IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

KEVIN ALEXANDER SCOTT, Petitioner/Defendant-Appellant.

SCWC-10-0000037

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-10-0000037; CR. NO. 10-1-0030K)

October 16, 2013

CONCURRING OPINION BY ACOBA, J.

I concur that the case must be remanded for a new trial because the circuit court erred in denying the request of Petitioner/Defendant-Appellant Kevin Alexander Scott (Scott) for transcripts of his codefendant's trial. However, I would hold that this error mandates the vacation of Scott's conviction without any showing of prejudice by Scott. The denial of a request for written transcripts of a prior trial has "so pervasive an effect on the reliable ascertainment of truth at

[the subsequent] trial that reversal must automatically result."[1] People v. Hosner, 538 P.2d 1141, 1148 (Cal. 1975). Consequently, as set forth infra, the harmless beyond a reasonable doubt standard[2] should not be applied.

I.

A.

In State v. Mundon, 121 Hawaiʻi 339, 219 P.3d 1126 (2009), the defendant, indigent and proceeding pro se, requested written transcripts of a preliminary hearing and grand jury proceeding in his case. Id. at 355, 219 P.3d at 1142. Instead of written transcripts, the defendant was given Compact Disk (CD) recordings of the prior proceedings. Id. Because the defendant was imprisoned, he lacked the equipment necessary to review the CD recordings and consequently the recordings were "useless." Id. at 355-36, 219 P.3d at 1142-43. Nevertheless, the

[1] Under Hawaiʻi law, "when used in an opinion or dispositional order, the word 'reverse' ends litigation on the merits." Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 35(e). However, in California, "if a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." Cal. Penal Code § 1262 (West 2013); accord People v. Murphy, 382 P.2d 346, 356 (Cal. 1963) ("An unqualified reversal remands the cause for new trial[.]"). In Hosner, the California Supreme Court's reversal was "unqualified." Hosner, 538 P.2d at 1149. Hence, the "reversal" in Hosner was the equivalent of a "vacation" under Hawaiʻi law. See HRAP Rule 35(e) ("When used in an opinion or dispositional order . . . the phrase 'vacate and remand' indicates the litigation continues in the court or agency in accordance with the appellate court's instruction.").

[2] Under the harmless beyond a reasonable doubt standard, an appellate court must determine "whether there is a reasonable possibility that error might have contributed to conviction." State v. Schnabel, 127 Hawaiʻi 432, 450, 279 P.3d 1237, 1255 (2012).

Intermediate Court of Appeals (ICA) concluded that "the trial court's failure to provide [the defendant] with the written transcripts was harmless inasmuch as [the defendant] failed to show that he was prejudiced by proceeding at trial without written transcripts." Id. (emphasis added).

This court held that Britt v. North Carolina, 404 U.S. 226 (1971), was "instructive" regarding "whether [the defendant was required to show that he was prejudiced by proceeding to trial without the written transcripts." Mundon, 121 Hawaiʻi at 357, 219 P.2d at 1144. In Britt, "the Supreme Court . . . recognized the innate value of transcripts [of the defendant's prior trial] for trial preparation and impeachment purposes and [held] that a defendant need not show a need for the transcripts 'tailored to the facts of a particular case[.]'" Id. (emphasis added). Therefore, the defendant was not required to "identify specific examples of prejudice." Id.

This court said, it was only necessary to show that no adequate alternative to the written transcripts existed. Id. Hence, "the ICA erred in concluding that the trial court's failure to provide [the defendant] with written transcripts was harmless error." Id. In my view, we have already decided that the failure to provide the defendant with transcripts of prior proceedings in his own case constitutes grave error without the

need to show prejudice and consequently, the defendant is entitled to a new trial.

B.

The rule mandating vacation of an order denying transcripts without a showing of prejudice is justified because "even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." Britt, 404 U.S. at 228. Even as to adequate modes of reviewing prior proceedings, Britt indicated that "[a] defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight."[3] Id. at 230. In Hosner,[4] the California Supreme Court explained that it is impossible for an appellate court to assess the impact of the denial of a prior trial transcript because a court cannot ascertain how counsel might use the transcript in "impeaching or

[3] In Britt, however, rejection of the defendant's request for a free transcript was upheld because the defendant "conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript." 404 U.S. at 230.

[4] Hosner held that an indigent defendant was entitled to the transcript of a prior trial under the equal protection clause of the Fourteenth Amendment to the United States Constitution. 538 P.2d at 1143.

rebutting" evidence:

> [T]he denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence.

538 P.2d at 1148 (emphasis added). To apply the harmless error rule, we would be left to "hypothesize" as to how defense counsel would have used the unavailable transcripts. See Mundon, 121 Hawaiʻi at 380, 219 P.3d at 1167 (Acoba, J., concurring and dissenting). This would result in "an entirely new level of compound conjecture" leading this court to

> first speculat[e] what evidence might have been impeached . . . [and] then speculat[e] [as to] how the trier of fact would have reacted to the speculated efforts at impeachment. . . . [T]his would be speculation running riot.

Hosner, 538 P.2d at 1148 (emphasis added).

As in State v. Cramer, 129 Hawaiʻi 296, 299 P.3d 756 (2013), determining the prejudicial effect in the instant case would require this court to make unwarranted assumptions regarding the effect of the transcript on the defendant's trial strategy. See id. at 303, 229 P.2d at 771. This court is not privy to the confidential work product or mental processes of attorney and client and therefore we cannot know what the defendant's theory of the case would be with or without the transcripts nor can we compel disclosure of such matters. We cannot infringe upon the right to counsel or the attorney-client

privilege by requiring counsel to identify specific trial strategies that he intended to pursue in order to demonstrate harmful error. See Mundon, 121 Hawaiʻi at 380, 219 P.3d at 1167 (Acoba, J., concurring and dissenting). It is not the role of this court to supplant defense counsel by guessing how a prior trial transcript might have been used. See Cramer 129 Hawaiʻi at 303, 299 P.3d at 764; see also Mundon, 121 Hawaiʻi at 380, 219 P.3d at 1167 (Acoba, J., concurring and dissenting).[5]

II.

The reasoning in Britt, Mundon, and Honser applies with equal force when a defendant is denied the transcript of a codefendant's trial arising from common circumstances. The transcripts of a codefendant's trial are inherently necessary for a defendant to prepare for his or her own trial. The government's strategy and evidence in a defendant's trial are likely to be related to the strategy and evidence presented in the trial of his or her codefendant. Because the trial of a codefendant usually arises out of the same incident, the transcript of a codefendant's trial would be essential to the defendant's preparation of a defense.

[5] Moreover, "it would be an unjustifiable waste of appellate resources to require an exhaustive comparison of trial transcripts in every case in which a transcript has been denied." United States v. Pulido, 879 F.2d 1255 (5th Cir. 1989)

Thus, "while counsel is studying [the transcript of the prior trial], the precise words used by a witness might trigger mental processes resulting in legitimate defense strategies which might otherwise be overlooked." Britt, 404 U.S. at 234-35 (Douglas, J., dissenting). Since the State's case against the defendant may be closely linked to its case against a codefendant, strategic insights may be gained from defense counsel's analysis of a codefendant's trial. The transcripts of a codefendant's trial would also be valuable for purposes of impeachment, inasmuch as some or all of the same witnesses will likely testify in both trials.

Additionally, "portions of the transcript, other than the testimony of witnesses, are often crucial to the preparation of an effective defense." Kennedy v. Lockyer, 379 F.3d 1041, 1048 (9th Cir. 2004). For example, "[o]pening and closing arguments may provide valuable insight into the government's strategy," and "motions to suppress or exclude often reveal . . . information regarding damaging and prejudicial evidence that the [S]tate plans to introduce, and the rulings thereon may sometimes be case-dispositive." Id.

Insights from the transcripts of a codefendant's trial may only be gained by defense counsel when he or she actually reads the document. "Such spontaneity can hardly be forecast or articulated in advance in terms of special or particularized

need." Britt, 404 U.S. at 234-35 (Douglas, J., dissenting). For example, a defendant may be unable to articulate how a transcript may be used for impeachment or to gain insight into the government's strategy without first reading the transcript. See Melendez v. State, 942 S.W.2d 76, 80 (1997) (Chavez, J., dissenting) (noting "the practically impossible burden" imposed by requiring a defendant to "show[] detailed information contained within a document that he [cannot] possess"). Because a defendant cannot be aware of the value of the transcript without first examining the transcript, requiring a defendant to make a showing of particularized need as a basis for obtaining the transcript of a codefendant's trial is problematical.

Thus, a defendant should not have to demonstrate a particular need for a transcript of his codefendant's trial. Such a requirement would be resurrected if, after a defendant demonstrated that the denial of a prior trial transcript was erroneous, he or she was required to demonstrate prejudice to establish on appeal that the error was not harmless. See Pulido, 879 F.2d at 1259. Hence, "it would be somewhat anomalous . . . to dispense with the need to prove that a transcript would be valuable but to reincorporate these same considerations into our test by way of an after-the-fact prejudice analysis." Id. at 1259; cf. Mundon, 121 Hawaiʻi at 357, 219 P.2d at 1144 (holding

that the ICA erred in applying a harmless error standard because the defendant was not required to show prejudice under Britt).[6]

Based on the foregoing, it is apparent that the denial of a codefendant's trial transcript would "infect[] all of the evidence offered" at Scott's trial. Hosner, 538 P.2d at 1148. Given the broad utility of a codefendant's trial transcript, it is not reasonably plausible for this court to determine that evidence would not have been more effectively impeached or rebutted by defense counsel with the aid of the transcript, or that defense counsel would not have altered his or her overall trial strategy. A request for a codefendant's trial transcript should be granted for the same reasons that justify granting trial transcripts of a defendant's prior trial in the same case.

