 614, 619, 673 P.2d 1036, 1041 (1983), this court set forth a comprehensive set of guidelines which a trial court should follow to ensure that a defendant who elects to proceed *pro se* at trial has voluntarily, knowingly, and intelligently waived his or her right to the assistance of counsel at trial:

The trial court should first examine the particular facts and circumstances relating to the defendant, such as the defendant's age, education, mental capacity, background and experience, and his [or her] conduct at the time of the alleged waiver. This is necessary to allow the trial court to determine the level and depth to which its explanation and inquiry must extend.

Secondly, in order to fully assure that the defendant is informed of the risks of self-representation, the trial court should make him [or her] aware of the nature of the charge, the elements of the offense, the pleas and defenses available, the punishments which may be imposed, and all other facts essential to a broad understanding of the whole matter.

Finally, the trial court should inform the defendant: of his [or her] right to counsel, whether private or appointed . . . ; that self-representation is detrimental to himself [or herself]; that he [or she] will be required to follow all technical rules and substantive, procedural, and evidentiary law; that the prosecution will be represented by able counsel; that a disruption of the trial could lead to vacation of the right to self-representation; and that if voluntary self-representation occurs, the defendant

may not afterward claim that he [or she] had inadequate representation.

Dowler, 80 Hawai'i at 250-251, 909 P.2d at 578-79 (App. 1995) (internal quotation marks and citation omitted; brackets and ellipsis in the original). See also Char, 80 Hawai'i at 268, 909 P.2d at 596 (before a criminal defendant may be deemed to have waived the right to counsel by conduct (in Char, the rejection of four court-appointed counsel), the Dickson requirements must be satisfied).

In this case, the record reveals that the court did not follow the foregoing guidelines before allowing Rydell to proceed *pro se*. There was no inquiry into Rydell's background, no explanation of the legal circumstances surrounding the case necessary to a broad understanding of the whole matter, no mention of the ramifications of the rejection of counsel, and no determination that Rydell clearly understood his right to counsel but knowingly and intelligently waived it.

B. The court's error requires reversal.

The "lack of defense counsel" is a "structural error[]" that is "held never harmless" and is grounds for reversal *per se*. State v. Suka, 79 Hawai'i 293, 298-99, 901 P.2d 1272, 1277-78 (App. 1995) (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991), overruled on other grounds, State v. Holbron, 80 Hawai'i 27, 32 n.12, 904 P.2d 912, 917, n.12 (1995)). But see Dickson, 4 Haw. App. at 623, 673 P.2d at 1043 (holding, before

Fulminante, supra, was decided, that "a trial court's failure to adequately warn a defendant of the dangers and disadvantages of self-representation" is "presumed to be prejudicial" unless the State "rebut[s] that presumption and prove[s] that the error was harmless beyond a reasonable doubt" (citations omitted)). At any rate, we observe from a review of the record of the bench trial that Rydell was severely hampered in defending himself and presenting his case *pro se*. For just one of numerous examples, Rydell could not present several of his defense witnesses at trial because of a lack of knowledge about how to go about establishing the relevancy of their testimonies. We therefore cannot say that his lack of counsel was harmless beyond a reasonable doubt.

III. Conclusion.

Accordingly, we vacate the April 20, 1999 judgment and remand for a new trial consistent with this opinion. In light of our disposition of this case, we do not reach Rydell's other points of error on appeal. We instruct the trial court on remand

to first hear and decide all of Rydell's pretrial motions not previously decided on the record.

DATED: Honolulu, Hawaii, September 24, 2001.

On the briefs:

Kermit Rydell,
defendant-appellant, pro se.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
plaintiff-appellee.

Associate Judge

Associate Judge