NO. 23096

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

SERGIO ENRIQUE AFANASENKO, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(POLICE REPORT NO. F-71047/SK)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Sergio Enrique Afanasenko was fined $225.00 pursuant to a judgment of conviction for criminal contempt of court, in violation of Hawaiʻi Revised Statutes (HRS) § 710-1077(1)(g) (1993),[1] entered on December 15, 1999 in the District Court of the Third Circuit, the Honorable Jeffrey Choi presiding. The criminal contempt charge was brought as a result of Afanasenko's failure to appear for trial before Judge Choi on August 5, 1998 for an underlying criminal offense. On appeal, Afanasenko raises a number of arguments in support of his contention that his criminal contempt conviction should be reversed, including allegations of judicial bias and prejudice.

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[1] HRS § 710-1077(1)(g), entitled Criminal Contempt of Court, provides in relevant part that "[a] person commits the offense of criminal contempt of court if . . . [t]he person knowingly disobeys or resists the process, injunction, or other mandate of a court[.]"

Based on our review of the record, we believe that a reasonable person might fairly conclude that Judge Choi's conduct in this case demonstrated a lack of neutrality, giving rise to an appearance of impropriety. We, therefore, hold that Afanasenko's conviction must be vacated and remanded for new trial before a different judge. Accordingly, we need not reach any of the remaining points of error.

I. BACKGROUND

Afanasenko was charged with criminal contempt of court for his failure to make an appearance before Judge Choi at the South Kohala Division of the District Court of the Third Circuit on August 5, 1998. Afanasenko's appearance was required in conjunction with an underlying charge, the validity of which he had repeatedly contested. The underlying charge was ultimately dismissed by the Honorable Riki May Amano,[2] pursuant to a motion for nolle prosequi on August 18, 1999, when the prosecution conceded that it was unable to prove the elements of the charge.

On December 8, 1999, Afanasenko appeared before Judge Choi for trial on the criminal contempt charge and was represented by deputy public defender Theresa Marshall. At the outset, Marshall requested a continuance of the trial in order to prepare and file a motion to dismiss. Marshall explained that

[2] The case involving the underlying charge (obstructing governmental operations) was committed to the circuit court pursuant to Afanasenko's demand for jury trial and assigned to Judge Amano.

her client was adamant about her filing the motion because he believed that the criminal contempt charge should be dismissed on the basis that the underlying charge had already been dismissed. In response, Judge Choi addressed Afanasenko, stating:

> [JUDGE CHOI:] . . . The rule cannot be that if you think [the charge is] no good that, "Oh, I'm not gonna go [to court] because I'm pretty convinced that I'm not guilty so that's why I didn't come, Judge." Nobody will come to court.
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> What stupid criminal would ever show up in court? Just don't come . . . because the charge is no good. Obviously, it's just ridiculous. We cannot do that.

At that point, Marshall requested the court's permission to withdraw from the case, explaining that she had been "unable to find case law that will support our position," but that Afanasenko "feels very strongly about this motion" and would prefer to proceed pro se.

Again, addressing Afanasenko, Judge Choi explained that one of the duties of a lawyer is

> not [to] come to court and help a client lie or present an argument that they know is -- is without merit because it just . . . messes up the system. . . . [I]t doesn't do the client any favors because, you know, judges are human, but it doesn't help your case to have your lawyer come and exasperate everybody and irritate everybody making stupid arguments.
>
> So the lawyer will not be doing you a favor by coming to court making stupid arguments. It doesn't help. It hurts. That's why Miss Marshall will not file something which her conscience tells her she cannot file.

Judge Choi then cautioned Afanasenko about the perils of representing himself; however, Afanasenko indicated, "Well, Your Honor, at this time I only need a week, uh, in order to file the motion[.]" Judge Choi stated:

> What I'm telling you is[,] if you file the motion, as far as I'm concerned, it's a frivolous motion. Meaning it's -- it's just a waste of ink and paper because what I'm telling you is even if the underlying charge was improperly brought, that is not a defense [to criminal contempt].
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> . . . We don't need a week for you to write it out because it's cut and dried.
>
> . . . Just 'cause you say it in writing isn't gonna make it more true. Just 'cause you repeat it ten times isn't gonna make it more true.

Judge Choi, in denying Afanasenko's request for a one week continuance, concluded by saying, "Unless you order me to fire Miss Marshall, in which case you're gonna be on your own, you don't get another lawyer, we're gonna proceed [with trial]." After a brief discussion off the record between Afanasenko and Marshall, Afanasenko advised the court that he was firing his attorney and requested a continuance in order to seek private counsel or represent himself. Judge Choi responded, "Too late. We're gonna proceed today."

At that point, Marshall, interceding on Afanasenko's behalf, advised Judge Choi that she believed Afanasenko was capable of representing himself, but that he needed time to prepare. Judge Choi responded:

> Okay. What -- what is there for him to do to prepare? I mean, if -- if it were a matter of doing -- if there's some representation that makes sense that indicates that there's something -- some useful purpose to be served other than delay, be happy to consider it, but I don't see anything in the nature of the case in what I've heard today or on the, uh, in the history of the case which suggests that any useful purpose will be served by further delay.

Subsequent to further discussions between the court and Marshall, Judge Choi granted the request for continuance, setting the new trial date for December 15, 1999.

On December 13, 1999, Afanasenko filed his motion to dismiss the criminal contempt charge. No ruling on the motion was made prior to trial, which commenced on December 15, 1999.

At trial, Afanasenko appeared pro se. The prosecution called Dexter Iriguchi, district court bailiff, who testified to serving Afanasenko with a court notice, dated June 24, 1998, that ordered him to appear in court on August 5, 1998. A copy of the court notice was admitted into evidence without objection. On cross-examination, Afanasenko attempted to elicit testimony from Iriguchi regarding the number of times Afanasenko complied with court appearances on the underlying charge. The prosecution objected on the ground of relevance, and the court sustained the objection, stating to Afanasenko, "I'm doing you a favor by sustaining the objection."

At the conclusion of Iriguchi's testimony, the prosecution requested that the court take judicial notice of its records and introduced, without objection, an "appearance detail" document for August 5, 1998, showing "[Afanasenko] not present, bench warrant issued[.]" The appearance detail also identifies Judge Choi as the presiding judge on August 5, 1998. In response to Judge Choi's question as to whether he had any objections to admitting the document into evidence, Afanasenko stated, "Uh, Your Honor, I miss, uh, mark the calendar. That is, uh, was the only reason I don't appear in the court." At that point, the

appearance detail was admitted into evidence, and the prosecution rested.

Afanasenko was then allowed an opportunity to testify and present evidence. He began by inquiring about the status of his December 13, 1999 motion to dismiss, which Judge Choi acknowledged he received. During the exchange between Afanasenko and the court regarding his motion, Afanasenko continued to maintain his position (as he had at the December 8, 1999 hearing) that the criminal contempt charge should be dismissed because the underlying charge had been dismissed. Judge Choi denied the motion.

Thereafter, Judge Choi informed Afanasenko that he had a right not to testify, but could do so if he desired, cautioning him that, should he choose to testify, he would be subject to cross-examination. At that point, Afanasenko made reference to comments made by Judge Choi at the December 8 hearing,[3] which he believed indicated that Judge Choi had prejudged his case.

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[3] Specifically, Afanasenko stated:

> Uh, Your Honor, at this point, uh, based on the fact, uh, the last week you make a statement of a criminal don't show up to the court, uh, the system no be working, and I believe this, uh, very bad statement for a judge to say that, which one is a prejudgment.
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> Uh, my best understanding all suspect[s] are innocent until proven guilty in the court of law, and if you saying the worse, the criminal don't appear to the court, that mean you including me and everyone else.

Citing to "Rule 21,"[4] Afanasenko requested that his case be transferred to another court. Ignoring Afanasenko's request, Judge Choi again asked Afanasenko if he wished to testify. Afanasenko indicated he did not and rested his case.

During closing argument, Afanasenko again alluded to his belief that Judge Choi had prejudged him, referring to the judge's use of the word "criminals." Afanasenko also expressed his disappointment because he believed that a "trial [was] supposed to be fair." In response, Judge Choi stated (as he had previously):

> We cannot have people just saying, "Well, I know I'm innocent so I'm not gonna go to court." Surely you can -- you're an intelligent person. You can see that -- the system cannot operate that way. Otherwise, everybody would -- would say, "Well, I know I'm innocent so I'm not gonna go."
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> Nobody would come to court. Why would anybody be stupid enough to come to court if that's a good excuse?