[6] Respectfully, State v. Razihna, 599 P.2d 808, 811-12 (Ariz. Ct. App. 1979) and United States v. Bamberger, 482 P.2d 166, 168-69 (9th Cir. 1973), cited by the majority, are inapposite. Razinha held that unlike a prior trial's transcript, the value of a codefendant's trial transcript "cannot be assumed." 599 P.2d at 811. But Razinha provided no explanation for this conclusion. The benefit of obtaining a transcript of defendant's prior trial and a transcript of a codefendant's trial are similar. In both circumstances, a defendant may use the transcript both to prepare his or her trial strategy and for impeachment purposes. See discussion supra. Hence, the Arizona court's application of the particularized need standard is not persuasive.

Razinha further held that the erroneous denial of a transcript of a co-defendant's trial was subject to harmless error analysis. Id. at 811-12. However, as explained supra, it would be inconsistent to require a defendant to demonstrate a particularized need for a transcript but nevertheless require the defendant to demonstrate prejudice in a harmless error analysis since the two considerations are virtually identical. Pulido, 879 F.2d at 1259.

Finally, neither Razihna nor Bamberger provide any rationale for the application of the harmless error standard. Inasmuch as requiring a showing of prejudice will inevitably require the trial and appellate courts to engage in fruitless speculation, see Hosner, 538 P.2d at 1148; cf. Cramer, at 303, 299 P.3d at 764, the application of the harmless error standard in Razinha and Bamberger should not be followed.

III.

Britt held that indigent defendants were entitled to relevant transcripts under the equal protection clause of the Fourteenth Amendment to the United States Constitution[7] because "the state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." 404 U.S. at 227. In this context, "[i]t is difficult to conceive of a situation in which a litigant with means would not want an exact reproduction of the prior proceeding to aid in tracking prior testimony and procedural developments in preparation for and during the retrial." Pulido, 879 F.2d at 1259 (Clark, C.J., concurring). Accordingly, "[t]he clear implication of such a process . . . in the mistrial/retrial situation is that almost every request should be granted." Id.

Based on the foregoing observations, a defendant with financial means would obviously order the transcripts of his or her codefendant's trial. It has been pointed out that "wealthier defendants tend to purchase transcripts [of a prior trial] as a matter of course," simply on the strength of the defendant's

[7] The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o state shall make or enforce any law which shall . . . deny to any person with its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Indigent defendants should also be entitled to relevant transcripts under the Hawaiʻi Constitution on independent state grounds. See Haw. Const. art 1, § 5 ("No person shall . . . be denied equal protection of the laws[.]").

interests in effective trial preparation and impeaching the State's witnesses. Britt, 404 U.S. at 235 (Douglas, J., dissenting) (emphasis added); see also Pulido, 879 F.2d at 1259 (Clark, C.J., concurring).

Inasmuch as the considerations relevant to a defendant's request for his own trial transcript apply to a request for the transcript of a codefendant's trial, see discussion supra, it may also be assumed that a wealthier defendant would purchase his codefendant's transcripts "as a matter of course." Under Britt, indigent defendants must have the same "basic tools for an adequate defense" as those with financial means. Non-indigent defendants would not hesitate to determine whether a "particularized need" exists before ordering the transcripts of a codefendant's trial. Hence, such a requirement cannot be imposed on indigent defendants without violating Scott's right to equal protection of the law.[8]

[8] Nevertheless, it may be possible for the government to rebut the precept that a transcript of a codefendant's trial is innately valuable to a defendant by showing that a defendant's request for a transcript is wholly frivolous. Cf. Hosner, 538 P.2d at 1146 (noting that the State could "overcome the presumption of the defendant's particularized need for the transcript"); State v. Blockyou, 407 P.2d 519, 522 (Kan. 1965) ("The state should not be required to subsidize frivolous requests for indigent appellants."). Frivolous claims are "lacking a legal basis or legal merit," or "not serious," see Black's Law Dictionary 739 (9th ed. 2009), and should be readily apparent without extensive examination. That issue is not raised here, however.

IV.

A.

To reiterate, the denial of a transcript affects the ascertainment of truth at trial "as where there has been a denial of the assistance of counsel, a biased judge, or the introduction of a coerced confession." Hosner, 538 P.2d at 1148 (citing Chapman v. California, 386 U.S. 18, 23 (1967)). Similarly, several Hawaiʻi decisions citing Chapman have concluded that there are some "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." State v. Suka, 79 Hawaiʻi 293, 298, 901 P.2d 1272, 1277 (App. 1995); see also State v. Silva, 78 Hawaiʻi 115, 121, 890 P.2d 702, 708 (App. 1995) (holding that denial of the right to an impartial tribunal "by definition, is inherently prejudicial and not harmless"); State v. Bowe, 77 Hawaiʻi 51, 56, 881 P.2d 538, 543 (1994) (admission of coerced confessions is "fundamentally unfair"); State v. Chow, 77 Hawaiʻi 241, 251, 883 P.2d 663, 673 (App. 1994) ("[W]e doubt that the denial of presentence allocution can ever be harmless error.").

In view of the inherent value of a transcript for purposes of discovery and impeachment, "it is not a matter of showing that the violation was harmless, but of showing that violation of the right to [the transcript] occurred." Cramer, 129 HawaiʻI at 310, 299 P.3d at 770 (Acoba, J., concurring)

(internal quotation marks omitted) (emphasis in original). Additionally, Britt undeniably established as a matter of equal protection the defendant's right to a transcript of a prior mistrial as a "basic tool of an adequate defense or appeal, where those tools are available for a price to other prisoners." 404 U.S. at 433.

B.

Under the Hawaiʻi Constitution, "[t]his court, in determining whether to apply harmless error review in the violation of a particular right, should look to the 'nature of the right at issue as well as the effect of an error upon trial.'" Cramer, 129 Hawaiʻi at 311, 299 P.3d at 771 (Acoba, J., concurring) (quoting Arizona v. Fulminante, 499 U.S. 279 (1991) (White, J., dissenting)) (internal brackets omitted). Thus, "[i]f a violation of the right would abort the basic trial process and render a trial or sentence fundamentally unfair, then an infraction of that right cannot be treated as harmless error." Id. (internal quotation marks and brackets omitted). "Once such an infraction is established, a criminal defendant thus is not required to show prejudice where the right that was violated protects important values underlying constitutional guarantees[.]" Id.

First, as to the nature of the right at issue, copies of a codefendant's trial transcripts are necessary for the

purposes of trial preparation or the impeachment of the State's witnesses. See Britt, 404 U.S. at 228. Proceeding to trial without access to such information infringes on the defendant's right to present a defense, rendering the trial fundamentally unfair.

Moreover, the equal treatment of all defendants is a bedrock principle of our criminal justice system. "Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with [a] crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" Griffin v. Illinois, 351 U.S. 12, 17 (1956) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)). In furtherance of this principle, all defendants must be provided with the "basic tool[s] of an adequate defense." See Britt, 404 U.S. at 433. The denial of a codefendant's trial transcripts "renders a trial . . . fundamentally unfair" if a defendant, because of his or her indigency, is denied access to items necessary to conduct a defense. As a matter of equal treatment, the erroneous deprivation of such transcripts cannot be deemed harmless.

Second, as to the affect of an error upon a trial, the Fulminante dissent explained that when "'a coerced confession constitutes a part of the evidence before a jury and a general verdict is returned, no one can say what credit and weight the

jury gave to the confession.'" 449 U.S. at 290 (White, J., dissenting) (quoting Payne v. Arkansas, 356 U.S. 560, 568 (1958)). Consequently, "[t]he inability to assess its affect on a conviction causes the admission at trial of a coerced confession to defy analysis by harmless error standards." Id. (internal quotation marks omitted). As explained supra, the denial of a codefendant's trial transcript permeates every aspect of trial. Cf. Honser, 538 P.2d at 1148. It is not reasonably possible for an appellate court to determine how the outcome of a trial would have been affected had transcripts not provided been instead allowed to a defendant. Hence, the "inability to assess" the effect of disallowed transcripts would defy "harmless error analysis." Fulminante, 499 U.S. at 291 (White, J., dissenting).

In sum, based on both the "nature of the right" to a codefendant's trial transcripts as well as the affect the denial of such transcripts would have on the outcome of a trial, application of the harmless error standard would be wrong. Cramer, 129 Hawaiʻi at 310, 299 P.3d at 770 (Acoba, J., concurring). Therefore, the case must be remanded for a new trial.

V.

Based on the foregoing, I respectfully concur.

/s/ Simeon R. Acoba, Jr.