

NOT FOR PUBLICATION

NO. 25940

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RICKY LEALAITAFEFA, Defendant-Appellant, and
PATRICK UFIUFI, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2340)

SUMMARY DISPOSITION ORDER

(By: Lim, Acting C.J., Foley and Nakamura, JJ.)

Ricky Lealaitafea (Defendant) appeals the June 4, 2003 judgment of conviction and sentence entered by the circuit court of the first circuit, the Honorable Richard K. Perkins, judge presiding.

After a searching review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Defendant's two points of error on appeal as follows:

1. Defendant first contends he received ineffective assistance on account of his trial counsel's refusal to call a certain witness. We disagree. Well-pedigreed precedent here provides that "the decision whether to call witnesses in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by judicial hindsight." State v. Aplaca, 74 Haw. 54, 70, 837 P.2d 1298, 1307 (1992) (brackets, citations and internal

quotation marks omitted). And where, as here, trial counsel's "actions or omissions alleged to be error . . . had an obvious tactical basis for *benefitting* the defendant's case[,] " her actions or omissions "will not be subject to further scrutiny." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (citation and block quote format omitted; emphasis in the original). We observe, in this regard, that trial counsel exploited the witness's absence from trial in her closing argument. Furthermore, we take a jaundiced view of Defendant's "uncorroborated, aspirational assertions[,] " both here and below, "that amount to mere speculation" about how the witness would have testified, State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32, 51 (1997), in light of the rule that, "Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) (citations omitted). Hence, Defendant fails to demonstrate "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Aplaca, 74 Haw. at 67, 837 P.2d at 1305 (citations and footnote omitted).

2. Citing Brady v. Maryland, 373 U.S. 83 (1963), Defendant avers the court erred in denying his oral motion to

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dismiss, which was based on the State's alleged suppression of evidence of the complaining witness's drug dealing and consequent welfare fraud. "However, in order to establish a Brady violation, an appellant must make a showing that the suppressed evidence would create a reasonable doubt about the Appellant's guilt that would not otherwise exist." State v. Jenkins, 93 Hawai'i 87, 104, 997 P.2d 13, 30 (2000) (brackets, citation and internal quotation marks omitted). Here, the complaining witness admitted her misconduct under lengthy and detailed cross-examination. Thereupon, Defendant's trial counsel argued the issue to the jury, vehemently and at length, in order to impeach the complaining witness. The purportedly suppressed evidence was thus salient before the jury, which nevertheless found Defendant guilty beyond a reasonable doubt. The proof being in the pudding, it cannot be said "that the suppressed evidence would create a reasonable doubt about Appellant's guilt that would not otherwise exist." Id. (brackets, citation and internal quotation marks omitted). At any rate, Defendant does not on appeal, and did not below, offer any support for his assertion that the State suppressed the evidence -- indeed, that the State even knew about the evidence in the first place. Cf. id. at 104-5, 997 P.2d at 30-31 ("where the state destroys evidence that has only a potential exculpatory value, due process is not offended unless the defendant can demonstrate that the state acted in bad faith" (brackets, citation and internal quotation marks omitted)).

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Therefore,

IT IS HEREBY ORDERED that the court's June 4, 2003 judgment is affirmed.

DATED: Honolulu, Hawai'i, December 10, 2004.

On the briefs:

Michael G.M. Ostendorp
and Shawn A. Luiz (Law
Office of Michael G.M. Ostendorp),
for defendant-appellant.

Acting Chief Judge

Associate Judge

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge