NO. 22728

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent-Plaintiff-Appellee

vs.

CHARLES E. MENDES, Petitioner-Defendant-Appellant

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 97-0298)

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

Petitioner-defendant-appellant Charles Mendes applies to this court for a writ of certiorari to review the memorandum opinion of the Intermediate Court of Appeals (ICA) in State v. Mendes, No. 22728 (Haw. Ct. App. Jan. 11, 2001) [hereinafter, "ICA's opinion"], affirming the circuit court's order denying his motion to correct or reduce sentence. We hold (1) that the circuit court abused its discretion by denying Mendes's motion on the ground that he was not entitled to hybrid representation without first determining whether Mendes was waiving his right to counsel and (2) that the ICA erred in holding that the circuit court should have dismissed Mendes's motion on the ground that he was not entitled to hybrid representation. However, the circuit court's error and the ICA's error were harmless because Mendes's motion was without merit. Therefore, we reverse part B. of the discussion section of the ICA's opinion and affirm the opinion in all other respects.

I. BACKGROUND

A. Factual and procedural background

On February 18, 1997, a grand jury indicted Mendes on the following counts:

> COUNT I: On or about the 30th day of September, 1995, in the City and County of Honolulu, State of Hawaii, CHARLES E. MENDES, while in the course of committing a theft from Rudolf Abel, and while armed with a dangerous instrument, did threaten the imminent use of force against Donald Bierce, a person who was present, with intent to compel acquiescence to the taking of or escaping with the property, thereby committing the offense of Robbery in the First Degree, in violation of Section 708-840(1)(b)(ii) [(1993)] of the Hawaii Revised Statutes [(HRS)].
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> COUNT II: On or about the 30th day of September, 1995, in the City and County of Honolulu, State of Hawaii, CHARLES E. MENDES did intentionally enter or remain unlawfully in a building, to wit, the address of [sic] Rudolph Abel, situated at 470 North Nimitz Highway #203 and #205, with intent to commit therein a crime against a person or property rights, thereby committing the offense of Burglary in the Second Degree, in violation of Section 708-811 [(1993)] of the Hawaii Revised Statutes.

Mendes was represented by a deputy public defender.

On August 14, 1997, Mendes pled guilty to both counts. Mendes stated that he "entered a building with intent to commit theft, and while committing theft, [he] was armed with a knife and threatened force against another person." In exchange for his plea, the prosecution agreed not to move for any extended, consecutive, or mandatory minimum sentencing. On October 23, 1997, the circuit court sentenced Mendes to concurrent terms of twenty years' imprisonment for Count I and five years' imprisonment for Count II.

Mendes, acting pro se, filed a Hawai‘i Rules of Penal Procedure (HRPP) Rule 35 motion to correct or reduce sentence on

July 6, 1999. Mendes argued that the circuit court violated HRS § 701-109 (1993) by convicting him of robbery and burglary because robbery is an included offense of burglary. Therefore, he sought to have his robbery conviction vacated. On July 29, 1999, the circuit court summarily denied his motion without a hearing. The order stated that, "[u]pon consideration of Defendant's motion, this court finds that Defendant is represented by counsel . . . and pursuant to State v. Hirano, 8 Haw. App. 330, 802 P.2d 482 (1990), defendant [sic] has no right to hybrid representation."

Mendes filed a timely notice of appeal on August 9, 1999. That day, Mendes also filed a notice of waiver of counsel, declaring that he would proceed pro se.

B. The ICA's opinion

On appeal, Mendes's primary argument was that the circuit court erred in denying his motion because he only intended to burglarize the premises and did not intend to rob the two men who discovered him and detained him.[1] He argued that,

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[1] In his opening brief, Mendes states that he:

> burglarized the premises, and upon his leaving he was apprehended by two persons, who held him until the arrival of the police, who placed Mendes into custody. Mendes being only five feet and one inch in hight [sic], and having his hands full of the merchandise that he stole from the premises, at first hand assumed that these two much larger men were in the process of robbing him of the goods that he stole minutes earlier.

We note that these facts are not part of the record on appeal and, therefore, cannot be considered. Mendes apparently argues that they are evidence of his lack of intent to rob the two men. However, as discussed infra, there is no basis in the record to review whether Mendes should be allowed to withdraw his

(continued...)

therefore, the robbery charge was an included offense of the burglary charge and that his conviction and sentence of both offenses violated HRS § 701-109 and his constitutional double jeopardy rights. The prosecution counterargued that the circuit court properly denied Mendes's motion on the ground that he was not entitled to hybrid representation, and, assuming arguendo that Mendes was entitled to hybrid representation, his motion was without merit. The ICA affirmed the circuit court's order in a memorandum opinion dated January 11, 2001.

In part B. of the discussion section, the ICA apparently held that the circuit court properly declined to address the merits of Mendes's motion because he was not entitled to hybrid representation, but that the circuit court should have dismissed the motion rather than deny it. ICA's opinion at 4 ("The July 6, 1999 Motion was summarily denied on the basis that Mendes 'has no right to hybrid representation.' That being the basis, the court should have dismissed the July 6, 1999 Motion rather than denying it."). However, the ICA went on to address the merits of the case because Mendes did eventually waive his right to counsel and because the motion presented questions of law. Id. at 4-5. The ICA held that: the record did not support Mendes's arguments that the robbery charge was an included offense in the burglary charge and/or that the robbery offense

[1](...continued)
guilty plea.

consisted only of a conspiracy or solicitation to commit the burglary offense; Mendes did not present sufficient grounds to warrant setting aside his conviction and allowing him to withdraw his plea; Mendes was not entitled to a reduction in his robbery sentence because he pled guilty; and the record did not support his allegation that the robbery charge was added after he pled guilty.[2] Id. at 5-7.

Mendes filed a timely application for a writ of certiorari. Mendes's application, which he titled "Notice of Certiorari," states in its entirety: "Comes now Defendant-Appellant Charles E. Mendes seeking to file Notice of Certiorari pursuant to Hawaii Rules of Appellate Procedure Rule 3, in the denial of appeal of the Cercuit [sic] Court'sOrder [sic] Summarily Denying Defendant's Motion to Correct or Reduce Sentence Filed on July 6, 1999, Without a Hearing." We treat this "notice" as a general claim that the ICA erred in affirming the circuit court's order and assume that Mendes intended to reassert all of his points of error. Therefore, we address all of the arguments that Mendes raised in his opening brief.

II. DISCUSSION

A. Standard of review

A circuit court's ruling on a motion to correct or

[2] The ICA's opinion did not address Mendes's argument that his conviction of both offenses violated his constitutional double jeopardy rights.

reduce sentence is generally reviewed under the abuse of discretion standard. See State v. Williams, 70 Haw. 566, 569, 777 P.2d 1192, 1194 (1989) ("A trial court has the discretion to, within the time limits set forth by HRPP Rule 35, reduce a sentence."). A court abuses its discretion when it "'clearly exceed[s] the bounds of reason or disregard[s] rules or principles of law or practice to the substantial detriment of a party litigant.'" State v. Putnam, 93 Hawai'i 362, 372, 3 P.3d 1239, 1249 (2000) (quoting State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000)).

Findings of fact are reviewed under the clearly erroneous standard. State v. Young, 93 Hawai'i 224, 230, 999 P.2d 230, 236 (2000). Conclusions of law are reviewed under the right/wrong standard. Id. at 230-31, 999 P.2d at 236-37.

B. Although there is no right to hybrid representation, the circuit court abused its discretion in denying Mendes's motion on that ground without first determining whether he was waiving his right to counsel.

The term "hybrid representation" refers to an arrangement where a defendant desires both the assistance of counsel and the right to conduct part of his defense pro se. State v. Hirano, 8 Haw. App. 330, 333, 802 P.2d 482, 484, cert. denied, 71 Haw. 668, 833 P.2d 901 (1990). State and federal courts have uniformly held that defendants do not have a constitutional right to hybrid representation and that the allowance of such representation lies within the discretion of

the court. Hirano, 8 Haw. App. at 334, 802 P.2d at 484 (citing 2 W. LaFave and J. Israel, Criminal Procedure § 11.5(f) at 52 (1984)). In Hirano, the ICA held that there is no right to hybrid representation under the Hawai‘i Constitution and that allowing such representation was within the trial court's discretion. Id. at 336, 802 P.2d at 485.

The circuit court summarily denied Mendes's motion to correct or reduce his sentence without a hearing on the ground that he was not entitled to hybrid representation because he was still represented by trial counsel. However, it was unclear as to whether Mendes was seeking hybrid representation or would have waived his right to counsel, as evidenced by his August 9, 1999 waiver. We hold that the circuit court abused its discretion in denying Mendes's motion on Hirano grounds without first giving Mendes the opportunity to waive his right to counsel. The ICA erred in holding that the circuit court should have dismissed Mendes's motion on the ground that he was not entitled to hybrid representation. However, insofar as the ICA did address the merits of Mendes's motion and appeal, the ICA's error was harmless.[3]

[3] Although the circuit court abused its discretion in denying Mendes's motion on the ground that he was not entitled to hybrid representation, the ICA correctly affirmed the order because the circuit court reached the right result. See Poe v. Hawai‘i Labor Relations Bd., 87 Hawai‘i 191, 197, 953 P.2d 569, 575 (1998) ("[W]here the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling. An appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance." (Citations and

(continued...)

C. Mendes's included offense argument is without merit.

On appeal, Mendes argued that the circuit court violated HRS § 701-109[4] by convicting him of robbery in the first degree and burglary in the second degree because the robbery charge was an included offense of the burglary charge.[5] Mendes's argument is without merit.

"Pursuant to HRS § 701-109(4)(a), the general rule is

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[3](...continued)
internal quotation marks omitted.)).

[4] HRS § 701-109 provides in pertinent part:

> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
>
> (a) One offense is included in the other, as defined in subsection (4) of this section[.]
>
> . . . .
>
> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
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> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
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> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

[5] The ICA also held that Mendes's convictions did not violate HRS § 701-109(1)(b) (1993) because there was no support in the record for Mendes's claim that the robbery offense consisted of only a conspiracy or solicitation to commit the burglary offense. ICA's opinion at 5-6. Although Mendes did raise this argument in his motion to correct or reduce sentence, he did not raise it on appeal. Therefore, we do not address it here.

that 'an offense is included if it is impossible to commit the greater without also committing the lesser.'" State v. Friedman, 93 Hawai'i 63, 72, 996 P.2d 268, 277 (2000) (quoting State v. Burdett, 70 Haw. 85, 87-88, 762 P.2d 164, 166 (1988)). HRS § 708-840 (1993) states in pertinent part:

> (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
> . . . .
> (b) The person is armed with a dangerous instrument and:
> . . . .
> (ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

In contrast, HRS § 708-811(1) (1993) states: "A person commits the offense of burglary in the second degree if the person intentionally enters or remains unlawfully in a building with intent to commit therein a crime against a person or against property rights."

Burglary in the second degree requires that the defendant enter or remain unlawfully on the premises, which is not required to establish robbery in the first degree. A person can commit robbery in the first degree while lawfully on the premises. Robbery in the first degree must have been committed in the course of a theft and while the defendant was armed with a dangerous instrument, neither of which is required to establish burglary in the second degree. A person can commit burglary without committing a theft or intending to commit a theft and a

person can commit burglary without a dangerous instrument. Thus, it is not "impossible to commit" burglary in the second degree without committing robbery in the first degree. Robbery in the first degree is not an included offense of burglary in the second degree under HRS § 701-109(4)(a).

Robbery in the first degree also does not consist of an attempt to commit burglary in the second degree or another included offense of burglary in the second degree. Therefore, robbery in the first degree is not an included offense of burglary in the second degree under HRS § 701-109(4)(b).

Finally, robbery in the first degree cannot be considered an included offense of burglary in the second degree under HRS § 701-109(4)(c). We have previously stated that:

> "Subsection (c) differs from (a) in that there may be some dissimilarity in the facts necessary to prove the lesser offense, but the end result is the same." State v. Freeman, 70 Haw. 434, 440, 774 P.2d 888, 892 (1989) (citing commentary to HRS § 701-109). Under subsection (c) analysis, the following factors are considered: (1) the degree of culpability; (2) the degree or risk of injury; and (3) the end result. Burdett, 70 Haw. at 90, 762 P.2d at 167 (citation omitted).

Friedman, 93 Hawai'i at 73, 996 P.2d at 278 (quoting State v. Alston, 75 Haw. 517, 533, 865 P.2d 157, 166 (1994)).

Both robbery in the first degree and burglary in the second degree require an intentional state of mind. See HRS §§ 708-840(1)(b)(ii) and 708-811(1). Thus, because both offenses have the same degree of culpability, it cannot be said that robbery in the first degree differs from burglary in the second

degree only in that robbery has a lower degree of culpability.

Further, burglary in the second degree and robbery in the first degree entail different injuries or risks of injury. The injury in burglary in the second degree is a violation of the property rights of the owner of the premises upon which the defendant unlawfully enters or remains. In contrast, the injury envisioned by robbery in the first degree is a violation of the property rights of the person whose property is stolen and the risk of physical harm, or actual physical harm, to the person whom the defendant threatens, or injures, in the course of the theft.

Similarly, the end results of burglary in the second degree and robbery in the first degree are different. As illustrated in the present case, the result of the burglary in the second degree was Mendes's unlawful presence on the property with an intent to commit a theft, but the result of the robbery in the first degree was a theft and a threat against someone who tried to stop Mendes. Robbery in the first degree does not differ from burglary in the second degree "only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission." The ICA correctly held that this argument was unsupported by the record.

D. Mendes's convictions did not violate his double jeopardy rights.

In his opening brief, Mendes also argued that convicting him of both offenses violated his double jeopardy rights because it inflicted multiple punishments for the same offense. The double jeopardy clauses of the state and federal constitutions protect criminal defendants against three distinct situations: 1) a second prosecution for the same offense after an acquittal; 2) a second prosecution for the same offense after a conviction; and 3) multiple punishments for the same offense. State v. Rogan, 91 Hawai'i 405, 416, 984 P.2d 1231, 1242 (1999).

We have not addressed whether the "same conduct" test, see, e.g., State v. Ake, 88 Hawai'i 389, 392-93, 967 P.2d 221, 224-25 (1998), or the "same elements" test, see, e.g., Blockburger v. United States, 284 U.S. 299 (1932), applies in the multiple punishments context that is at issue here. But see Tomomitsu v. State, 93 Hawai'i 22, 31, 995 P.2d 323, 332 (App. 2000) (noting that, in State v. Caprio, 85 Hawai'i 92, 937 P.2d 933 (App. 1997), the ICA held that the "same elements" test applies). It is unnecessary to address this distinction here. Under either test, robbery in the first degree and burglary in the second degree do not constitute the same offense; they have different elements and address different conduct. Compare HRS § 708-840(1)(b)(ii) with HRS § 708-811(1). The circuit court did not violate Mendes's constitutional double jeopardy rights by

convicting him of both offenses.

E. Mendes's other arguments do not warrant vacating the circuit court's order.

Mendes also makes several statements in his opening brief that seem to imply that he did not commit the robbery and that he did not intend to plead guilty to both offenses. Mendes argues that he had but one intent, to commit the burglary, and that he did not intend to rob the two people who detained him.[6] He states that he pled guilty on counsel's advice but claims that he "pled guilty to the charge of burglarizing said premises, and the charges of robbery were entered later." Along those lines, he also claims that "information had been withheld from the court, and [he has] been convicted of additional charges." Mendes's claim that the robbery count was added after he pled guilty is completely meritless because he was indicted on both charges and the plea form he executed lists both charges. If he is in fact arguing that his plea to both counts was not knowingly, intelligently, and voluntarily made, there is insufficient evidence in the record to review this claim because the transcripts from the change of plea hearing are not a part of the record on appeal. It is appellant's burden to provide the necessary transcripts to review any point of error that requires

[6] We note that Mendes argues that he could not have committed the offense of robbery in the first degree as defined by HRS § 708-840(1)(b)(i) (1993). However, he was charged with, and his statement in his plea support, a violation of HRS § 708-840(1)(b)(ii).

consideration of an oral proceeding. State v. Hoang, 93 Hawai‘i 333, 334, 3 P.3d 499, 500 (2000) (citing Hawai‘i Rules of Appellate Procedure Rule 10 (1999)) (some citations omitted). Without the transcript, there is no basis upon which to review Mendes's point of error. See id.

Finally, Mendes argued that he was entitled to a reduction in his sentence because, as someone who pled guilty, he should not have received the maximum sentence for the robbery offense. Mendes's plea form indicates that, in exchange for his guilty plea, the prosecution agreed not to seek extended, consecutive, or mandatory minimum sentencing. Mendes's argument that he was also entitled to a sentence of less then twenty years' imprisonment is without merit.

Mendes's guilty plea form states that the maximum indeterminate sentence he could receive for the robbery count was twenty years and that his attorney had informed him of the possible maximum indeterminate sentence. Further, robbery in the first degree is a class A felony, and HRS § 706-659 (Supp. 1995) states that "a person who has been convicted of a class A felony . . . shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation." (Emphasis added.) Based on the existing record, when Mendes made his plea: he was aware that he could be sentenced to twenty years' imprisonment for the robbery offense;

the prosecution had not offered him a sentence reduction in exchange for his plea; and a twenty-year sentence was in accord with the applicable law. Therefore, the ICA properly held that none of Mendes's other arguments warrant vacating the circuit court's order.

III. CONCLUSION

The ICA erred in holding that the circuit court should have dismissed Mendes's motion on the ground that he was not entitled to hybrid representation. However, the ICA reached the correct result in that it affirmed the circuit court's order on the ground that Mendes's motion to correct or reduce sentence was without merit. Therefore, we reverse part B. of the discussion section of the ICA's opinion and affirm the opinion in all other respects.

DATED: Honolulu, Hawai'i, May 22, 2001.

On the brief:

Charles E. Mendes,
appearing pro se,
on the writ