

NO. 26664

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff

vs.

EGAN INOUE, Defendant

HOWARD K. K. LUKE, Petitioner

vs.

HONORABLE REYNALDO D. GRAULTY, Judge of the
First Circuit Court of the State of Hawai'i, Respondent

ORIGINAL PROCEEDING
(FC-CR NO. 03-1-2660)

ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,
and Circuit Judge Waldorf, in place of Acoba, J., recused)

Upon consideration of Petitioner Howard K. K. Luke's petition for a writ directed to a judge, the papers in support and opposition, and the records and files herein, Petitioner asks the court to vacate: (1) the May 11, 2004 findings of fact, conclusions of law and judgment of conviction re: Howard Luke, Esq.; adjudging Petitioner guilty of summary contempt of court as a petty misdemeanor; (2) the May 28, 2004 amended findings of fact, conclusions of law and judgment of conviction re: Howard Luke, Esq.; and (3) the May 28, 2004 order denying reconsideration and reverse his conviction for summary contempt of court. Alternatively, Petitioner seeks vacation of the conviction and sentence and remand for a hearing before a different judge.

Inasmuch as Petitioner was convicted of summary contempt of court pursuant to Hawai'i Revised Statutes (HRS)

§ 710-1077(3) (a) (1993), we have jurisdiction to review the conviction in a proceeding for an extraordinary writ. See HRS § 710-1077(5) (a judgment, sentence, or commitment under subsection 3(a) shall not be subject to review by appeal, but shall be subject to review in an appropriate proceeding for an extraordinary writ or is a special proceeding for review). Based upon our review of the entire record submitted by the parties, we address the issues raised as follows:

1. Citing Gabriel v. Gabriel, 7 Haw. App. 95, 746 P.2d 574 (1987), Petitioner contends he was not granted adequate notice of the charge against him. Unlike the attorney in Gabriel, who was charged with constructive criminal contempt of court, Petitioner's conduct in the instant case was characterized as summary contempt pursuant to HRS § 710-1077(3) (a) because the offending conduct was in the immediate view and presence of the court and the court had knowledge of all of the facts constituting the offense. Thus, the requirement for written notice set forth in Gabriel is inapplicable to the present case.

In Evans v. Takao, 74 Haw. 267, 842 P.2d 255 (1992), a case in which the attorney was charged with summary contempt of court, we concluded written notice of the specific charge was not required, but before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during the trial, he should have reasonable notice of the specific charge and an opportunity to be heard in his own behalf. Evans, 74 Haw. at 285, 842 P.2d at 263-264 (citing Taylor v. Hayes, 418 U.S. 488, 498-499 (1974)). In Evans, this court concluded that oral notice of the facts and charge was sufficient.

Although we believe the respondent judge could have articulated the charge more clearly at the time the alleged contemptuous conduct occurred, when looking at the record as a whole, we conclude Petitioner had adequate notice of the charge against him and the specific facts leading to the charge.

2. Petitioner contends the respondent judge failed to conduct a proper hearing because Petitioner was not provided an opportunity to speak prior to the determination of guilt. Both the State and the respondent judge acknowledge Petitioner was adjudicated guilty prior to being allowed to speak in his own behalf. They contend, however, that he had ample opportunity to speak before sentence was imposed and when he filed the motion for reconsideration.

We concluded in Evans v. Takao, supra, that before an accused attorney is finally adjudicated in contempt and sentenced after trial for conduct that occurred during trial, he should have the opportunity to be heard in his own behalf. Inasmuch as the events occurred before the judge's own eyes and a reporter's transcript is available, due process does not require a full-scale trial. Taylor v. Hayes, 418 U.S. at 499. At minimum, the contemnor should have the opportunity to urge that the behavior at issue was not contempt, but the acceptable conduct of an attorney representing his client, or he might present matters in mitigation or otherwise attempt to make amends with the court. Id. As the respondents point out, Petitioner had the opportunity to speak before sentencing and he filed a motion for reconsideration. Nevertheless, if the right to due process is to have any meaning, the accused must have the opportunity to defend or explain his behavior prior to the adjudication of guilt. Cf. State v. Schutter, 76 Hawai'i at 208, 873 P.2d at 87 (in holding a subsequent motion for reconsideration can not cure a court's failure to allow the accused contemnor the right to pre-sentence allocution and once a defendant is denied the opportunity to be heard, the denial of due process cannot be corrected later through a motion for reconsideration). Inasmuch as the hearing afforded Petitioner was insufficient, we vacate the conviction and remand the case for another hearing.

3. Relying on State v. Brown, 70 Haw. 459, 776 P.2d 1182 (1989), Petitioner contends the respondent judge was required to disqualify himself from conducting the contempt hearing. Our opinion in Brown addressed a situation distinct from the situation presented in the instant petition. In Brown, we considered disqualification in a contempt case involving indirect constructive criminal contempt as opposed to direct summary contempt that is at issue in this case. We addressed the issue of disqualification of a judge in a summary contempt proceeding in Evans, 74 Haw. at 291-92, 842 P.2d at 266, and held that where the contempt is committed in the immediate presence of the court or under such circumstances that the court has knowledge of all facts constituting the offense, the determination of whether the contempt proceeding may be had before the accuser depends on the nature of the alleged misconduct and the character of the judge's response to the misconduct. Id. (Citations omitted). We further stated:

[w]here the record reflects "marked personal feelings ... on both sides" inflicting lingering "personal stings" on the judge (i.e. where the case conveys an apparent "flavor of animosity on the part of the judge against counsel," ... such that the citing judge manifestly loses his or her capacity to "perform judicial duties without bias or prejudice") another judge "should [be] substituted for the purpose of finally disposing of the charges of [summary] contempt[.]" On the other hand, where the judge: (1) responds to the alleged direct summary criminal contempt "dispassionately and with a decorum befitting a judicial proceeding"; (2) affords the accused "an opportunity to be heard in his own behalf"; and (3) gives the alleged contemnor "reasonable notice of the specific charges when conviction and punishment for trial conduct are delayed until after trial," due process does not mandate a substitution.

Evans, 74 Haw. at 291-292, 842 P.2d at 266 (citations omitted)).

In the instant case, the record does not reflect a personal sting upon the respondent judge causing him to lose his capacity to perform his duties without bias and the record seems

devoid of any animosity by the respondent judge against Petitioner, and the respondent judge provided sufficient notice of the charge. The respondent judge, however, failed to afford Petitioner an opportunity to be heard in his own behalf prior to finding him guilty. Consequently, pursuant to the standard for disqualification we set forth in Evans v. Takao, we conclude the proceeding on remand must be held before another judge.

4. Petitioner finally contends there was insufficient evidence to support a conviction of contempt of court. The record shows some evidence of each element of the offense, but Petitioner was not granted the opportunity to present his defense or explanation prior to his conviction. Therefore, the weight and credibility to be given the evidence must be determined at the hearing on remand.

Based upon the forgoing,

IT IS HEREBY ORDERED that the petition for a writ directed to a judge is granted in part, and the judgment of conviction is vacated. This case is remanded to the circuit court for a hearing before another judge.

DATED: Honolulu, Hawai'i, October 7, 2004.

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Eric A. Seitz, and
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petitioner on the writ

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