SCWC-11-0000081

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

ABEL SIMEONA LUI, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000081; CASE NOS. 3P810-73 and 3P810-74)

DISSENT BY POLLACK, J.

I respectfully dissent from the denial of certiorari in this case. I disagree with the conclusion of the Intermediate Court of Appeals (ICA) that Petitioner/Defendant-Appellant Abel Simeona Lui (Lui) waived by conduct his constitutional right to counsel at trial. I would also find that the District Court of the Third Circuit (district court) plainly erred by facilitating plea negotiations during pretrial proceedings without obtaining from Lui a valid waiver of his right to counsel and by not eliciting a valid waiver of Lui's right to testify during trial.

I.

The Sixth and Fourteenth Amendments to the United States Constitution "guarantee[] a defendant the right to have counsel present at all critical stages of the criminal proceedings." Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012) (quotation marks omitted). "Article I, Section 11 of the Hawaii State Constitution likewise guarantees an accused the right to counsel." State v. Dicks, 57 Haw. 46, 47, 549 P.2d 727, 729 (1976).

"Critical stages" at which the right to counsel applies "include arraignments . . . and the entry of a guilty plea." Frye, 132 S. Ct. at 1405; United States v. Wade, 388 U.S. 218, 226 (1967) ("[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.") (footnotes omitted).

Due to the critical importance of plea negotiations, it is well-established that a defendant has the constitutional right to effective assistance of counsel during plea bargaining. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."); Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012); Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

The right to effective assistance of counsel derives from the right to counsel itself. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Thus, a complete denial of counsel during plea negotiations would result in a constitutional violation absent a valid waiver of the right.

In order for a defendant to validly waive the right to counsel and proceed *pro se*, "the record must indicate that he was offered counsel but that he voluntarily, knowingly, and intelligently rejected the offer and waived that right." State v. Dickson, 4 Haw. App. 614, 619, 673 P.2d 1036, 1041 (1983) (emphasis added). "Courts will not presume acquiescence in the deprivation of such a fundamental right, nor will waiver be presumed from the echoes of a silent record." Id. The trial court must satisfy the requirements of State v. Dickson and "examine the particular facts and circumstances relating to the defendant," make the defendant aware of all "facts essential to a broad understanding of the whole matter," and inform the defendant of the right to counsel and the disadvantages of self-representation. Id. at 619-20, 673 P.2d at 1041-42.

In this case, Lui's right to counsel attached at his arraignment on April 14, 2010. He appeared without counsel and was informed by the court that he could apply to the office of the public defender for legal representation.

Lui returned to court on May 12, 2010 for a pretrial conference. At that time the court, without undertaking the Dickson inquiry, proceeded to facilitate plea negotiations between Lui and the State:

> THE COURT: Mr. Lui, do you wish to represent yourself?
> MR. LUI: Yes, sir.
> THE COURT: Has the state extended any plea offer?
> MR. SHIIGI: Not yet, your Honor. Mr. Lui did not have a mailing address nor a phone number. So I'll give him a plea offer at this time. The state will dismiss the disorderly conduct charge, which is at Count 2, in exchange for the harassment, which is the offense of touching of the victim . . . . Police reports -- well, and the state will be seeking a $100 fine for the harassment.
> THE COURT: Mr. Lui, do you accept or reject this plea offer?
> MR. LUI: I reject. And I have something to read to the Court before I say anything. Number one, dismiss because there is evidence that this person was breaking the law. When the case is dismissed, return my money.
> I'm asking the Court because I have evidence here. And if they want to continue this, that's up to them. I want to dismiss this case, and then we can go later on. The remedy to all of this -- it says they cannot spray here. It's the law, if you want to look at it. Sir, this is -

(Emphases added).

On July 14, 2010, Lui appeared before the district court for trial without counsel. Initially, Lui indicated that he wished to represent himself. It was only at this point that the court attempted to conduct the Dickson inquiry that the court had not conducted at the prior proceeding. However, during the court's colloquy with Lui, Lui indicated that he would apply to the public defender's office rather than waive his right to counsel. Even after Lui indicated that he intended to apply for a public defender, the court asked Lui for his "offer" to the State.

> MR. LUI: I get one more question to ask you. Because we -- before we even go there, would the state consider what I'm saying? To make things, to drop all of this, we no need go through all of that?
> THE COURT: What is your offer?
> MR. LUI: No. I'm to --
> THE COURT: What is your offer of settlement? What are you offering to give to the state? You want to make a deal, you have to make it something that they can live with, you know.
> MR. LUI: Well, I'm not here to disgrace anybody or anything. It's just pau. They no can spray no more, and just follow the law.
> THE COURT: So your offer is that you want the state not to spray anymore and to drop the charges?
> MR. LUI: Yeah. I mean, this guy is working for the state. We no need go through all of this. And if we got to go through the court, I going bring in all kind people.
> THE COURT: Do you have any response, Mr. Shiigi?
> MR. SHIIGI: Judge, I don't think -- you know, the state rejects the offer.

(Emphases added). The court was aware that it had not obtained Lui's waiver of counsel before facilitating plea negotiations because immediately after the State rejected Lui's offer, the court asked Lui again if he wanted to apply to the public defender's office:

> THE COURT: Okay. So do you want to apply to the public defender?
> MR. LUI: I think I will consider that, your Honor.
> THE COURT: Yes, or no?
> MR. LUI: Yes.
> THE COURT: And you understand that this will delay your trial?
> MR. LUI: Yes.
> THE COURT: And you would be essentially waiving your right to a speedy trial.
> MR. LUI: Yes.

The district court's facilitation of plea negotiations prior to satisfying the Dickson inquiry and obtaining a valid waiver of the right to counsel was a clear violation of Lui's constitutional right to counsel and an infringement of his substantial rights. "[T]he right to a fair trial is a

substantial right for which this court has reviewed alleged violations of plain error." State v. Walsh, 125 Hawai'i 271, 285, 260 P.3d 350, 364 (2011). See State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (plain error is applied "to prevent the denial of fundamental rights"). "The right to counsel is an essential component of a fair trial[.]" State v. Dickson, 4 Haw. App. 614, 618, 673 P.2d 1036, 1041 (1983).

In particular, where the defendant's right to counsel has been denied during the critical stage of plea negotiations, the defendant's substantial rights have been affected. As recently observed by the U.S. Supreme Court, "In today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). "To a large extent," plea bargaining "determines who goes to jail and for how long . . . . It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Id. (quotation marks omitted) (emphasis in original). Thus, the complete denial of Lui's right to counsel during this critical stage in the prosecution infringed on his substantial rights and plain error review is appropriate.

The district court's violation of Lui's right to counsel was not harmless beyond a reasonable doubt. State v. Dickson, 4 Haw. App. 614, 623, 673 P.2d 1036, 1043 (1983)

(adopting the harmless beyond a reasonable doubt standard to determine "what relief may be accorded a *pro se* defendant upon a trial court's failure to adequately warn a defendant of the dangers and disadvantages of self-representation"). During the May 12, 2010 plea negotiations, Lui, without counsel and without having waived counsel, rejected the State's offer to dismiss one of the charges against him in exchange for pleading guilty on the second charge and paying a $100 fine. The State's offer would have required no jail time. Instead, Lui was convicted on both counts, sentenced to concurrent seven-day jail terms, and ordered to pay criminal injury fees. Thus, the deprivation of the right to counsel during Lui's plea negotiations cannot be said to have been harmless beyond a reasonable doubt.

In addition, the fact that Lui received a trial does not cure the denial of the right to counsel during the plea bargaining process. As the Supreme Court has explained, "Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quotation marks and citation omitted).

Thus, I would hold that the district court's violation of Lui's right to counsel constituted plain error and was not harmless beyond a reasonable doubt.

II.

The ICA erred in holding that "Lui waived his right to counsel in this case by his continual inaction in failing to contact the [Office of the Public Defender] or secure private counsel despite repeated continuances and the district court's advisement that January 26, 2011 was [a] firm trial date with no further continuances." Memorandum Opinion at 3 (emphasis added).

Lui was arraigned on April 14, 2010. On May 12, 2010, he indicated that he would represent himself but the district court did not undertake the Dickson inquiry and obtain a valid waiver of Lui's right to counsel. On July 14, 2010, the State's witnesses were present and the State was ready to proceed. Lui initially indicated that he would proceed *pro se* but after the court conducted the Dickson colloquy, Lui stated that he would apply to the office of the public defender. The trial was continued to November 17, 2010.

On November 17, 2010, Lui appeared without counsel and indicated that he would proceed *pro se*. However, following further discussion with the court, Lui informed the court that he planned to hire an attorney, Gary Zamber (Zamber). The court continued the trial to January 26, 2011 and informed Lui and the State's witnesses that there would be no further continuances.

On January 26, 2011, Lui appeared and informed the court that he had hired Zamber, who was not present due to

another court case in Hilo but who had been trying to contact the court all morning. Lui stated that he told Zamber "about today's trial" and "He told me that he would take care of this."

The judge spoke with Zamber on the phone and Zamber confirmed that he had "agreed to assist" Lui:

> MR. ZAMBER: Okay. I have a -- I've been trying to contact the court but just getting the answering machine. I am willing to assist him. However, I have a court appearance at 1:30 here in Hilo, so I could not be present personally today. I have my calendar if we wish to schedule for further proceedings. I would be happy to assist him. I would need to seek discovery and have a bit of time that way, but I am willing to assist Mr. Lui in this matter.
>
> THE COURT: Did Mr. Lui hire you?
>
> MR. ZAMBER: Uh, well, not formally. He has asked me to assist him, and I have agreed to assist him. I don't know that there is going to be much of an exchange of, you know, monies in that way, but I am willing to assist him.
>
> THE COURT: When did he hire you?
>
> MR. ZAMBER: He contacted me -- gosh, I'd say just maybe a couple of weeks ago we had some initial conversation whenever I was assisting Ms. Ahn Lui when I came to Kona at that time, and he was talking with me about the case. And then a gentleman yesterday put together an affidavit - had an affidavit put together, and they presented this affidavit. They had driven over to Hilo side and presented that to me for my review.

(Emphases added). Zamber stated that he was not aware that the case was set for a "firm trial date":

> THE COURT: Did he tell you that today was the firm trial date?
>
> MR. ZAMBER: I had no idea that it was set for a firm trial date. He was told that he was meant to get counsel if he was going to have counsel, and that's why he had contacted me.

After further discussion, the court concluded that Mr. Zamber's non-appearance was "more likely" due to "Mr. Lui's lack of effort at following up" and determined that the case would proceed for trial that day:

> MR. ZAMBER: Well, I will note that there had been some discussion that there was a -- you know, that there was a case. I indicated that, you know, I would -- I would assist him but that I could not be present on today's date.
>
> THE COURT: Okay. No motions to continue have been filed, and are you saying that you weren't prepared?
>
> MR. ZAMBER: Well, I'm saying that, you know, I'm just getting the information from the Court today and then also from Mr. Lui last evening, and I have a conflict in the calendar.
>
> THE COURT: Well, then it's Mr. Lui's fault for not informing you about the nature of today's hearing and/or your fault for not being properly prepared, but I'm not going to sanction you because it appears that it's more likely Mr. Lui's lack of effort at following up on his request. So if you want, he can call you in private. I'll give him time to do that.
>
> MR. ZAMBER: Okay, Judge. Thank you.
>
> THE COURT: All right. Thank you. Bye.
>
> Okay. So you can call him, Mr. Lui. We'll take a five-minute break, and you can make that phone call, but we're going to proceed to trial today.
>
> MR. LUI: Fine.
>
> THE COURT: And we'll recess.
>
> (Recess.)

(Emphases added).

As stated, a defendant's waiver of the right to counsel must be voluntary, knowing and intelligent, and the trial court must satisfy the Dickson requirements for a finding of a valid waiver. State v. Dickson, 4 Haw. App. 614, 619-20, 673 P.2d 1036, 1041-42 (1983). In this case, the district court never satisfied the Dickson requirements. The only time the court attempted to conduct the Dickson inquiry was at the July 14, 2010 proceeding, at which point Lui stated that he would apply to the public defender's office rather than waive the right to counsel.

Although waiver of the right to counsel may be shown by conduct, waiver by conduct "cannot occur before the *Dickson* requirements have been satisfied." State v. Sinagoga, 81 Hawai‘i

421, 918 P.2d 228 (App. 1996), overruled on other grounds by State v. Veikoso, 102 Hawai‘i 219, 74 P.3d 575 (2003).

Moreover, in order for a defendant to waive the right to counsel by conduct, the conduct must be of "an unequivocal nature." State v. Tarumoto, 62 Haw. 298, 300, 614 P.2d 397, 399 (1980) (per curiam). In the instant case, the district court did not conduct the Dickson colloquy until the July 14, 2010 proceeding. The trial was continued to November 17, 2010 and then again to January 26, 2011. However, on the trial date, rather than proffer a generalized and unsubstantiated statement that he was planning to secure counsel, Lui informed the court that he had retained Zamber, and Zamber confirmed that he had agreed to assist Lui.

Although Zamber also stated that he was not aware that the case was set for a "firm trial date," and the court appeared to place more blame on Lui than on Zamber for the latter's non-appearance, the record does not indicate whether Zamber attempted to continue the other matter scheduled in Hilo, or the extent of the efforts Zamber had made regarding Lui's case prior to the trial date. In addition, there was no evidence that Lui was attempting to mislead the court in order to delay trial or that he engaged in dilatory tactics sufficient to "forfeit" or waive his right to counsel. See United States v. Goldberg, 67 F.3d

1092 (3d Cir. 1995).[1] On the contrary, Zamber confirmed that Lui contacted him in the weeks prior to the trial date and that they had reached an agreement that Zamber would assist him.

"Because a criminal defendant's right to be represented by counsel is an essential component of a fair trial . . . , courts are most solicitous to assure an accused adequate legal representation and guardingly indulge in a strong presumption against waiver of this fundamental right." State v. Dowler, 80 Hawai'i 246, 250, 900 P.2d 574, 578 (App. 1995) (citations, quotation marks and brackets omitted).

On these facts, I would not find that Lui "unequivocally" waived his right to counsel by conduct and I would find that the ICA erred in determining that Lui waived his right to counsel through "continual inaction."

[1] "Forfeiture" is distinct from the concept of "waiver," and can be caused by "extremely serious misconduct, regardless of the defendant's knowledge of the right and irrespective of whether the *Dickson* requirements have been satisfied or defendant intended to relinquish the right." State v. Sinagoga, 81 Hawai'i 421, 438, 918 P.2d 228, 245 (App. 1996).

In Goldberg, the court explained that "forfeiture would appear to require extremely dilatory conduct." 67 F.3d at 1101. While the Goldberg court also discussed waiver through dilatory misconduct, it appears that the court contemplated that those situations would involve the defendant's intentional engagement in dilatory tactics or other evidence of manipulation on the defendant's part. See id. at 1100 ("Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel.") (emphasis added).

III.

The district court also plainly erred by not eliciting a knowing and voluntary waiver of Lui's right to testify pursuant to Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995).

Under Tachibana, "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." Id. at 236, 900 P.2d at 1303. The purpose of the Tachibana colloquy is to ensure that the defendant is "aware of his right to testify and that he knowingly and voluntarily waived that right." Id. at 237, 900 P.2d at 1304. This colloquy should be conducted once prior to the start of trial, id. at 237 n.9, 900 P.2d at 1304 n.9, and then again prior to the close of the defendant's case. Id. at 237, 900 P.2d at 1304.

