NO. 25226

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

MUAO MAELEGA, also known as MUAO MAELECA,
Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-2217)

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

Defendant-Appellant Muao Maelega, also known as Muao Maeleca (Defendant) appeals from the June 13, 2002 judgment of conviction and sentence, entered by the Circuit Court of the First Circuit[1] (the court), finding him guilty of Attempted Murder in the First Degree, Hawai'i Revised Statutes (HRS) § 705-500 (1993)[2], 707-701(1)(e) (1993)[3] & 706-656 (1993 & Supp. 1999).

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[1] The Honorable Judge Sandra Simms presided over Defendant's motion for a fourth attorney and the trial. The Honorable Richard K. Perkins presided over the denial of additional expenses.

[2] HRS § 705-500 defines "**Criminal attempt**" as follows:

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to

(continued...)

On appeal, Defendant asserts the court erred in: (1) denying the motion for additional expert expenses to determine Defendant's fitness to proceed and penal responsibility; (2) denying Defendant's fourth request for an attorney and in finding he waived his right to counsel; (3) failing to determine whether the bailiff's exchange of a pen with a "Crayola" marker in front of the jury prejudiced his right to a fair trial; and (4) denying Defendant's motion for a continuance to allow his witness to consult with counsel.

We conclude that the court did err with respect to the second issue raised. Because we hold as to the second issue that the court did not validly determine that Defendant waived his right to counsel and that he was thus required to proceed pro se, we vacate the judgment and remand the case for a new trial.

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[2](...continued)

be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[3] HRS § 707-701 provides in relevant part:

Murder in the first degree. (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

. . . .

(e) A person while the defendant was imprisoned.

Issues one, three, and four relate to trial matters which may not arise or may be resolved pragmatically on remand. Accordingly, they are only briefly discussed.

I.

The following evidence, among other matters, was adduced at trial. On March 3, 2000, at about 7:00 a.m., Adult Correctional Officer (ACO) Joseph Kuehner (Kuehner) and Sergeant Robert Comeau (Comeau) approached Defendant's cell to take him to the recreation area. Since Defendant was the only inmate in his block, he was the first to be taken to the recreation area. Defendant extended his arms through the door to be handcuffed and then used the toilet. He reached towards the shelf above the toilet, allegedly to turn off his radio. As Kuehner opened the door, Defendant walked out and to the left. Defendant then ran towards Kuehner with his arms raised and struck Kuehner's neck. Kuehner punched Defendant in the left eye and, with the assistance of Comeau, pulled Defendant to the floor. Kuehner and Comeau held Defendant down as he struggled and threatened them. A few seconds later, Kuehner realized he had been stabbed. Kuehner was taken to Queen's Hospital, where Dr. Steven Nishida removed a pencil from Kuehner's neck.

II.

On November 15, 2000, Michael Ostendorp (Ostendorp) was appointed to represent Defendant. As to Defendant's first issue, Ostendorp filed on November 30, 2000, a Motion for Mental Examination to obtain a panel of three qualified examiners (Panel) to determine Defendant's fitness to proceed and penal responsibility. On December 1, 2000, one psychiatrist, Dr. Robert Collis, and two psychologists, Dr. Olaf Gitter and Dr. Thomas Cunningham, were appointed to the Panel. On January 9, 2001, Ostendorp requested $4,000 to retain Dr. Daryl Matthews to examine Defendant's mental records, review the Panel's findings, and determine Defendant's fitness to proceed. Dr. Matthews' fees were $200 an hour and he estimated a minimum of forty hours was necessary for Defendant's case. The court allowed expert fees in the amount of $1600 instead of $4000, indicating the funds could be used for any psychiatrist or psychologist.

Two members of the Panel found Defendant fit to proceed. Dr. Collis issued a written evaluation on January 10, 2001. It stated that Defendant's diagnosis was "Axis I Psychosis NOS (in remission); "Axis II Personality Disorder NOS (Boderline, sociopathic, poor anger control; Axis III 0; Axis IV 3; Axis V 55/55." However, Dr. Collis found Defendant fit to proceed and able to assist in his own defense. In a second evaluation received on January 11, 2001, Dr. Collis opined that Defendant was "moderately but not substantially impaired by his mental condition" at the time of the alleged offense. Dr. Cunningham's

opinion was received on March 1, 2001. Dr. Cunningham found Defendant suffered from "Psychotic Disorder, Not Otherwise Specified, and Crystal Methamphetamine Dependence, In a Controlled Setting" at both the time of the alleged offense and during the evaluation. In Dr. Cunningham's view, Defendant was not substantially impaired by a mental disorder at the time of the incident. Although Defendant "was apparently experiencing symptoms of a serious mental disorder around the time in question," Dr. Cunningham believed that Defendant was sane. Dr. Cunningham stated that Defendant's "fund of general knowledge was weak, but he did not impress as being mentally retarded."

The diagnosis of the third Panel member, Dr. Gitter, was received on March 23, 2001. Because Dr. Gitter was unable to interview Defendant and based his diagnosis on Defendant's records, he did not express an opinion as to Defendant's fitness to proceed. However, Dr. Gitter did find that Defendant's "cognitive and volitional capacities at the time of the alleged offense were substantially impaired as a result of his mental disorders."

On March 7, 2001, Ostendorp filed a motion to continue the hearing on Defendant's mental evaluations scheduled on March 20, 2001.[4] Ostendorp claimed he was unable to obtain a mental health expert for $1600 and was in the process of requesting additional funds to hire Dr. Matthews to present

[4] The March 7, 2001 motion was entitled "Defendant's motion to continue order granting oral motion for mental evaluation."

evidence at the March 20 hearing and that Defendant's medical records from Samoa had not been received. The court denied Ostendorp's motion to continue the hearing on Defendant's mental evaluations, but continued the hearing because Defendant was absent. He filed another motion to continue the mental evaluation so that Dr. Matthews could assist in cross-examination and preparation for trial. The court denied the motion to continue and proceeded with Dr. Cunningham's testimony.

On March 30, 2001, Dr. Cunningham testified at the hearing to determine Defendant's fitness to proceed. Defense counsel claimed he could not effectively cross-examine Dr. Cunningham without a mental health expert. On April 18, 2001, Ostendorp filed an Ex-Parte Motion for Extraordinary Litigation Expenses of $8000 to retain Dr. Matthews.

On April 18, 2001, the court denied the motion for extraordinary litigation expenses. In doing so it stated, inter alia, that "counsel has not sufficiently established that a psychologist or psychiatrist willing and able to provide the services requested cannot be retained for the amount already authorized." After considering the expert opinions of the two doctors who examined Defendant and based on its own observations, the court found Defendant fit to proceed.

III.

As to Defendant's second issue, on June 7, 2001, Ostendorp filed a motion to withdraw as counsel stating "irreconcilable differences" between himself and Defendant. Defendant had requested a change of counsel several times, complaining that "[Ostendorp] never come [sic] see me. Nobody sees me. He [Ostendorp] never answer my phone call [sic]. Never answer my letter [sic]." The court granted the motion and appointed Defendant's second attorney, Lane Takahashi, (Takahashi) as counsel on June 21, 2001.

On August 29, 2001, Takahashi filed a motion to withdraw as counsel at Defendant's request. Defendant was upset with Takahashi because Takahashi allegedly refused to hire a private investigator and failed to visit him two times. On the second occasion, Defendant claimed Takahashi rescheduled a visit, but did not appear. Defendant complained Takahashi "had an attitude against [him]" and was "disrespectful." The court stated it was concerned about a pattern developing with Defendant finding some reason to disagree with his attorney and then asking for a substitution of counsel. It explained, "It is difficult to have counsel appointed for you. . . . The charges [sic] that you're facing in this case is a serious charge, a serious charge." The court did not further discuss the charge or defenses available to Defendant. The court agreed to appoint another attorney with the following admonition:

> [I]f you don't get along [with your attorney] or <u>if it comes</u>

> up again, I'm going to treat that as you're giving up your right to have counsel and you'll go to trial with us on your own . . . [b]ecause you don't get to say I don't like what you're doing. You don't get to pick and choose.

(Emphasis added.) On September 18, the court[5] appointed Defendant's third attorney, Chester Kanai (Kanai).

Because Defendant felt Kanai was not "providing effective representation," the defense on December 6, 2001, filed a motion for withdrawal and substitution of counsel. On December 11, 2001, Kanai stated he had met Defendant several times and, "it just got to the point where he doesn't trust me, and I don't trust him." Kanai claims Defendant called him a "liar" several times and he "took it real personal." Kanai stated, "I don't want to represent [Defendant], and I don't think [Defendant] wants my representation. . . . I don't even want to be standby counsel for [Defendant]. I feel that strongly about it. I just don't want anything further to do with the case." The court found that Defendant had waived his right to counsel and appointed Kanai as standby counsel:

> The concern I have is that this is a situation that is indeed being rather manipulated as you say by me, but I see it being done by you.
>
> And so I told you before, what I would have to make a finding of if we had to go through this again would be that you have given up your right to have counsel represent you in the trial. And, clearly, based on what you have told me today, based on what you've told me previously, and based on-you say you don't understand the system, but it's pretty clear you've got some knowledge and experience as to how these things are to proceed-I'm prepared-I will grant the motion to withdraw for Mr. Kanai, and I will make a finding based upon the records of this proceeding that you have waived your right to counsel and so we will be proceeding to

[5] The Honorable Richard Perkins appointed the attorney.

> trial on March the 25th. It will be a trial where you are representing yourself.
>
> I am going to appoint Mr. Kanai as standby counsel. I know he does not want to do that but his role as standby counsel is a very limited role, limited solely to addressing procedural matters that occur during the course of trial.

(Emphases added.) In findings of fact the court stated, inter alia, that "it is [Defendant's] consistent failure to cooperate with court-appointed counsels that is the cause of breakdown in communication and the lack of trust." The court's conclusions of law stated in pertinent part that

> the pattern of conduct exhibited by Defendant Maelega amounts to a manipulation of court procedure and an interference with the fair administration of justice. The Court further concludes Defendant Maelega, by his conduct, has waived his right to court-appointed counsel.

Defendant then represented himself pro se and Kanai was appointed standby counsel. Jury trial proceeded on April 15, 2002.

IV.

Briefly as to Defendant's third issue, on the morning of the second day of jury selection, the bailiff walked to Defendant's table and took away his pen. The bailiff then returned to the table and gave Defendant a Crayola marker. Defendant objected, but the court stated that his concern would not be addressed "at this point."[6] During the afternoon session,

[6] Defendant first attempted to object after the pen exchange occurred:

> [Defendant]: Excuse me, Your Honor. Can I say something please?
> The Court: Not at this point, Mr. Maelega.
> [Defendant]: Yeah, but–
> The Court: Not at this point. Not–
> [Defendant]: Yeah, but the emergency situation I'm

(continued...)

Defendant complained that the pen incident was prejudicial because the incident occurred in the jury's presence. The court stated that she "wasn't sure" if the pen exchange occurred in the presence of the jury or not, but she was "positive" the bailiff was not "blatant." The court offered to give the jury a curative instruction, which Defendant refused. Defendant explained that "especially [since] I'm facing accusation of pens, stuff li' dat, it's automatically making up their mind already." Later that afternoon, the prosecution gave its opening statement, in which it alleged Defendant stabbed an ACO in the neck with a pencil.

V.

Briefly as to Defendant's fourth issue, at trial, after the prosecution's request for a witness list, Defendant asked to call witnesses from the prosecution's list, including inmate Alomalietoa Sua (Sua). On April 29, 2002, Defendant called Sua to testify about how Defendant was treated at the Halawa facility.

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[6](...continued)

> going to bring to you because I need my pen for write. The State is issuing me one marking pen.
>
> The Court: Not at this point. Mr. Arrisgado [(the prosecutor)], you may proceed. If you persist, I told you what we'd do. Mr. Arrisgado, you may proceed.
>
> [Defendant]: So in other words, there's no way I can defend myself. I've been railroaded to force to represent myself. And I've been given all this-
>
> The Court: Mr. Maelega, I told you you'll have a chance to speak. We're not addressing that now. And I told you what I would do.
>
> [Defendant]: I need my pen to write.
>
> The Court: You have something to write with. That's it. You have something. Mr. Arrisgado, proceed.

Sua testified on April 29, 2002 that he was in the Special Holding Unit during the incident on March 3, 2000. Sua indicated he had just found out that he was being called that morning and wanted to consult his attorney before testifying further because he was involved in an "ongoing case" similar to Defendant's case. The court did not allow a continuance to allow Sua to confer with counsel.

VI.

As to Defendant's second point on appeal, we hold that the trial court erred in requiring Defendant to proceed pro se because it failed (1) to give Defendant "a clear choice of either continuing with present counsel" or proceeding pro se, State v. Char, 80 Hawai'i 262, 268-69, 909 P.2d 590, 596-97 (App. 1995), and (2) to inform Defendant of the consequences of proceeding pro se.

As mentioned, at the August 30, 2001 hearing where Takahashi, Defendant's second counsel, was allowed to withdraw and Kanai, Defendant's third counsel was appointed, the court warned Defendant that she would not appoint another attorney for Defendant and if he raised the issue again, he would have to proceed pro se. The record indicates that when the court appointed Kanai, the court noted that Defendant was manipulating the process by repeatedly requesting new counsel and then finding a reason to disagree with them. The court stated, "You're picking issues and finding things on which to disagree with

counsel and then using that as a basis to, you know, to fire them or discharge them because they're not doing what you want them to do." The court granted the motion to appoint new counsel but warned Defendant that "the number of attorneys that are -- that are able to handle these kinds of very serious, difficult cases is not that large. There's not that many people. In fact, quite honestly, you['ve] gone through most of it."

Therefore, although the court agreed to grant another court-appointed attorney to Defendant, it warned that if this issue came up again, it would find that he waived his right to counsel. The court stated, "I'm going to appoint somebody else. . . . But if you don't get along or if it comes up again, I'm going to treat that as you're giving up your right to have counsel and you'll go to trial with us on your own, okay?"[7] (Emphasis added.) Defendant replied, "Yes, your Honor." The court did not inform Defendant of the consequences of proceeding pro se.

Subsequently, Defendant was back on a motion to appoint new counsel on December 11, 2001. The court allowed Defendant to explain why he did not wish to be represented by Kanai.

[7] Prior to granting the motion to appoint new counsel, the court expressed concern over Defendant's seeming manipulation of the proceedings. The court stated, "If I grant this motion and all of a sudden Mr. Takahashi gets out of the case and someone else is appointed, then you'll find some reason to disagree with that attorney as well . . . [a]nd then we'll be back in the same situation and we can't go to trial because you can't get along with anybody and order them to agree to your defense." Based on this reasoning the court stated that "I'm going to be forced to find that you are waiving your right or giving up your right to have counsel represent you because the right to have counsel doesn't mean you get to dictate what they do, how they do it, or even who it is."

Defendant explained that Kanai failed to give Defendant records that Defendant had requested, and failed to visit Defendant when he promised he would.[8] Defendant explained that Kanai made "three promises and he couldn't come through with it . . . to put up [a] defense for me . . . . I cannot trust this person [to] represent me that way because my it's my life on the line not his life." The court granted the third attorney's motion to withdraw as counsel. It found that "there is no good cause to warrant appointment of a fourth court-appointed counsel for Defendant[.]"

Given Defendant's pattern of behavior, the court could reasonably reject a request for the appointment of a "new attorney." This court has held that "there is no absolute right[,] constitutional or otherwise, for an indigent to have the court order a change in court-appointed counsel." State v. Torres, 54 Haw. 502, 504, 510 P.2d 494, 496 (1973). "Whether a change in counsel should be permitted, therefore, rests in the sound discretion of the trial court." State v. Ahlo, 2 Haw. App. 462, 469, 634 P.2d 421, 426 (1981).

[8] When Defendant was first given the opportunity to explain why he did not wish to have Kanai as his attorney, Defendant stated that he was "not prepared for this motion." However, after the prosecution was allowed to make its objections to the motion, Defendant went on to explain why he did not wish to have Kanai as his attorney.

VII.

But the court also held that "based upon the records of this proceeding [(12/11/01)] that you [(Defendant)] have waived your right to counsel and so will be proceeding to trial[.]" "The right to counsel may be waived if waiver is voluntarily, knowingly and intelligently made." State v. Tarumoto, 62 Haw. 298, 300, 614 P.2d 397, 399 (1980); see also Char, 80 Hawai'i at 268, 909 P.2d at 596 ("A 'waiver' is the defendant's intentional and voluntary relinquishment of a known right."). The ICA has held that waiver may be by conduct:

> In criminal cases, an indigent defendant is deemed to have waived by conduct, his or her right to the services of the public defender or court-appointed counsel if the following six requirements are satisfied: (1) the defendant requested a substitute court-appointed counsel; (2) the defendant was afforded a reasonable opportunity to show cause for a substitute court-appointed counsel; (3) the trial court did not abuse its discretion when it decided that a substitute court-appointed counsel was not warranted; (4) the requirements of State v. Dickson, 4 Haw. App. 614, 619-20, 673 P.2d 1036, 1041 (1983), were satisfied;[9] (5) the

[9] According to Char, these requirements are as follows:

> The trial court should first examine the particular facts and circumstances relating to the defendant, such as the defendant's age, education, mental capacity, background and experience, and his conduct at the time of the alleged waiver. This is necessary to allow the trial court to determine the level and depth to which its explanation and inquiry must extend.
>
> Secondly, in order to fully assure that the defendant is informed of the risks of self-representation, the trial court should make him aware of the nature of the charge, the elements of the offense, the pleas and defenses available, the punishments which may be imposed, and all other facts essential to a broad understanding of the whole matter.
>
> Finally, the trial court should inform the defendant: of his right to counsel, whether private or appointed; that self-representation is detrimental to himself; that he will be required to follow all technical rules and substantive, procedural, and evidentiary law; that the prosecution will be represented by able counsel; that a disruption of the trial could lead to vacation of the right to self-

(continued...)

> defendant was given a clear choice of either continuing with present counsel or being deemed to have waived by conduct his or her right to counsel; and (6) the defendant refused to continue with present counsel.

Id. at 268-69, 909 P.2d at 596-97. Therefore, all factors must be met in order to conclude that Defendant has waived his right to counsel by conduct alone.

VIII.

Although the court concluded that Defendant waived his right to counsel by his conduct, the waiver was not "intentional and voluntary" because (1) no clear choice was afforded Defendant at the December 11, 2001 hearing to either continue with his

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[9](...continued)

> representation; and that if voluntary self-representation occurs, the defendant may not afterward claim that he had inadequate representation.
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> The trial judge is not required to give the defendant a short course in criminal law and procedure, since a defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself. However, the record should reflect some interchange on the above matters such as will indicate to a reviewing court that the defendant knew and understood the dangers and disadvantages of self-representation.
>
> Those matters, which we shall call here "specific waiver inquiry" factors, provide a guideline for the trial court in dealing with a demand for waiver of counsel. The record need not reflect a discussion between the court and a defendant illuminating every such factor. However, where the record fails to reflect that the trial court has sufficiently examined the defendant so as to establish that he is aware of the dangers and disadvantages of self-representation, or that the defendant has made a knowing and intelligent waiver, an appellate court will be hard-pressed to find that a defendant has effectively waived counsel. In such situations, the conviction of a *pro se* criminal defendant is vulnerable to reversal unless the record also contains overwhelming circumstantial evidence indicating that the requirements of a knowing and intelligent waiver have otherwise been met. State v. Dickson, 4 Haw. App. 614, 619-21, 673 P.2d 1036, 1041 (1983) (citations and footnote omitted).

Char, 80 Hawai'i at 269 n.3, 909 P.2d at 597 n.3 (citations omitted).

present counsel or to proceed pro se, and (2) Defendant was not informed of the consequences of choosing to proceed pro se.

Defendant "concedes the following four [sic] Char factors: (1) that he requested another attorney; (2) that he had an opportunity to explain why he needed another attorney; and (6) that he refused to continue with present counsel."[10]. Char requires satisfaction of the remaining three factors. As to the third Char factor, the court had reasonable grounds to reject the request for another substitute court-appointed counsel. However, factor three is interrelated with factor five because factor five requires that Defendant be given a clear choice between continuing with counsel or proceeding pro se. Factor five, in turn is interrelated with factor four -- the Dickson case requirements, because the choice to be made by Defendant hinges on his understanding, required by Dickson, of the consequences of self-representation. To reiterate, factor four requires that:

> The trial court should first examine the particular facts and circumstances relating to the defendant, such as the defendant's age, education, mental capacity, background and experience, and his conduct at the time of the alleged waiver. This is necessary to allow the trial court to determine the level and depth to which its explanation and inquiry must extend.
>
> Secondly, in order to fully assure that the defendant is informed of the risks of self-representation, the trial

[10] Although Defendant states that he concedes "the following four Char factors," he only states three factors. The prosecution, therefore contends in its answering brief that "by implication, it appears [Defendant] is also conceding the fifth factor, i.e. that the trial court gave Defendant a clear choice of continuing with present counsel or being deemed to have waived counsel." We disagree. Although the fifth factor in Char was not discussed by Defendant, it certainly does not mean that he has conceded the point on appeal. Inasmuch as Defendant has raised the issue of the court's abuse of discretion in denying Defendant's fourth request for a court-appointed attorney, he has raised all the relevant factors upon which this court must rely in deciding abuse of discretion.

> court should make him aware of the nature of the charge, the elements of the offense, the pleas and defenses available, the punishments which may be imposed, and all other facts essential to a broad understanding of the whole matter.
>
> Finally, the trial court should inform the defendant: of his right to counsel, whether private or appointed; that self-representation is detrimental to himself; that he will be required to follow all technical rules and substantive, procedural, and evidentiary law; that the prosecution will be represented by able counsel; that a disruption of the trial could lead to vacation of the right to self-representation; and that if voluntary self-representation occurs, the defendant may not afterward claim that he had inadequate representation.

Dickson, 4 Haw. App. at 619-20, 673 P.2d at 1041-42 (emphases added) (citations omitted).

As to the first Dickson requirement, the trial court was required to "examine the particular facts and circumstances relating to the defendant . . . [which is] necessary to allow the trial court to determine the level and depth to which its explanation and inquiry must extend." Id. at 619, 673 P.2d at 1041. As explained by the prosecution, the court was aware of Defendant's education because Defendant referred to himself repeatedly as uneducated and illiterate. The court was also aware of Defendant's experience in a previous trial that resulted in a conviction for murder and prosecutions for assaulting an ACO.

The second Dickson requirement was that the "trial court should make [the Defendant] aware of the nature of the charge, the elements of the offense, the pleas and defenses available, the punishments which may be imposed, and all other facts essential to a broad understanding of the whole matter." Id. at 619-20, 673 P.2d 1041 (citations omitted). The court did

not make Defendant aware of these matters so that he would be "informed of the risks of self-representation." Id. The court did not make him aware of the "charge, . . . the pleas and defenses available, [and] the punishments which may be imposed." Id. (citations omitted). The prosecution's arguments that the Defendant was aware of these matters because of prior convictions or that he stated he was going to "be incarcerated in prison for the rest of my life without parole" is unpersuasive. Inasmuch as the trial court is "charged with the function of assuring that the defendant's waiver of counsel is made knowingly and intelligently[,]" the court should have expressly made Defendant aware of the charge, the pleas, the defenses and the possible punishment. Id. at 619, 673 P.2d 1041.

As to the third Dickson requirement, the court should have

> informed [D]efendant: of his right to counsel . . . that self-representation is detrimental to himself; that he will be required to follow all technical rules and substantive, procedural, and evidentiary law; that the prosecution will be represented by able counsel; that a disruption of the trial could lead to vacation of the right to self-representation; and that if voluntary self-representation occurs, the defendant may not afterward claim that he had inadequate representation.

Id. at 620, 673 P.2d 1041-42. The ICA in Dickson also stated that "[t]he record need not reflect a discussion between the court and a defendant illuminating every such factor[,]" the trial court must have "sufficiently examined the defendant so as to establish that he is aware of the dangers and disadvantages of self-representation." Id. at 620-21, 673 P.2d at 1042. The

court did not inform Defendant of any such matters at all. The court, thus, failed to inform Defendant of the consequences of proceeding pro se when it granted the motion to withdraw as counsel and found Defendant was to proceed pro se. Therefore, based on the foregoing, the court did not satisfy the fourth Char factor.

Furthermore, as to the fifth Char factor, Defendant was not "given a clear choice of either continuing with present counsel or being deemed to have waived by conduct his or her right to counsel." Char, 80 Hawai'i at 268-69, 909 P.2d at 596-97. The court stated at the December 11, 2001 hearing, "I told you [(Defendant)] what would occur if I had to address this again would be that I would have to find, based on your pattern here . . . that you're giving up your right to counsel. And I told you I'd find that, and you'd be required to proceed to trial pro se." This statement by the court did not provide Defendant with a choice at the December 11, 2001 hearing of whether to continue with his present counsel or to proceed pro se. Rather, it ordered that Defendant proceed pro se but without the court's compliance with the requirements set forth in Char. "Waiver may be shown by conduct of an unequivocal nature," however, Defendant's conduct was not unequivocal because he was not provided a clear and informed choice in consonance with Char. As such, the court failed to satisfy the fifth Char factor. Thus,

Defendant did not effectively waive his right to counsel. Tarumoto, 62 Haw. at 300, 614 P.2d at 399.

In sum, the court abused its discretion because it failed (1) to inform Defendant of the hazards and obligations of self representation and (2) to afford Defendant a clear choice in either retaining present counsel or proceeding pro se when it deemed Defendant had waived his right to counsel.

IX.

As to his first issue on appeal, Defendant argues that the court erred in its April 18, 2001 order denying extraordinary litigation expenses (1) in holding that there was insufficient factual basis supporting a need for comprehensive testing to evaluate Defendant's mental disorder, (2) in declaring that counsel had not sufficiently established that another doctor might have performed the services for the amount previously authorized, and (3) in preventing Defendant from presenting evidence at any of the fitness hearings because he did not have the funds to hire an expert.

Inasmuch as this case is remanded, it is not certain whether Defendant will again challenge Defendant's fitness to proceed or raise the defense of lack of penal responsibility. On appeal, Defendant does not contend he was not fit to proceed[11] and the defense of lack of penal responsibility was not raised at

[11] Defendant stated to the court on March 30, 2001, that he was fit for trial.

trial. Accordingly, we need not decide this issue in the present appeal.

We note that Defendant is entitled to receive court-paid litigation expenses under HRS § 802-7 (Supp. 1997) for the assistance of a mental health expert if such services are necessary for an adequate defense. See HRS § 802-7; Arnold v. Higa, 61 Haw. 203, 205, 600 P.2d 1383, 1385 (1979). However, at present the record lacks any declaration or affidavit from an expert in the field indicating the appropriate amount of hours required for particular tasks and the funds necessary in that regard to hire an expert. In this light, Defendant is not precluded from requesting reconsideration of his request for additional fees for expert assistance on remand, if issues pertinent to such a request are raised. Whether additional funds should be authorized is subject to the court's proper exercise of discretion. State v. Hoopii, 68 Haw. 246, 247-49, 710 P.2d 1193, 1185 (1985).

X.

As to his third issue, any question concerning a writing implement for Defendant's use may be pragmatically resolved prior to trial. As to his fourth issue, the need for a continuance to enable Sua to confer with his counsel is obviated inasmuch as arrangements for consultation may be made before retrial.

XI.

Accordingly, the court's June 13, 2002 judgment of conviction and sentence is vacated and the case remanded for proceedings in accordance with this decision.

DATED: Honolulu, Hawai'i, April 26, 2004.

On the briefs:

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