

NO. 26912

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
SOLOMON K. TAMPON, aka SOLOMON K. KALUA,
aka SOLOMON K. KALANI, Defendant-Appellant
(CRIMINAL NO. 00-1-0179(2))

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STATE OF HAWAII

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AND

STATE OF HAWAII, Plaintiff-Appellee,
v.
SOLOMON K. TAMPON, aka SOLOMON KAIHUE KALUA KALANI,
Defendant-Appellant
(CRIMINAL NO. 00-1-0587(2))

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Solomon K. Kalua (Kalua), fka Solomon K. Tampon,¹ aka Solomon K. Kalani and Solomon Kaihue Kalua Kalani, appeals from the August 24, 2004 Judgment that was entered in the Circuit Court of the Second Circuit² convicting Kalua as charged in Criminal No. 00-1-0587(2) (No. 0587), and sentencing him to two consecutive twenty-year terms of imprisonment with credit for time served, a mandatory minimum ten year term of imprisonment, and ordering Kalua to pay a \$500 Crime Victim Compensation fee.

¹ Defendant-Appellant Solomon Kalua testified that "Tampon" had been his last name from his mother, but in 1994 he had it legally changed to "Kalua".

² Judge Shackley F. Raffetto presided.

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For actions allegedly taken by him on April 17, 2000 at about 5:30 p.m., Kalua was indicted on May 1, 2000 in Criminal No. 00-1-0179(2) (No. 0179) for the following offenses:

- Count One: Robbery in the First Degree, Hawaii Revised Statutes (HRS) § 708-840(1)(b);
- Count Two: Sexual Assault in the First Degree, HRS § 707-730(1)(a);
- Count Three: Kidnapping, HRS § 707-720(1)(c) and/or (d);
- Count Four: Unauthorized Control of a Propelled Vehicle, HRS § 708-836; and
- Count Five: Prohibited Possession of a Firearm, HRS § 134-7(b).

For actions allegedly taken by him on April 17, 2000 at about 2 p.m., Kalua was indicted on November 6, 2000 in No. 0587 for the following offenses:

- Count One: Burglary in the First Degree, HRS § 708-810(1)(c); and
- Count Two: Robbery in the Second Degree, HRS § 708-841(1)(a) or (b).

The alleged victim of the robbery in this case was Carol Resurrection (Carol). She testified at the trial.

On August 24, 2001, the State moved to consolidate the two cases for trial. In an accompanying declaration, the deputy prosecuting attorney stated in part:

3. Both cases involve robberies that occurred on the same day (April 17, 2000) in Wailuku, and are of the same or similar character, even if not part of a single scheme or plan, or are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan;

4. The State asserts that the motive for both cases was [Kalua's] desperate attempt to support his drug habit and/or obtain money, and that the sex assault offense in Cr. No. 00-1-0179(2) was opportunistic, with the main motive being the robbery[.]

(Emphasis in original.) On October 1, 2001, after a hearing on August 28, 2001, the Court entered the Order Granting Motion to Consolidate Cr. Nos. 00-1-0179(2) and 00-1-0587(2) for Trial.

Pursuant to a Trial Stipulation filed on June 5, 2002, the jury was advised that

the following facts are true and accurate and will be admitted into evidence in lieu of other evidence:

RANDOLPH³ LOUIS CABILES, date of birth May 1, 1956, is unavailable as a witness to testify at trial as a result of having died on or about January 7, 2002, of severe arteriosclerotic cardiovascular disease.

(Footnote added.)

On June 18, 2002, the Court entered an Order Granting State's Motion to Permit Prior Testimony and/or Statements of Deceased Witness at Trial. Therein, the court stated in part:

4. Balancing all the facts and circumstances, there are equivalent circumstantial guarantees of trustworthiness to meet the standard of right to confrontation:

a. The grand jury testimony was given under oath before the grand jury, which was recorded;

b. The witness, Randolph Cabiles, testified based on his personal knowledge;

c. The witness had no guarantee of immunity or other deal with the State;

d. The police statement was given at the police station to a police officer and the witness knew he was being recorded at that time;

e. The witness appeared voluntarily before the grand jury and voluntarily at the police station for his statement;

f. The witness did not have any relationship with the State, or any deal, and was not a co-defendant; and

³ The name of this person is spelled "Randolph" and "Randolf" throughout the record. The record does not provide verification as to which spelling is correct.

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g. Once the witness identified [Kalua] and gave his taped statement to police, he never recanted any part of the statement.

5. The court therefore finds Randolph Cabiles' grand jury testimony and taped statement to police are exceptions to the hearsay rule, pursuant to [Hawai'i Rules of Evidence (HRE)] 804([b])(7).

. . . .

THEREFORE, IT IS HEREBY ORDERED that . . . the grand jury testimony and taped statement of Randolph Cabiles may be admitted into evidence as an exception to the hearsay rule, under H.R.E. 804([b])(7), but any references to incarceration in jail will be excluded as too prejudicial[.]

On April 17, 2000, Police Officer Ryan Masada obtained a statement from Randolph Cabiles. Officer Masada's report of that statement was read into evidence as follows:

Okay. It says, "he was sitting on the hollow tile cement wall located on the east side of the building smoking a cigarette when he observed the fair skinned male, approximately five feet eight inches in height, 250 pounds, wearing a gray sweater, gray pants, exit the building via the only entry exit door located on the south side of the building.

The male party then walked to a charcoal colored type of vehicle that was parked directly in front of the building holding a brown paper package in his left arm and held the key in his right hand to open the driver's side door.

The male party then drove off within the vehicle heading east on Alua Street approximately ten minutes prior to police arrival. Cabiles said he was unable to positively identify this unknown male party if he is seen again."

Detective Michael Kahooohanohano subsequently interviewed Randolph Cabiles and testified as follows:

Q. Detective, what did Randolph Cabiles tell you that you placed in your report, if you could tell the ladies and gentlemen of the jury on April 18th, 2000 at approximately 4:50 p.m.?

A. Okay. After I interviewed Mr. Cabiles, he stated to me on April 17th, 2000, Randolph Cabiles had been in Robert Harris' office slash residence with Harris most of the morning. Even buying him a plate lunch or they had lunch together in Harris' unit. He left Harris' unit only after Harris had fallen asleep later that afternoon and had left his belongings on the chair.

He went outside to Freitas' body shop called Carpro (phonetic) located at the rear of 786 Alua Street. He'd been

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working earlier that day at Brian Freitas' shop. He walked to the front of the building, sat on the tile wall between the two buildings, and started to smoke his cigarettes.

He noticed a lone charcoal gray Toyota Camry fronting the building and knew that it belonged to the female who taught Tita on the second floor of the building. He estimated the time to be approximately 6:00 p.m. when he saw a lone male exit the front door of the building wearing a gray sweater and long pants holding a paper sack under his left arm, using a set of keys in his right hand and opened the door to the gray Toyota Camry parked in the front, enter the vehicle, and drive off.

He did not get a good look at the male's face because the male looked away from him, but could describe him as having fair skin, being five feet eight inches tall, and weighing in excess of 200 pounds. He could not provide any additional information regarding the suspect.

He could not offer any information regarding the incident. He again indicated that he did not know who the male is and could not provide a description of the male's face because he did not see the male's face.

The testimony of Randolph Cabiles to the grand jury on April 28, 2000, was read to the jury on June 17, 2002. It stated, in part:

Q. Let me take you to . . . April 21st, approximately 11:22 in the morning. Did the police have you look at a series of photographs?

A. Yes.

Q. About six photographs?

A. Six photographs.

Q. What they call a photographic line-up?

A. Right.

. . . .

Q. Were you able to recognize any person from among the six photographs that you observed . . . as the person that you saw coming out of the Bulosan Building on April 17th? In other words, the person that you knew to be Sol?

A. Yes. Right away.

Q. What picture was he?

A. Number six.

A Trial Stipulation filed on May 29, 2002 and read to the jury on June 17, 2002 stated, in part:

[T]he following facts are true and accurate and will be admitted into evidence in lieu of other evidence:

1. Prior to APRIL 17, 2000, [Kalua] was convicted of committing a felony crime; and
2. Prior to and on or about APRIL 17, 2000, [Kalua] was aware that as a convicted felon, he was prohibited from owning, possessing, or controlling any type of firearm.

As a witness for the defense, Andres Robert Cabiles, the brother of Randolph Cabiles, testified that Randolph Cabiles was not a truthful person.

During the jury trial on June 4, 2002, the Court advised Kalua of his constitutional right to testify or not to testify at trial. On June 18, 2002, Kalua testified.

On June 20, 2002, the jury returned a verdict of not guilty in No. 0179, and a verdict of guilty as charged in No. 0587.

On October 27, 2004, Kalua's notice of appeal was filed.

In the first point of error, Kalua contends that plain error occurred when the Court failed to inform Kalua of his right to testify or not testify. As noted above, the record contradicts the factual basis of this point.