In this case, the district court informed Lui of his right to testify prior to the start of trial. After the State rested its case and the district court asked Lui if he wanted to testify, the following exchange occurred:

> MS. WALTON: The state has no other witnesses.
> THE COURT: All right. So, Mr. Lui, did you want to call any witnesses? Did you want to call any witnesses?
> MR. LUI: No, sir, not now.
> THE COURT: Okay. And you have the right to testify if you wish, or you can remain silent. Anything else? Did you want to testify?
> MR. LUI: We went through all of this already. I gave you folks the affidavits, and I will stand on what I said. And I'm going to tell you I stand that I am the owner of Honu'apo. I'm an heir.
> MS. WALTON: Objection. The defendant isn't sworn. If he wants to testify, he needs to be sworn.

> MR. LUI: I need to put it where you -- I have my chance to speak. I'm just speaking my --
> THE COURT: You just want to make a closing statement then?
> MR. LUI: A closing statement, yes.
> THE COURT: Okay. Wait until after the state has made its closing statement.
> Okay. Ms. Walton.

(Emphases added). It is not clear what "affidavits" or prior statements Lui was referring to. During Lui's cross-examination of one of the State's witnesses, Lui had asked whether he could use an "affidavit" regarding the State's spraying of herbicides on the land where the incident occurred. In addition, at the beginning of the proceedings that day Lui had provided a copy of a document to the prosecutor and the court, although the document was not filed in court. The record also does not show that Lui introduced an affidavit or any other document as an exhibit into evidence during the trial.

Lui's statement that "I gave you folks the affidavits, and I will stand on what I said," indicates his belief that his prior statements and documents had been entered into evidence and rendered his testimony unnecessary. Rather than addressing Lui's clear confusion regarding the right to testify and his ability to "stand on" any of his prior statements or "affidavits," the court moved directly to closing statements.

On this record, it cannot be said that Lui "knowingly and voluntarily" waived the right to testify. Thus the district court violated Lui's constitutional right to testify.

This court has previously employed plain error to address trial errors infringing on the defendant's right to testify. See State v. Staley, 91 Hawai'i 275, 286, 982 P.3d 904, 916 (1999); State v. Schnabel, 127 Hawai'i 432, 464, 279 P.3d 1237, 1269 (2012).

"Once a violation of the constitutional right to testify is established, the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt." Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307. "In other words, the question is whether there is a reasonable possibility that error may have contributed to conviction. If there is a reasonable possibility, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Hoang, 94 Hawai'i 271, 279, 12 P.3d 371, 379 (App. 2000) (quotation marks and ellipses omitted).

"In general, it is inherently difficult, if not impossible, to divine what effect a violation of the defendant's constitutional right to testify had on the outcome of any particular case." Id. Thus, Hawai'i courts have previously found that the denial of the defendant's right to testify was not harmless beyond a doubt where the record did not indicate what the defendant's testimony would have been. See State v. Silva, 78 Hawai'i 115, 125, 890 P.2d 702, 713 (App. 1995) (holding that

denial of the right to testify was not harmless beyond a reasonable doubt where defendant's conviction "was essentially based on the uncontroverted testimony" of the complaining witness and the record did not indicate what the defendant's testimony would have been).

In this case, the record does not reflect what Lui may have testified to in regard to his actions on the day of the incident. Lui's closing statement addressed his theory that the State should not be permitted to continue "spraying poison on the land." He did not address his actions with respect to the underlying harassment and disorderly conduct charge. There were also no defense witnesses presented to refute the State's witnesses or to suggest what Lui's testimony would have been.

Therefore, pursuant to Hoang and Silva, I would find that the district court's violation of Lui's constitutional right to testify was not harmless beyond a reasonable doubt.

IV.

For the foregoing reasons, I would accept the application for writ of certiorari. Therefore, I respectfully dissent.

DATED: Honolulu, Hawai‘i, January 29, 2013.

/s/ Richard W. Pollack

Associate Justice