Thereafter, Judge Choi found Afanasenko guilty of criminal contempt and fined him $200.00, plus an additional $25.00 for the Criminal Injuries Compensation Fund. Afanasenko timely filed his notice of appeal on January 13, 2000.

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[4] Afanasenko's reference to Rule 21 is presumably to Hawai'i Rule of Penal Procedure (HRPP) Rule 21 (1999), which provides in relevant part that "[t]he court upon a motion of the defendant shall transfer the proceeding as to him . . . if the court is satisfied that there exists in the circuit . . . so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in the circuit." HRPP Rule 21, however, is clearly inapplicable to the circumstances in this case.

On October 12, 2001, this court temporarily remanded the case to Judge Choi for entry of an amended judgment, specifically incorporating "the particular circumstances of the offense," as required by HRS § 710-1077(5) (1993).[5] On October 31, 2001, the following findings of facts and conclusions of law were filed.

> AMENDED FINDINGS OF FACT
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> 1. Defendant Afanasenko received written notice and order (State's Exhibit 1) on June 24, 1998 in open court directing his return to court on August 5, 1998.
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> 2. Defendant did not appear for court on August 5, 1998.
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> 3. Defendant does not deny receiving notice that he was ordered to appear on August 5, 1998 and that he failed to appear.
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> 4. Defendant's reason for nonappearance was his belief that service in the underlying proceedings was defective.
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> CONCLUSIONS OF LAW
>
> 1. Defendant knowingly failed to appear in court when directed, thereby committing Contempt of Court in violation of Hawai'i Revised Statutes (HRS) Section 710-1077[(1)](g).

II. DISCUSSION

In this appeal, Afanasenko, appearing pro se, raises several points of error. These include allegations of procedural error, insufficient evidence, and erroneous findings of fact, as well as prejudice and discrimination on the part of the trial court.[6] We begin our discussion by addressing the issue of

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[5] HRS § 710-1077(5) provides in pertinent part that, "[w]henever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment."

[6] Although Afanasenko's exposition of the points on which he relies is inartfully worded, and he, at times, fails to "show where in the record the alleged error occurred and where it was objected to[,]" as required by Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4), we are nevertheless able to glean from Afanasenko's brief as a whole the challenges raised on appeal.

(continued...)

judicial bias because of "[t]he charge that a trial judge denied a party a fair trial because of personal bias is a serious one." Aga v. Hundahl, 78 Hawai'i 230, 247, 891 P.2d 1022, 1039 (1995). A claim of judicial bias is review de novo upon the entire record. State v. Yip, 92 Hawai'i 98, 104, 987 P.2d 996, 1002 (App. 1999) (citing Aga, 78 Hawai'i at 247, 891 P.2d at 1039). "Judicial bias in a criminal case is 'structural' error, and mandates reversal, without more." Yip, 92 Hawai'i at 104, 987 P.2d at 1002 (citing Neder v. United States, 527 U.S. 1 (1999)). However, we have stated that,

> "if a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties." United States v. Torxell, 887 F.2d 830, 833 (7th Cir. 1989) (citing United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985)); see also People v. McLain, 226 Ill. App. 3d 892, 168 Ill. Dec. 716, 589 N.E.2d 1116, 1125 (1992) (noting that appearance of impropriety alone does not affect substantial rights warranting reversal); Opher v. State, 68 Md. App. 491, 513 A.2d 939, 942 (1986) (noting that, "[e]ven where there is an appearance of impropriety . . . [,] reversal is not required unless substantial rights of the defendant are actually affected").

State v. Gomes, 93 Hawai'i 13, 19, 995 P.2d 314, 320 (2000). In evaluating whether a judge's conduct gave rise to an "appearance of impropriety," we have applied an objective test,

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[6](...continued)
Accordingly, "in the interests of fairness and justice" and recognizing Afanasenko's pro se status on appeal, we disregard his failure to follow the mandates of HRAP Rule 28(b)(4). See Dan v. State, 76 Haw. 423, 428, 879 P.2d 528, 533 (1994).

> based not on the beliefs of the petitioner or the judge, but on the assessment of a reasonable impartial onlooker apprised of all the facts as to whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

TSA Int'l, Ltd. v. Shimizu Corp., 92 Hawai'i 243, 255, 990 P.2d 713, 725 (1999) (quoting State v. Ross, 89 Hawai'i 371, 380, 974 P.2d 11, 20 (1999) (internal quotation marks omitted)).

In this case, Afanasenko argues that his due process rights were violated when he was forced to appear before a judge who exhibited prejudice against him and failed to act with the necessary impartiality required of his office. Preliminarily, we note that Afanasenko failed to move for disqualification on the basis of bias or prejudice, as required under HRS § 601-7(b) (1993).[7] However, judges have an obligation to disqualify or recuse themselves "in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . instances where . . . the judge has a personal bias or prejudice concerning a party[.]" Revised Code of Judicial Conduct, Canon 3(E)(1)(a) (1995); see also Ross, 89 Hawai'i at 379, 974 P.2d at 19 (recognizing that, "aside from the technical absence of bias or conflict of interest, certain situations may give rise to such uncertainty concerning the ability of the judge to rule

[7] HRS § 601-7(b) requires a party alleging bias or prejudice to file an affidavit prior to trial, "stat[ing] the facts and the reasons for the belief that bias or prejudice exists[.]" If a party fails to file such an affidavit before trial, the law requires that "good cause . . . be shown" for the failure to do so. HRS § 601-7(b).

impartially that disqualification becomes necessary"). Consequently, "failure to move for recusal at the trial level cannot entirely preclude a party's raising the issue on appeal." Gomes, 93 Hawai'i at 17, 995 P.2d at 318. Moreover, Afanasenko raised the issue of judicial bias at trial when he expressed his concern that Judge Choi had "prejudged" the outcome of the case and requested that the case be transferred to another judge. Thus, the issue was clearly brought to the court's attention, but Judge Choi failed to properly address it.

On appeal, Afanasenko argues that Judge Choi's inability to maintain neutrality is evinced by: (1) the judge's failure to rule on his motion to dismiss prior to trial; (2) the fact that Judge Choi convicted him despite a lack of sufficient evidence to prove guilt beyond a reasonable doubt; and (3) the excessive fine that was imposed. In the present case, Judge Choi repeatedly diminished the substantive merits of Afanasenko's legal arguments, even before they were formally presented to the court, by: (1) stating, "if you file the motion [to dismiss], as far as I'm concerned, it's a frivolous motion"; (2) characterizing Afanasenko's desire to file a motion to dismiss as "a waste of ink and paper"; and (3) stating, "[j]ust 'cause you say it in writing isn't gonna make it more true. Just 'cause you repeat it ten times isn't gonna make it more true."

The various exchanges between the court and Afanasenko also included Judge Choi's ill-advised selection of such phrases as "stupid criminal" and "stupid arguments," as well as his ultimatum that "unless you [(Afanasenko)] order me to fire Miss Marshall [(Afanasenko's court-appointed attorney)], in which case you're gonna be on your own, you don't get another lawyer, we're gonna proceed [with trial]." Moreover, even after Afanasenko complied by firing his attorney, Judge Choi nevertheless refused -- at least initially -- to grant the requested continuance of trial.

Based on our review of the record, we believe that a "reasonable impartial onlooker apprised of all the facts," TSA Int'l, Ltd., 92 Hawai'i at 255, 990 P.2d at 725, might reasonably question Judge Choi's impartiality. We, therefore, hold that Judge Choi's conduct, at minimum, gave rise to an appearance of impropriety. As aptly stated by the Florida Supreme Court:

> We judges must always be mindful that it is our responsibility to serve the public interest by promoting justice and to avoid, in official conduct, any impropriety or appearance of impropriety. We must administer our offices with due regard to the system of law itself, remembering that we are not depositories of arbitrary power, but judges under the sanction of law. Judges are expected to be temperate, attentive, patient and impartial, diligent in ascertaining facts, and prompt in the performance of a judge's duties. Common courtesy and considerate treatment of jurors, witnesses, court personnel, and lawyers are traits properly expected of judges. Court proceedings and all other judicial acts must be conducted with fitting dignity and decorum, reflecting the importance and seriousness of the inquiry to ascertain the truth.

In re Schwartz, 755 So. 2d 110, 114 (Fla. 2000) (emphasis in original) (citation omitted).

III. CONCLUSION

Based on the foregoing, we vacate the district court's December 15, 1999 judgment for criminal contempt and remand for new trial before a different judge. In light of the disposition of this case, we need not address the remaining points of error.

DATED: Honolulu, Hawai'i, April 18, 2002.

On the briefs:

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