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NO. 27016

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WILLIAM DUTRO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 03-1-0384(2))

NORRHA T. YARA
 CLERK, APPELLATE COURTS
 STATE OF HAWAI'I

2006 MAY 17 AM 9:14

FILED

SUMMARY DISPOSITION ORDER

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

In this cockfighting case, William Dutro III (Defendant) appeals the December 14, 2004 judgment of the Circuit Court of the Second Circuit (circuit court)¹ that convicted him, upon a jury's verdict and as charged, of racketeering (count one), promoting gambling in the first degree (count ten) and cruelty to animals (count eleven). Defendant also contests the December 9, 2004 order that denied the July 23, 2004 motion for new trial he filed claiming ineffective assistance of counsel.

After a meticulous 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 points of error on appeal as follows:

1. Defendant challenges, in various ways but for the first time on appeal, the sufficiency of the charges in the indictment. This point lacks merit, because Defendant cannot "show prejudice or that the indictment cannot within reason be

¹ The Honorable Shackley F. Raffetto presided.

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construed to charge [the] crime[s]." State v. Motta, 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983).

2. Defendant challenges the sufficiency of the evidence before the grand jury. However, "'absent unusual circumstances, any defects in a pretrial determination of probable cause are rendered moot, or are without any effective remedy, which is much the same thing, by a subsequent conviction[.]'" State v. Montgomery, 103 Hawai'i 373, 381, 82 P.3d 818, 826 (App. 2003) (quoting In re Doe, 102 Hawai'i 75, 78, 73 P.3d 29, 32 (2003)).

3. Defendant argues that the circuit court abused its discretion in denying his motion for new trial. See State v. Aplaca, 96 Hawai'i 17, 21, 25 P.3d 792, 796 (2001). We agree. Defendant's trial counsel rendered ineffective assistance because, either

(a) trial counsel failed to investigate a number of defense witnesses, an "error[] or omission[] reflecting counsel's lack of skill, judgment, or diligence[,]" which "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense" that those witnesses could have provided. State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992) (footnote and citations omitted); or

(b) trial counsel's joint representation of co-defendants was "a relationship giving rise to a conflict of interest . . . between defense counsel and [his] clients;

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and . . . the relationship adversely affected defense counsel's performance," State v. Richie, 88 Hawai'i 19, 44, 960 P.2d 1227, 1252 (1998); or

(c) trial counsel's joint representation of co-defendants was "a relationship giving rise to a conflict of interest . . . between defense counsel and [his] clients; and . . . the client did not consent to the relationship[,]" id.; or

(d) all or a combination of the foregoing reasons. Accordingly, we must vacate the judgment and remand, Aplaca, 74 Haw. at 73, 837 P.2d at 1308 ("finding of ineffective assistance of counsel mandates reversal [sic] of defendant's conviction" (citation omitted)), if there was sufficient evidence adduced at trial to support the convictions. State v. Malufau, 80 Hawai'i 126, 132, 906 P.2d 612, 618 (1995) ("challenges to the sufficiency of the evidence must always be decided on appeal").

4. Defendant contends the circuit court erred in denying his oral and written motions for judgment of acquittal because (1) there was insufficient evidence to support his convictions; (2) he was improperly convicted of racketeering in addition to promoting gambling in the first degree and cruelty to animals, citing Hawaii Revised Statutes (HRS) § 701-109(1)(d) (1993); and (3) his actions were *de minimis*, citing HRS § 702-236 (1993). We disagree, because

(a) there was substantial, and therefore

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sufficient evidence, State v. Ildefonso, 72 Haw. 573, 576-77, 827 P.2d 648, 651 (1992); State v. Tamura, 63 Haw. 636, 637-38, 633 P.2d 1115, 1117 (1981), to support Defendant's convictions for racketeering, HRS § 842-2(3) (1993); State v. Ontai, 84 Hawai'i 56, 62, 929 P.2d 69, 75 (1996); cf. State v. Bates, 84 Hawai'i 211, 213-14, 224-26, 933 P.2d 48, 50-51, 61-63 (1997) (racketeering conviction upheld for collection of an unlawful debt for an ongoing sports betting operation) with State v. Martin, 103 Hawai'i 68, 74-76, 79 P.3d 686, 692-94 (App. 2003) (racketeering conviction reversed where there was no evidence of an enterprise apart from the single act of extortion), for promoting gambling in the first degree, HRS § 712-1221(1)(a) (1993); HRS § 705-500 (1993), and for cruelty to animals, HRS § 711-1109(1) (Supp. 2005); HRS § 705-500;

(b) it is not the case that "[t]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct[,]" HRS § 701-109(1)(d); and

(c) Defendant's actions were precisely the kind of conduct envisaged by the legislature in defining the offenses. HRS § 702-236; Bates, 84 Hawai'i at 224, 933 P.2d at 61 ("the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise" (citations and block quote format omitted)); HRS

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§ 705-500.

Therefore,

IT IS HEREBY ORDERED that the circuit court's December 14, 2004 judgment is vacated, its December 9, 2004 order denying Defendant's motion for new trial is reversed, and the cause is remanded for a new trial.

DATED: Honolulu, Hawai'i, May 17, 2006.

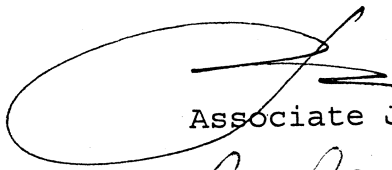
On the briefs:

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Artemio C. Baxa,
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County of Maui,
for Plaintiff-Appellee.

Corinne KA Wataxalu

Acting Chief Judge


Associate Judge

Clare R. Foley
Associate Judge