

NOS. 26354 & 26498

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WARREN K. ELICKER, Defendant-Appellant,
and
ALBERT R. BATALONA and DAVID K. SCRIVNER, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-0787)

SUMMARY DISPOSITION ORDER

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

In this consolidated appeal, Defendant-Appellant Warren K. Elicker (Elicker) appeals from the Judgment filed on January 9, 2004 (No. 26354) and the Amended Judgment filed on March 9, 2004 (No. 26498) in the Circuit Court of the First Circuit (circuit court).^{1/} A jury found Elicker guilty, as charged, of Count II of the Indictment, Escape in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 710-1021 (1993).

The circuit court sentenced Elicker, a repeat offender, to five years of imprisonment, which the court extended to ten years of imprisonment, and ordered that the sentence be served consecutively to any sentence(s) Elicker was then serving. Judgment was filed on January 9, 2004. Elicker appealed from the Judgment on January 22, 2004.

^{1/} The Honorable Marie N. Milks presided.

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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After a hearing on the restitution issue, the circuit court ordered that Elicker pay a free-standing order of restitution in the amount of one-third of \$9,448, "jointly and severally with co-defendants (with [Elicker's] share to be \$3,149.33)" and a fine of \$10,000. The circuit court ordered Elicker to pay the restitution and fine "at the rate of no less than \$1.00 per month, if employed. Should [Elicker] gain the ability to pay, then payments to be made at the rate of 10% of [Elicker's] expendable income (income minus expenses)." An Amended Judgment was filed on March 9, 2004, and Elicker appealed from the Amended Judgment on April 7, 2004.

Elicker's two appeals were consolidated on August 6, 2004.

On appeal, Elicker argues it was reversible error for the circuit court to deny his Motion for Change of Venue because of the pretrial publicity associated with the escape, especially concerning his co-defendant, Albert R. Batalona (Batalona). Because the circuit court excused many jurors who had been tainted by news accounts of Elicker's escape from Halawa Correctional Facility (HCF), along with fellow HCF prisoners Batalona and David K. Scrivner, Elicker contends he was unable to draw a fairer cross-section of the community and, thus, was deprived of his right to a fair trial. Elicker asserts that only two of at least one-hundred and fifty potential jurors did not

hear about the case through some exposure to the media; hence, the publicity was so pervasive, there was no way for the jurors in his trial to render a decision solely on the evidence presented.

Next, Elicker contends it was reversible error for the circuit court to deny his Motion for Severance of Defendants. He was prejudiced, he argues, by being tried jointly with Batalona, who was infamous for committing a series of bank robberies just three years prior to their escape. Due to the notoriety Batalona had garnered from his earlier crimes, Elicker posits, the joinder of Elicker's case with Batalona's created more pretrial publicity of Elicker's alleged crime and pending trial. In addition, Elicker contends, the joint trial allowed for the admission of evidence damaging to him that would not have been admissible had he been tried separately. Elicker contends the joinder prejudiced him since Batalona was tried for robbery, whereas Elicker was tried for mere escape.

Lastly, Elicker maintains the circuit court abused its discretion in sentencing him to an enhanced prison term, restitution, and fine because (1) the enhanced prison term was not decided by a jury, (2) the State was not a victim entitled to receive restitution, and (3) Elicker was indigent and, therefore, unable to pay either restitution or a fine.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) The circuit court did not err in denying the Motion for Change of Venue because the court (a) found that there was not a barrage of inflammatory publicity immediately prior to trial amounting to a huge wave of public passion, (b) found that the media accounts were primarily factual, and (c) conducted a thorough-going examination of jurors who had been exposed to negative publicity. State v. Pauline, 100 Hawai'i 356, 365-69, 60 P.3d 306, 315-19 (2002).

(2) The circuit court did not err in denying Elicker's Motion for Severance of Defendants because (a) there was no evidence as to inconsistent defenses between Elicker and Batalona warranting a severance of their trials, (b) the record on appeal does not reflect that Elicker was prevented from introducing evidence that would have been admissible in a separate trial for him not involving Batalona, and (c) the circuit court did not admit evidence damaging to Elicker that would not have been inadmissible in a separate trial for Elicker. State v. Timas, 82 Hawai'i 499, 511-12, 923 P.2d 916, 928-29 (App. 1996).

Furthermore, with regard to this last sub-point, the circuit court instructed the jury to

give separate consideration to the evidence applicable to each defendant. Each defendant is entitled to your separate consideration. You must return a separate verdict for each defendant.

Jurors are presumed to follow the instructions issued by the court. State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996).

(3) Given the Hawai'i Supreme Court's decision in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004), notwithstanding the decision of the United States Court of Appeals for the Ninth Circuit in Kaua v. Frank, No. 05-15059, 2006 WL 51178, at *2 (9th Cir. Jan. 11, 2006), on this point, the circuit court did not abuse its discretion in sentencing Elicker to an extended term as a multiple offender after the court determined that an extended term was necessary for the protection of the public. State v. Simeona, 10 Haw. App. 220, 237, 864 P.2d 1109, 1117 (1993) (this court is not required to follow a decision of the Ninth Circuit).

(4) An application of HRS § 706-646 (Supp. 2005) to the facts in the instant case reveals that the State was a direct victim of Elicker's crime in that prison cells and other areas of HCF were damaged in the course of his escape from HCF. Therefore, the circuit court was not statutorily barred from ordering restitution to the State for repairs.

(5) The circuit court erred by not entering "findings and conclusions specifically illustrating" that Elicker could afford to pay restitution of \$3,149.33, State v. Werner, 93 Hawai'i 290, 297, 1 P.3d at 760, 767 (App. 2000), and a fine of

\$10,000, HRS § 706-641(3) & (4) (1993). Therefore, we vacate the circuit court's restitution order and fine.

Therefore,

We vacate that part of the March 9, 2004 Amended Judgment ordering Elicker to pay restitution of \$3,149.33 and a fine of \$10,000, and affirm the remainder of the Amended Judgment. We remand this case to the Circuit Court of the First Circuit for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, March 6, 2006.

On the briefs:

Shawn A. Luiz
for Defendant-Appellant.

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge