

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26865

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
SYDNEY T. KIDO, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-0265)

SUMMARY DISPOSITION ORDER

(By: Burns, Chief Judge, Watanabe, and Nakamura, JJ.)

Defendant-Appellant Sydney T. Kido (Kido) was retried after his convictions were vacated on appeal. On retrial,¹ the jury again found Kido guilty as charged of Promoting a Dangerous Drug in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 1996) (Count 1), and Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993) (Count 2). The Circuit Court of the First Circuit (circuit court) sentenced Kido to five years' imprisonment on each of Counts 1 and 2 to be served concurrently with each other and with any other sentence Kido was serving. Kido appeals from the circuit court's Judgment entered on September 22, 2004.

On appeal, Kido argues that the circuit court abused its discretion by: 1) unduly restricting Kido's voir dire examination of prospective jurors, in violation of his right to a fair and impartial jury; and 2) refusing to allow Kido to impeach

¹ The Honorable Lono J. Lee presided.

witnesses with their prior inconsistent statements from Kido's first trial, in violation of his confrontation clause rights under the United States and Hawai'i Constitutions. Kido further contends that because his convictions have already once been vacated on appeal after his first trial, this court should invoke its inherent power to administer justice and dismiss the case with prejudice based on the errors committed during the second trial, instead of vacating the convictions and remanding for a third trial.

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

1. We reject Kido's argument that the restrictions placed by the circuit court on Kido's voir dire questions to the prospective jurors violated his right to a fair and impartial jury. Kido contends that the court committed prejudicial error in preventing him from: a) using examples drawn from unrelated offenses to illustrate the concepts of elements and states of mind and how the burden of proof applies to them; and b) proffering that Kido was homeless during questions designed to ferret out any bias against the homeless. The circuit court's rulings did not foreclose Kido from asking alternate questions or rephrasing the existing questions to elicit the desired information. In any event, there was no showing that the circuit court's rulings in restricting Kido's voir dire questions substantially prejudiced Kido's right to a fair and impartial jury. See State v. Altergott, 57 Haw. 492, 499-500, 559 P.2d

728, 734 (1977) ("[A]bsent abuse of his broad discretion, and a showing that the rights of the accused have been substantially prejudiced thereby, the trial judge's rulings as to the scope and content of voir dire will not be disturbed on appeal." (quoting United States v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973) (alteration in original)); State v. Churchill, 4 Haw. App. 276, 279-81, 664 P.2d 757, 760-61 (1983).

2. The circuit court precluded both the prosecution and Kido from using the witnesses' testimony at the first trial to impeach the witnesses during the retrial. The court's ruling was apparently based on concerns that the jury's learning of the prior trial might cause the jury to speculate on the need for the retrial and result in prejudice. The court's concerns could have been addressed by means short of a blanket prohibition against the use of the witnesses' prior trial testimony for impeachment. We conclude that the circuit court erred in imposing a blanket rule prohibiting Kido from using testimony from the prior trial to impeach the prosecution's witnesses. See Hawaii Rules of Evidence (HRE) Rules 607 and 613 (1993); U.S. v. Smith, 776 F.2d 892, 897-98 (10th Cir. 1985); Finney v. State, 385 N.E.2d 477, 481 (Ind. Ct. App. 1979).

Nevertheless, we further conclude that the circuit court's error was harmless beyond a reasonable doubt under the circumstances of this case. Kido contends that the circuit court's ruling precluded him from impeaching Honolulu Police Department (HPD) Officers Russell Pereira and Jeffrey Nagai at

the retrial by showing that they had testified differently at the first trial on several matters. However, our review of the record shows that the alleged inconsistencies proffered by Kido either did not exist or involved minor, inconsequential differences on collateral matters. We therefore conclude that even though the circuit court erred in imposing a blanket rule prohibiting Kido from using the officers' prior trial testimony to impeach them, there was no reasonable possibility that such error might have contributed to Kido's convictions. See State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999).

IT IS HEREBY ORDERED that the September 22, 2004, Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 2, 2006.

On the briefs:

Mary Ann Barnard
for Defendant-Appellant

Donn Fudo
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee

James A. Burns
Chief Judge

Bruce K.A. Watahala
Associate Judge

Craig H. Nakamura
Associate Judge