In the second of error, Kalua contends that the joinder of the two separate criminal cases into one trial was so prejudicial that it ultimately denied Kalua his right to a fair

trial. Kalua denied being at the alleged 5:30 p.m. incident. Kalua admitted being at the alleged 2 p.m. incident but disputed the charge of Robbery in the First Degree. Relevant to the alleged 2 p.m. incident, Kalua testified in part:

Q. . . . Prior to April 17th did you know Randolph Cabiles?

A. Yeah.

Q. How did you know him?

A. He was in jail with us.

. . . .

Q. Well, did you lend him money or did you give him money?

A. No, I gave him drugs.

Q. Was he supposed to pay for those?

A. Yeah.

Q. Did he?

A. No.

Q. So when, approximately, did this happen before the 17th of April, 2000?

A. Two weeks before this incident went happen I gave him. I trying to help him out.

Q. Okay. So now on the 17th of April, Carol testifies that you came into her office place.

A. Yeah.

Q. What were you doing there?

A. I went for go get my money from Randolph.

The Hawai'i Rules of Penal Procedure (2007) state in part:

Rule 8. JOINDER OF OFFENSES AND DEFENDANTS.

(a) Joinder of Offenses. Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses:

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(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

.....
Rule 13. CONSOLIDATION.

(a) Generally. The court may order consolidation of two or more charges for trial if the offenses, and the defendants if there are more than one, could have been joined in a single charge.

The applicable standard of review is the following:

"On appeal, a trial court's order consolidating cases for trial under [Hawai'i Rules of Penal Procedure (HRPP)] Rule 13 shall not be disturbed absent an abuse of discretion." In re John Doe, Born on October 26, 1977, 79 Hawai'i 265, 273, 900 P.2d 1332, 1340 (App.1995) (citations omitted). Cf. State v. Renon, 73 Haw. 23, 31, 828 P.2d 1266, 1270 (1992) ("We review the [circuit] court's decision to join defendants in a single trial for an abuse of discretion.")

State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002)

(brackets in the original).

The Court instructed the jury, in part, as follows:

Twenty-five.

The defendant is charged with more than one offense under separate counts in the Indictment. Each count and the evidence that applies to that count is to be considered separately. The fact that you may find the defendant not guilty or guilty of one of the counts charged does not mean that you must reach the same verdict with respect to any other count charged.

Kalua argues:

Ultimately the conviction [in No. 0587] was the result of the Court's granting the State's Motion to Consol[i]date the two separate criminal cases. As a result of [Kalua] having to testify about his not being involved in [No. 0179], he was forced to confess his complicity in [No. 0587]. Given the charges contained in [No. 0179, Kalua] had to have the jury consider his criminal history, his incarceration and affiliation with known criminals, his drug use. The combination of the two cases together all but created such prejudice that [Kalua] was not given a fair trial in [No. 0587].

Had these cases not been consolidated[,] the criminal background and associations as well as [Kalua's] testifying would

not have occurred in [No. 0587], and the outcome would not have been so sure for the State as there was an element of reasonable doubt.

We conclude that the court did not abuse its discretion when it entered the October 1, 2001 Order Granting Motion to Consolidate Cr. Nos. 00-1-0179(2) and 00-1-0587(2) for Trial.

In the third point of error, Kalua contends that the Court reversibly erred when it did not give the jury a definition of theft when instructing on robbery. The record contradicts the factual basis of this point.

In the fourth point of error, Kalua contends that his Sixth Amendment Rights were violated when he was sentenced to an extended term of incarceration without being specially pled by the State or being determined by a jury. In light of State v. Mauqaotega, 107 Hawai'i 399, 114 P.3d 905, (2005), we disagree.

Although the opening brief neither asserts the following as a point on appeal nor argues it, the opening brief's subject index states the following as one of the "questions presented": "WAS [KALUA'S] CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS EXAMINE HIS ACCUSERS VIOLATED WHEN THE COURT ALLOWED RANDOLPH CABILES['] POLICE STATEMENTS AND GRAND JURY TESTIMONY TO BE PUT BEFORE THE JURY?" We conclude that this is not a properly presented point on appeal, therefore, we disregard it.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35 (2007), and after carefully reviewing the record and the briefs, and duly considering and applying the law relevant to the

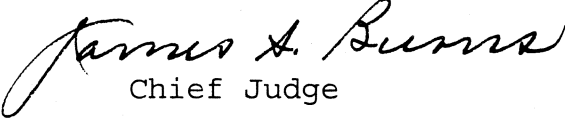
issues raised and arguments presented, we affirm the August 24, 2004 Judgment.

DATED: Honolulu, Hawai'i, April 13, 2007.

On the briefs:

Richard D. Gronna
for Defendant-Appellant.

Brandon L.K. Paredes,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge