

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28222

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RITA ADILAN BLANCHARD, also known as Yolly,
Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 05-1-2150)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Rita Adilan Blanchard (Blanchard) appeals from the October 3, 2006 Amended Judgment of Conviction and Sentence, entered in the Circuit Court of the First Circuit (circuit court),¹ convicting Blanchard of Unlawful Methamphetamine Trafficking in violation of Hawaii Revised Statutes § 712-1240.6(3) (Supp. 2005), and sentencing her to ten years of incarceration with a mandatory minimum of one year.

The charge stemmed from a January 20, 2005 incident in which Blanchard allegedly participated with a person identified as "Bobby" in the sale of crystal methamphetamine to undercover police officer James Farrell (Officer Farrell). The case was tried to a jury, which returned a guilty verdict.

Blanchard raises the following points of error on appeal:

(1) "The trial court should have submitted the procuring agent jury instruction based on the evidence and to not have done so was plain error."

(2) "[Blanchard] was denied the effective assistance of counsel by the failure to submit the procuring agent jury instruction."

¹ The Honorable Michael D. Wilson presided.

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Blanchard's points of error as follows:

(1) The circuit court did not err by failing to give a procuring agent instruction *sua sponte*, State v. Nichols, 111 Hawai'i 327, 337, 141 P.3d 974, 984 (2006), because there was no factual basis for the defense established at trial. State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002) ("a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be") (internal quotation marks and citation omitted).

"The principle behind the procuring agent defense is that 'one who acts merely as a procuring agent for the buyer is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable.'" State v. Balanza 93 Hawai'i 279, 285, 1 P.3d 281, 287 (2000) (quoting State v. Reed, 77 Hawai'i 72, 79, 881 P.2d 1218, 1225 (1994)). The applicability of the procuring agent defense "rests on the specific facts of the case[,] and is "[g]enerally" a question for the jury to determine. State v. Davalos, 113 Hawai'i 385, 392, 153 P.3d 456, 463 (2007).

Officer Ferrell's testimony established that Blanchard handled both the drugs and the money involved in this transaction. Moreover, Ferrell's testimony supports the inference that Blanchard participated in the negotiation of the sale at least to the extent of advising "Bobby" that Officer

Farrell wanted "clear."² Thus this case is distinguishable from Balanza, where the evidence was insufficient to support the conviction of a defendant who neither handled the drugs or money, nor participated in the negotiations. 93 Hawai'i at 287-88, 1 P.3d at 2889-90. While the supreme court held in Davalos that the presence of those factors did not automatically mean that a procuring agent instruction should be refused, 113 Hawai'i at 391-92, 153 P.3d at 462-63, there was evidence in Davalos that the defendant was going to share the drugs with the undercover officer and was in fact contributing \$10 toward the \$30 total purchase price. Id. at 387-88, 153 P.3d at 458-59. There was no such evidence here, since Blanchard did not testify and Officer Ferrell's testimony did not in any way suggest that Blanchard was helping to pay for or was going to receive some of the drugs.

On these facts, we conclude that the circuit court did not err in failing to *sua sponte* give a procuring agent instruction.

(2) Blanchard has failed to establish that her trial counsel's representation of her was ineffective. Blanchard has the burden of establishing: (a) that there were specific errors or omissions reflecting her counsel's lack of skill, judgment, or diligence; and (b) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003) (internal quotation marks, citations, and footnote omitted). However, because there was no factual basis for instructing the jury on the procuring agent defense, Blanchard has failed to meet her burden of establishing that her

² Although Officer Ferrell testified that he overheard "nothing specific" regarding the conversation between Blanchard and Bobby, the officer's testimony shows that Blanchard must have discussed the drug transaction, because when Bobby exited the store he asked Officer Ferrell "how much [Officer Ferrell] wanted." Thus, the evidence supports the inference that Blanchard conversed with Bobby regarding the sale of crystal methamphetamine to Officer Ferrell.

counsel's actions withdrew or impaired a meritorious defense.
Id.

Accordingly, the October 3, 2006 Amended Judgment of Conviction and Sentence entered in the Circuit Court of the First Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, May 13, 2008.

On the briefs:

Lane Y. Takahashi
for Defendant-Appellant.

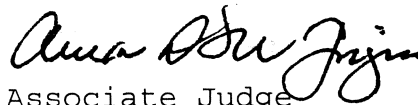
Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge