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Intermediate Court of Appeals
CAAP-15-0000385
29-JUN-2016
08:42 AM

CAAP-15-0000385

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
CHARLES P. LATHROP, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
KONA DIVISION
(CASE NO. 3DCW-14-0001981)

SUMMARY DISPOSITION ORDER

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

After a bench trial, Defendant-Appellant Charles P. Lathrop (Lathrop) was found guilty of violating a temporary restraining order (Count 3) and third-degree assault (Count 4). The District Court of the Third Circuit (District Court)^{1/} sentenced Lathrop to concurrent terms of one-day of imprisonment with credit for time served and also imposed a \$55 crime victim fee on each count. The District Court entered its Judgment on April 6, 2015.

On appeal, Lathrop contends that his right to the effective assistance of counsel was violated because his trial counsel: (1) failed to learn before trial the elements necessary to convict Lathrop of violating a temporary restraining order

^{1/} The Honorable Margaret K. Masunaga presided.

(TRO); and (2) failed to present evidence that Lathrop did not understand the terms of the TRO.^{2/}

Lathrop bears the burden of establishing that his trial counsel provided ineffective assistance of counsel. State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980). To meet this burden, Lathrop must satisfy the following two-part test: (1) he "must establish specific errors or omissions of [his trial] counsel reflecting counsel's lack of skill, judgment or diligence"; and (2) he "must establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 348-49; 615 P.2d at 104.

As explained below, we conclude that Lathrop has failed in this appeal to meet his burden of establishing that his trial counsel provided ineffective assistance, and we therefore affirm the District Court's Judgment.

I.

We resolve Lathrop's arguments on appeal as follows:

1. Lathrop does not provide any basis for believing that his trial counsel did not know the elements necessary to prove the offense of violating a TRO before Lathrop's trial. Lathrop suggests that his counsel did not know the mens rea required to prove a criminal violation of a TRO. However, the record demonstrates that Lathrop's trial counsel clearly knew that the prosecution was required to prove that Lathrop acted intentionally or knowingly in violating the TRO. We conclude that Lathrop's contention that his trial counsel failed to learn the elements of the TRO offense before trial is without merit, and we therefore reject his claim of ineffective assistance that is premised on that contention.

2. Lathrop argues that his trial counsel was ineffective for failing to present evidence that Lathrop did not

^{2/} Lathrop's arguments on appeal do not challenge his conviction for third-degree assault, and we therefore do not address this conviction.

understand the terms of the TRO. He suggests that trial counsel should have presented evidence "such as testimony from Defendant-Appellant Lathrop that he had not read the TRO after being served with it, or similar testimony from one of the other people present when Defendant-Appellant Lathrop was served [with the TRO]."

The record shows that Lathrop's trial counsel did elicit testimony in support of a defense that Lathrop did not knowingly violate the TRO. At trial, defense counsel elicited testimony from Richard Rose (Rose), the person who served the TRO on Lathrop, that Rose did not read the TRO to Lathrop and that Lathrop did not sign the TRO because Lathrop was occupied cleaning fish with some other people when the TRO was served. In addition, evidence was presented through Officer Coley Rowe (Officer Rowe), who contacted Lathrop in response to complaints that he had violated the TRO, that Lathrop said he did not know that the TRO was in effect. Officer Rowe testified on direct examination by the prosecution that Lathrop said the person who served him with the TRO had not explained what it was and that Lathrop assumed that the TRO did not go into effect until his court date (which had not yet taken place). On cross-examination, defense counsel elicited testimony from Officer Rowe that Lathrop said the "[TRO] was not explained to him and that he did not think it was in effect until his court date."^{3/}

Although Lathrop argues that his trial counsel was ineffective for failing to introduce additional testimony to support his lack-of-knowledge defense, he fails to provide

^{3/} On the other hand, the prosecution presented evidence from the complaining witnesses that shortly after the TRO was served on Lathrop, Lathrop confronted the complaining witnesses in separate incidents at or near their work place, threatened them, and assaulted one of the complaining witnesses and that Lathrop stated that the TRO was "worthless," that it was "BS," and that "[y]our restraining order doesn't mean shit to me." The prosecution also presented evidence that Lathrop violated the terms of the TRO (1) after he was told by one of the complaining witnesses that the TRO was "in effect," that Lathrop had to leave the complaining witness alone, and that the complaining witness was calling the police and (2) after the other complaining witness told Lathrop that Lathrop was not supposed to be there because the complaining witnesses had a restraining order against him.

reliable evidence of what specific testimony was available. See State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) ("Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses."). For example, the record does not include affidavits describing the proffered testimony of those present when Lathrop was served with the TRO. The record also does not contain an affidavit or other reliable evidence specifically describing what Lathrop would have said if asked about his understanding of the TRO when he testified at trial. Moreover, the record does not contain Lathrop's trial counsel's explanation for not directly questioning Lathrop on this subject. Prior to Lathrop's testimony, evidence had already been introduced to support a lack-of-knowledge defense. There may have been strategic or other reasons for defense counsel to avoid questioning Lathrop about his understanding of the terms of the TRO.

Based on the existing record, we conclude that Lathrop has failed to satisfy his burden of establishing that his trial counsel provided ineffective assistance. We therefore affirm the District Court's Judgment. We note, however, that substitute counsel was not appointed for Lathrop until after the notice of appeal was filed and this case was already pending on appeal. Thus, it does not appear that Lathrop had a fair opportunity to develop a record to support his claim of ineffective assistance of counsel. Accordingly, our decision to deny Lathrop's claim of ineffective assistance of counsel is without prejudice to Lathrop raising an ineffective assistance of counsel claim on a more developed record in a subsequent proceeding under Hawai'i Rules of Penal Procedure (HRPP) Rule 40. See State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993).

II.

For the foregoing reasons, we affirm the District Court's Judgment without prejudice to Lathrop filing a petition

under HRPP Rule 40 that raises a claim of ineffective assistance of counsel.

DATED: Honolulu, Hawai'i, June 29, 2016.

On the briefs:

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Curtis)
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Linda L. Walton
Deputy Prosecuting Attorney
County of Hawai'i
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Craig H. Nakamura
Chief Judge

Award In Fines
Associate Judge

[Signature]
Associate Judge