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Supreme Court  
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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

KAOLINO RICHARD BAKER, Petitioner/Defendant-Appellant.

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SCWC-11-0000666

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-11-000666; FC-CR NO. 10-1-0329K)

January 27, 2014

CONCURRING OPINION BY ACOBA, J.

Inasmuch as this case is remanded, I would hold that the waiver of the right to jury trial in this case was invalid,<sup>1</sup> because additionally, (1) the Family Court of the Third Circuit (the family court) did not engage Petitioner/Defendant-Appellant Kaolino Richard Baker (Baker) in an on-the-record colloquy that would ensure that he fully understood the right that he was waiving, and (2) Baker's oral waiver was insufficient in that the

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<sup>1</sup> I concur with the majority's holding that the family court failed to ensure that Baker's waiver of his right to a jury trial was voluntary. See majority opinion at 2-3.

court did not include in its advisement to Baker on-the-record, the four specific rights that were mentioned in the waiver form,<sup>2</sup> namely, that (1) twelve members of the community compose a jury, (2) defendants may take part in jury selection, (3) jury verdicts must be unanimous, and (4) the court alone decides guilt or innocence if defendants waive a jury trial. State v. Gomez-Lobato, 130 Hawai'i 465, ---, 312 P.3d 897, 905 (2013) (Acoba, J., concurring); see also State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000) (citations omitted).

I.

First, it has been explained that "[t]he colloquy in open court informing a defendant of his right to a jury trial at arraignment serves several purposes: (1) it more effectively insures voluntary, knowing and intelligent waivers; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal; and (3) it emphasizes to the defendant the

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<sup>2</sup> The waiver form as it appears in the record is severed on the right side, but apparently states in part that:

I understand that I have the constitutional right to a jury trial. Furthermore, I under[stand] that a jury trial is a trial in the Circuit Court before a judge and a jury and that I can partic[ipate] in the process of selecting a jury of twelve (12) citizens from the Third Circuit. This jury w[ould hear] the evidence in my case, and then decide if I am guilty or not guilty. Finally I understand [that] in order for me to be convicted by a jury, their vote must be unanimous.

I know that if I give up my right to a jury trial, the trial will be held in this [c]ourt b[efore a] judge would would alone decide if I am guilty or not guilty. I request that my case be tried [before a] judge.

seriousness of the decision.” Friedman, 93 Hawai‘i at 68, 996 P.2d at 274 (internal quotation marks, citation, and punctuation omitted). The failure to obtain such a waiver of this fundamental right constitutes reversible error. Id. (citing State v. Ibous, 75 Haw. 118, 120, 857 P.2d 576, 577 (1993)).

A “[c]olloquy is defined as any formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant’s understanding of the proceedings and of the defendant’s rights.” State v. Chong Hung Han, 130 Hawai‘i 83, 90, 306 P.3d 128, 135 (2013) (internal quotation marks and citation omitted) (emphases in original). In addition to the deficiencies the majority points out with respect to the waiver form, it is abundantly clear that the colloquy in this case did not sufficiently allow the judge to “ascertain[] [Baker’s] understanding of the proceedings and of [his] rights.” Id. (internal quotation marks and citation omitted).

Here, the family court engaged in the following exchange with Baker during the entry of plea hearing<sup>3</sup>:

THE COURT: You’re Kaolino Baker?

MR. BAKER: Yes.

. . . .

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<sup>3</sup> Baker was charged with Abuse of a Family or Household Member, Hawai‘i Revised Statutes § 709-906(1) (Supp. 2010). This exchange with the family court took place after Baker pled not guilty and executed a “Waiver of Jury Trial” form.

THE COURT: And you signed [the "Waiver of Jury Trial" Form] on February 23, 2011?

MR. BAKER: Yes.

THE COURT: Do you have any questions about this document?

MR. BAKER: No.

. . . .

THE COURT: Is your mind clear?

MR. BAKER: Yes.

THE COURT: You speak and understand the English language?

MR. BAKER: Yes.

. . . .

THE COURT: Okay. I'm going to hand this back to you and have you sign this, that you acknowledge that we went over this in open court and you know what you're doing. Okay?

The [c]ourt will order you to return here on March 23rd at 8:30 a.m. for pretrial conference.

Plainly, the family court did not ascertain whether the defendant understood the proceedings and the rights that he was waiving. The questions of the family court focused on Baker's signing of the waiver form, asking "yes" or "no" questions. The questions did not ask Baker anything about the specific contents of the form, or explain its significance. The family court asked only "[d]o you have any questions about this document?", a question which would not go to whether the defendant understood the substance of the rights he was waiving. The family court ended its questioning with the statement that "I'm going to hand this back to you and have you sign [the form], that you acknowledge that we went over this in open court and you know

what you're doing[,]” (emphasis added), but the family court did not in fact review the form in open court or explain to the defendant any provisions of the form, let alone obtain an assurance that he understood the rights he was waiving. See Han, 130 Hawai‘i at 90, 306 P.3d at 135. Under these circumstances, the court’s colloquy was deficient and thus did not ensure that the defendant’s waiver of his right to a jury trial was made knowingly, intelligently, and voluntarily.

II.

Second, in order to ensure that a waiver of the constitutional right to a trial by jury, Haw. const. art. I, § 14, is knowingly, intelligently and voluntarily made, courts must conduct an on-the-record colloquy that includes informing the defendant that (1) twelve members of the community compose a jury, (2) defendants may take part in jury selection, (3) jury verdicts must be unanimous, and (4) the court alone decides guilt or innocence if defendants waive a jury trial. Gomez-Lobato, 130 Hawai‘i at ---, 312 P.3d 897 at 905 (Acoba, J., concurring). See Friedman, 93 Hawai‘i at 68, 996 P.2d at 273 (citations omitted). For “[i]t is not difficult to foresee that courts will continue to be faced in the future with . . . questions as to the validity of jury trial waivers.” Gomez-Lobato, 130 Hawai‘i at ---, 312 P.3d at 917 (Acoba, J., concurring).

Here, again, this court is faced with the question of whether a defendant's waiver of his right to trial by jury was made knowingly, intelligently, and voluntarily. Thus, I reiterate that individual courts are free to include in their colloquies the four-part on-the-record advisement informing a defendant that "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." Id. (citing Friedman, 93 Hawai'i at 69, 996 P.2d at 274). See also State v. Valdez, 98 Hawai'i 77, 78, 42 P.3d 654, 655 (App. 2002).

/s/ Simeon R. Acoba, Jr.

