IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

RITALYNN MOSS CELESTINE,
Petitioner/Defendant-Appellant.

SCWC-14-0000335

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-14-0000335; CASE NO. 1DTA-13-00956)

APRIL 12, 2018

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I respectfully dissent. The Majority vacates Defendant Ritalynn Moss Celestine's conviction because it concludes that the district court failed to engage Celestine in a true colloquy. Although I acknowledge that the colloquy fell short of our

instructions to trial courts in Tachibana and its progeny, I would nonetheless hold that Celestine's waiver of her right to testify was knowing, intelligent, and voluntary based on the totality of the circumstances. It appears from the record that Celestine understood the nature of the proceedings, and her responses to the district court's questions evince no uncertainty or misunderstanding regarding her right to testify. The Tachibana colloquy is a means to an end--i.e., protecting a defendant's constitutional right to testify--not an end unto itself.

In Tachibana, this court announced a new rule: "[i]n order to protect the right to testify under the Hawaiʻi Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." Tachibana v. State, 79 Hawaiʻi 226, 236, 900 P.2d 1293, 1303 (1995) (footnotes omitted). In an accompanying footnote, we cautioned:

> In conducting the colloquy, the trial court must be careful not to influence the defendant's decision whether or not to testify and should limit the colloquy to advising the defendant
>
> > that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be

> advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right.

Id. n.7, 900 P.2d at 1303 n.7 (quoting State v. Neuman, 371 S.E.2d 77, 82 (W. Va. 1988)).

This court further explicated in subsequent cases what steps a trial court must take to protect a defendant's right to testify. In Lewis, we held that a trial court must inform a defendant prior to trial 1) of their personal right to testify, and 2) that, if he or she has not testified by the end of trial, the court will briefly question him or her to ensure that the decision not to testify is their own. State v. Lewis, 94 Hawaiʻi 292, 297, 12 P.3d 1233, 1238 (2000).

In Han, we held that trial courts must engage in a "true 'colloquy'" to ensure that defendants understand their rights. State v. Han, 130 Hawaiʻi 83, 90, 306 P.3d 128, 135 (2013). We determined in Han that such a colloquy would entail conducting a "verbal exchange" with the defendant "at least twice" before accepting his waiver. Id. However, we also noted that "this court will look to the totality of the facts and circumstances of each particular case" "to determine whether a waiver of a fundamental right was voluntarily and intelligently undertaken." Id. at 89, 306 P.3d at 134 (quoting State v. Friedman, 93 Hawaiʻi 63, 66-67, 996 P.2d 268, 273-74 (2000)

(internal quotation marks and brackets omitted)). In Han, as in Tachibana, the defendant did not speak English proficiently and required an interpreter in the courtroom. See id. at 85, 306 P.3d at 130; Tachibana, 79 Hawaiʻi at 229, 900 P.2d at 1296. We found that this language barrier was a "salient fact" that impacted the defendant's ability to understand the rights that he waived:

> The presence of a "salient fact" underscores the importance of the court's colloquy as a procedural safeguard that protects a defendant's right to testify or to not testify. "Salient facts," such as mental illness or language barriers, require that a court effectively engage the defendant in a dialogue that will effectuate the rationale behind the colloquy and the on-the-record waiver requirements as set forth in Tachibana.

Han, 130 Hawaiʻi at 92, 306 P.3d at 137 (citation omitted).

Thus, we conducted a step-by-step inquiry because there was a language barrier:

> With respect to the Tachibana colloquy at the close of defendant's case, first, the court did not ask Petitioner for appropriate responses to ensure that Petitioner understood the rights articulated, and second, the risk that Petitioner did not understand was exacerbated by the fact that Petitioner needed an interpreter during the proceedings.

Id. at 93, 306 P.3d at 138.

Accordingly, I disagree with the Majority's contention that the salient fact in Han "only exacerbated" the flaws in the trial court's colloquy. Majority at 14 n.14. The salient fact was an integral part of the totality of the circumstances upon which we concluded that the defendant in Han had not made a

knowing, intelligent, and voluntary waiver of the right to testify.

In the instant case, the district court began with a pretrial advisement as required by Lewis:

> THE COURT: Okay. Miss Celestine, to advise you of your rights at trial, at some point in time the State will rest, okay, and you'll have an opportunity to testify or remain silent. Should you choose to remain silent, the Court can infer no guilt because of your silence. Basically, you'll be invoking your Fifth Amendment right against self-incrimination.
>
> Okay, you understand?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: However, if you do wish to testify, you need to be sworn in, you're also subject to cross-examination by the State's attorney. Okay?
>
> [THE COURT]: Okay. And when the State does rest, okay, I'll remind you again, okay, I have to finish this even though we're doing this piece -- piecemeal today. All right. Any questions? Okay. Thank you.

After the State rested, the Tachibana colloquy proceeded as follows:

> THE COURT: Okay. Just in caution, okay, I had explained to you, okay, on the 12th that you had the right to testify and the right to remain silent, okay. They call this your Tachibana rights. It's based on a case law that the appellate court found that the trial court needed to inform you of your rights, okay. If you chose not to testify, the Court could infer no guilt because of your silence; basically you would be invoking your Fifth Amendment right against self-incrimination. Okay. On the other hand, if you do wish to testify, you need to be sworn in, you also will be subject to cross-examination by the State's attorney.
>
> Okay. Your attorney just indicated to the Court that you will not be testifying. Is that correct?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Okay. Is anybody forcing you not to testify?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. It's your own decision?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay, very good, why don't you have a seat. . . .

(Emphasis added).

The Majority concludes that the district court "did not engage in a sufficient verbal exchange with Celestine to ascertain whether her waiver of the right to testify was based on her understanding of the principles related by the district court." Majority at 15. For example, the Majority states that the district court should have engaged in a verbal exchange with Celestine after the court stated, "Your attorney just indicated to the Court that you will not be testifying. Is that correct?" and Celestine replied, "Yes, sir." Majority at 14. The Majority concludes that "the court's question does not indicate whether [Celestine] was expressing that she did not wish to testify or merely confirming that her attorney had just told the court she would not be testifying." Majority at 14.

Respectfully, such formalism is not the best method to protect a defendant's right to testify. This court instituted the Tachibana colloquy as a prophylactic measure to protect that right. This measure is a means of ensuring that defendants do

not forfeit their constitutional rights unwittingly, not an end unto itself. Accordingly, the appropriate inquiry for our review of an alleged Tachibana violation is whether, in light of the totality of the facts and circumstances of the case, it appears that the defendant's waiver was knowing, intelligent, and voluntary. See Han, 130 Hawaiʻi at 89, 306 P.3d at 134. A court's flawlessly executed colloquy cannot guarantee with absolute certainty that a defendant's waiver was knowing, intelligent, and voluntary.[1] Nor does a court's failure to strictly comply with the guidelines of our Tachibana case law compel the conclusion that the defendant's waiver was constitutionally invalid, so long as the facts and circumstances indicate that it was knowing, intelligent, and voluntary. Reducing our review of waivers of the right to testify to a checklist detaches the Tachibana colloquy from the vital constitutional concerns that led to its creation.

In the present case, Celestine was advised of her right to testify at the beginning of trial pursuant to Lewis, responding, "[y]es, sir" when asked if she understood. The district court's ultimate colloquy advised Celestine that 1) she had the right to testify; 2) she had the right to remain silent;

[1] For example, a defendant experiencing mental illness or under the influence of drugs or alcohol might answer "yes" to a judge's questions while failing to comprehend their meaning or import.

3) if she chose not to testify, the court could infer no guilt because of her silence, as she would be invoking her constitutional right against self-incrimination; and 4) if she chose to testify, she would need to be sworn in, and would be cross-examined by the State. The court then asked her if she was choosing not to testify, to which she responded, "[y]es, sir." The court asked her if anyone was forcing her not to testify, to which she responded, "[n]o, sir." Finally, the court asked her if not testifying was her own decision, to which she responded, "[y]es, sir."

In sum, the district court conducted a valid Lewis pretrial colloquy as well as an ultimate colloquy that explicitly advised Celestine of four out of the five components of her right to testify under Tachibana. The court failed to tell Celestine that no one could prevent her from testifying, but it did ask her if anyone was forcing her not to testify, to which she responded, "[n]o, sir." This question strongly implies that it would be impermissible for someone to force her not to testify, and I fail to see what benefit Celestine might have derived from the more explicit advisement. Moreover, Celestine responded clearly to the court's questions, and the record contains no indication of a language barrier, mental illness, or other salient fact suggesting that she might not have comprehended the court's plain

English advisements regarding the waiver. Accordingly, I would hold that Celestine's waiver of her right to testify was valid, as the circumstances indicate that it was "voluntarily and intelligently undertaken." Han, 130 Hawaiʻi at 89, 306 P.3d at 134.

The Majority cites Han for the proposition that "beyond advising defendants of the rights afforded to them, a court must engage defendants in a true colloquy to ascertain whether the defendant understands the right to testify and the right not to testify and whether the decision not to testify is made with an understanding of these rights." Majority at 11. In Han, this court held that the trial court should have elicited responses from the defendant after advising him that he had a right to remain silent, and after the trial court stated to the defendant, "now that the State has finished its case and you had a chance to discuss what happened with your attorney, and based on that discussion, you have decided that you are not going to testify on your behalf." Han, 130 Hawaiʻi at 90, 306 P.3d at 135. We also agreed with the defendant that these errors were "more egregious" in light of his need for an interpreter, observing that "'[s]alient facts,' such as mental illness or language barriers, require that a court effectively engage the defendant in a dialogue that will effectuate the rationale behind the colloquy

and the on-the-record waiver requirements as set forth in Tachibana." Id. at 92, 306 P.3d at 137 (citation omitted). We concluded: "Taken together, the errors by the court in the instant case demonstrate that [the defendant's] waiver of the right to testify was not made knowingly, intelligently, and voluntarily." Id. at 93, 306 P.3d at 138 (citation omitted).

We vacated the Han defendant's conviction based on our analysis of the facts and circumstances of that case, which did not support the conclusion that his waiver was valid. Id. at 93-94, 306 P.3d at 138-39. As in Han, the district court in the instant case did not ask Celestine if she understood her rights during the Tachibana colloquy, but this alone does not compel the same result as Han. First, any harm from this error here is mitigated by the court's pretrial Lewis advisement, which it concluded by asking, "[o]kay, you understand?" Second, the record evidences no salient fact that might have impeded Celestine's ability to understand the court's advisements.

The level of precision required by the Majority has the additional negative consequence of interfering with the ability of the trial courts to communicate effectively with defendants. A trial court is far better situated than we are to "read" a defendant and understand how best to communicate the complex legal principles that underlie a Tachibana colloquy. The trial

court here evidently believed that its reference to "invoking your Fifth Amendment right against self-incrimination" would resonate with the defendant, and achieve the ultimate goal of ensuring a knowing and voluntary waiver. In contrast, requiring the court to read from a script could be far less effective. In any event, I believe we should give the trial courts some leeway in their approach,[2] and evaluate the waiver based on the totality of the circumstances.

In conclusion, the approach used by the Majority in today's decision is not the best method to achieve the objectives of Tachibana--to "protect defendants' rights while maintaining the integrity of the criminal justice system." Tachibana, 79 Hawaiʻi at 234, 900 P.2d at 1301. As discussed above, the facts and circumstances of the instant case support the conclusion that Celestine's waiver was voluntarily and intelligently made, and thus constitutionally adequate. The Majority correctly points out flaws in the district court's colloquy, but its conclusion that these flaws render Celestine's waiver unknowing, unintelligent, or involuntary is unsupported by the record.

[2] Such leeway does not mean that critical aspects of the Tachibana inquiry, like obtaining an on-the-record waiver from defendant of defendant's right to testify, can be omitted. See, e.g., State v. Staley, 91 Hawaiʻi 275, 982 P.2d 904 (1999) (holding that trial court's failure to elicit from defendant an on-the-record waiver of his right to testify was plain error, where defense counsel, not defendant, waived right to testify). However, the touchstone should be evaluating the totality of the circumstances to determine whether the court's colloquy failed to protect the defendant's right to testify.

Strict adherence to the guidance set forth in Tachibana and its progeny is commendable as a best practice--it makes the job of appellate courts considerably easier--but I disagree that failure to adhere to the script word-for-word is a per se violation of the defendant's constitutional rights.

For the foregoing reasons, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama