NO. CAAP-15-0000428

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
PEGGY ANN LASATER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(KONA DIVISION)
(CR. NO. 14-1-191K)

SUMMARY DISPOSITION ORDER
(By: Nakamura, Chief Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Peggy Ann Lasater (**Lasater**) appeals from the April 16, 2015 Judgment, Conviction, and Sentence (**Judgment**) in the Circuit Court of the Third Circuit (**Circuit Court**)[1] convicting her of one count of Theft in the Second Degree in violation of Hawaii Revised Statutes (**HRS**) § 708-831 (2014), four counts of Promoting a Dangerous Drug in the Third Degree in violation of HRS § 712-1243(1) (2014), and three counts of Prohibited Acts Related to Drug Paraphernalia in violation of HRS § 329-43.5 (2010). The Circuit Court sentenced Lasater to

[1] The Honorable Ronald Ibarra presided.

concurrent five-year terms of imprisonment, with a mandatory minimum term of one year and eight months.

Lasater raises three points of error on appeal, contending that: (1) the Circuit Court abused its discretion when it denied Lasater's oral motion to have her counsel withdraw and for new counsel to be appointed; (2) the Circuit Court plainly erred when it incompletely instructed the jury regarding the definition of possession by using only the standard pattern jury instruction; and (3) trial counsel's multiple omissions and errors denied Lasater effective assistance of counsel.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Lasater's points of error as follows:

(1) The Hawaiʻi Supreme Court has held:

> Although "there is no absolute right, constitutional or otherwise, for an indigent to have the court order a change in court-appointed counsel," State v. Torres, 54 Haw. 502, 504, 510 P.2d 494, 496 (1973), when an indigent defendant requests that appointed counsel be replaced, the "trial court has a duty to conduct a 'penetrating and comprehensive examination' of the defendant on the record, in order to ascertain the bases for the defendant's request." Soares, 81 Hawaiʻi at 355, 916 P.2d at 1256 (quoting Kane, 52 Haw. at 487–88, 479 P.2d at 209); see also Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991). This "inquiry is necessary to protect the defendant's right to effective representation of counsel," Soares, 81 Hawaiʻi at 355, 916 P.2d at 1256 (quoting Kane, 52 Haw. at 487–88, 479 P.2d at 209), and it must be "the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern," Lockhart, 923 F.2d at 1320; United States v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991).
>
> The trial court's inquiry must also be sufficient to enable the court to determine if there is "good cause" to warrant substitution of counsel. Soares, 81 Hawaiʻi at 355, 916 P.2d at 1256. Whether there is "good cause" requiring substitution of counsel will depend on the facts of the case. Typically, "good cause" exists when there is a conflict of interest on the part of defense counsel, a complete breakdown in communication between the attorney and client, or an irreconcilable difference between the attorney

> and client. See, e.g., id. at 355, 916 P.2d at 1256 (collecting cases).

State v. Harter, 134 Hawaiʻi 308, 323-24, 340 P.3d 440, 455-56 (2014).

Here, on the day of trial, Lasater informed the Circuit Court that she had concerns about court-appointed counsel Alfred Lerma's (**Lerma's**)representation of her because: (1) Lerma would not give Lasater a legal opinion on Lasater's chances at trial, purportedly only saying that there were no guarantees as to the outcome of a jury trial; (2) Lasater had not been informed of the mandatory minimum sentencing attached to her charges until noon on the day before trial, and because it took her "several hours" to get to Lerma's office, Lasater only had "ten minutes" to make a decision about the State's plea offer; and (3) Lasater felt that Lerma was not representing her to the fullest extent because she felt that Lerma was concerned that he might have to sit in front of the prosecutor in the case, based on Lasater having heard that the prosecutor was trying to get an appointment to become a judge.

The Circuit Court inquired as to the basis of Lasater's concern about the prosecutor. When Lasater responded that her concern was just based on her feelings, the court tried to alleviate Lasater's concern by telling her there were no judicial vacancies. Lasater's other concerns were focused principally on the plea bargains offered by the State, which Lasater had rejected, and the assessment of whether to accept a plea or go to trial. It appears from the record, however, that the plea offer conveyed to Lasater on the day before trial had been conveyed by

the prosecutor to defense counsel on the day before trial. With respect to Lasater's feeling that Lerma should have given her a more specific legal opinion, the court inquired as to whether Lerma went over what he believed the State's evidence would be and she responded, "Yes, we've gone over that."

We conclude that the Circuit Court's inquiry was sufficiently penetrating and comprehensive to ascertain the bases for Lasater's concerns. The court clearly tried to address Lasater's feelings that Lerma might be thinking about appearing in front of the prosecutor some day by informing her that no judicial vacancies were open. After identifying Lasater's concerns, the court found them not to constitute good cause for requiring substitution of counsel, particularly on the day of trial. We cannot conclude that the Circuit Court abused its discretion in doing so.

(2) At the conclusion of the evidentiary portion of the trial, the jury was instructed regarding the definition of possession, based on the standard pattern jury instruction, as follows:

> A person is in possession of an object if the person knowingly procured or received the thing possessed or was aware of her control of it for a sufficient period to have terminated her possession.
>
> The law recognizes two kinds of possession: Actual possession and constructive possession.
>
> A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing for a sufficient period to terminate her possession of it, either directly or through another person or persons, is then in ... constructive possession of it. The fact that a person is near an object or is present or associated with a person who controls an object, without more, is not sufficient to support a finding of possession.
>
> The law recognizes also that possession may be sole or joint. If one person alone has actual or ... constructive possession of a thing, possession is sole. If two or more

> persons share actual or constructive possession of a thing, possession is joint.
>
> The element of possession has been proved if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either solely or jointly with others.

See also Hawaiʻi Pattern Jury Instructions - Criminal, § 6.06 Possession.

Lasater argues that the court plainly erred in giving this instruction because, pursuant to State v. Foster, 128 Hawaiʻi 18, 282 P.3d 560 (2012), more emphasis must be placed on the element of intent. We disagree. First, read as a whole, the jury instruction correctly reflects the settled law, as stated in Foster, including that "to establish constructive possession of an item, intent to exercise dominion and control over it must be shown in addition to knowledge of the item and the power to exercise dominion and control." Id. at 27, 282 P.3d at 569.

In addition, the issue in Foster was not the (essentially identical) jury instruction, but whether the evidence in that case supported an inference that the defendant had the intent to exercise dominion and control over a certain firearm and ammunition based on his knowledge of and proximity to those items to him in his vehicle. Id. at 29, 282 P.3d at 571. Here, Lasater was not convicted solely on the basis that she had knowledge of the illegal nature of certain items and that she allegedly had ownership or possession over the place where they were found. Rather, in addition to jewelry, drugs, and Lasater's identification being found at the home where Lasater had resided, Tucker Bontecou (**Bontecou**) testified, *inter alia*, that he had stolen jewelry from his stepmother, brought the jewelry to

Lasater's residence, and "sold them" to Lasater in exchange for drugs and cash, after he informed Lasater that the jewelry was stolen.[2]

Lasater's argument that her conviction must be vacated based on legally insufficient instruction of the jury is without merit.

(3) Lasater identifies three categories of ineffective assistance of counsel.

First, Lasater contends that Lerma failed to properly present and argue a pretrial motion regarding issues of suppression and dismissal. In particular, Lasater contends that the first issue raised concerning the movement of items during the search of the subject residence was speculative, absent additional evidence of fraudulent intent associated with the police photography, and the second issue raised, concerning a lack of probable cause to arrest her, also needed to be supported by live witnesses, which trial counsel failed to call. On appeal, Lasater fails to demonstrate that the failure to call such witnesses resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. See, e.g., State v. Wakisaka, 102 Hawaiʻi 504, 513-14, 78 P.3d 317, 326-27 (2003) (explaining the defendant's burden of establishing ineffective assistance). In conjunction with this first contention, Lasatar also argues that trial counsel should have

[2] Lasater testified that, although Bontecou had shown her the jewelry, told her it was stolen, and offered to sell it to her, she neither bought it or possessed it, and had moved out of the residence prior to discovery by the police of the items at issue, pursuant to a search warrant.

argued "staleness" because the search occurred 11 days after the items to be seized had been seen in the place to be searched because "even if unsuccessful, [such motion] would be useful in testing the waters of the 'no constructive possession' defense by eliciting, and locking in, the testimony of potential alibi witnesses at a pre-trial motion hearing." Lasater cites no authority for her ineffective-assistance-due-to-failure-to-test-the-waters theory and we find none. Thus, we cannot conclude that the failure to pursue this course of action constitutes a denial of assistance within the range of competence demanded of attorneys in criminal cases.

In addition, it appears from the reply brief that Lasater contends that counsel should have argued that Lasater had "automatic standing" to challenge the search warrant – even though her defense theory was that she no longer lived at the residence and, accordingly, she did not constructively possess the items in question – based on the dissent in State v. Taua, 98 Hawaiʻi 426, 49 P.3d 1227 (2002). Even assuming, *arguendo*, that the automatic standing argument was a potentially viable avenue to challenge the search warrant while denying the facts that would otherwise be necessary to establish standing, as discussed above, Lasater has otherwise failed to establish ineffective assistance related to challenging the search.

Second, Lasater contends that trial counsel improperly presented *in limine* and other pre-trial arguments, thus evidencing counsel's misunderstanding of the rules of evidence. However, her argument does not specify how, or otherwise

demonstrate that, counsel's alleged missteps resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Lasater also states that trial counsel should have filed a notice of alibi and subpoenaed Zachary Williams (**Williams**) as an "alibi witness" in support of her defense that she could not have had constructive possession of the items in question at the time of the search because, at that time, she was living on a beach sixty miles away. However, as the supreme court has noted about the defense of alibi, "[i]ts function is not to establish a defense nor to prove anything, but merely to raise a reasonable doubt of the presence of the accused at the scene of the crime." State v. Cordeira, 68 Haw. 207, 211, 707 P.2d 373, 376 (1985) (citation and internal quotation marks omitted). In this case, the critical inquiry into the "scene of the crime" was not simply the moment when the police executed the search warrant, but earlier, when Lasater allegedly accepted the stolen jewelry and possessed or constructively possessed the other illegal items. Here, Lasater is not entirely denying her presence at the scene; at trial, she testified that she was present at the subject residence when Bontecou brought the jewelry to sell to her. While additional testimony that she had left the residence and moved to the beach theoretically could have bolstered her defense theory, the decision whether or not to call specific witnesses is "normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by

judicial hindsight." State v. Forman, 125 Hawaiʻi 417, 426, 263 P.3d 127, 136 (App. 2011). Nevertheless,

> [i]f counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.' . . . It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

Id. (quoting State v. Aplaca, 74 Haw. 54, 71, 837 P.2d 1298, 1307 (1992)). It appears from the record that trial counsel considered potential witnesses Williams and Franklin Rivera (**Rivera**), Lasater's boyfriend. However, in the interview between Bontecou and Hawaiʻi County Police Department (**HCPD**) Officer Jackson and Detective Sean Smith, Bontecou indicates that Rivera was also a drug dealer and that he had supplied Bontecou with methamphetamine. Rivera also indicated during a pre-trial hearing on January 14, 2015 that he would likely assert his Fifth Amendment right against self-incrimination if called to testify at trial. Lerma's statement to the court during trial that Williams had not yet made up his mind about whether he would testify the next day, and Williams's failure to testify, suggests that he too may have been unwilling to testify. Thus, there was at least a basis for Lerma to believe that if Rivera were cross-examined at trial on credibility, such testimony might have done more harm than good to Lasater's chances of success. In addition, Williams's August 8, 2014 declaration only stated that he encountered Lasater and Rivera, allegedly living on the beach, on November 26, 2013, which is two days after the last time Bontecou stated that he saw Lasater together with the drugs and jewelry at the subject residence. Thus, Lerma may have

reasonably determined, through his inquiry, that the potential testimony of Williams and Rivera would have been fruitless or harmful and, on the record before us, we decline to second-guess Lerma's decision not to call Williams and Rivera as witnesses.

Finally, Lasater presents a list of purported mistakes related to objections, failure to make objections, responses to objections, counsel's opening statement, improper evidentiary challenges, and a "general lack of knowledge and ability to convey that knowledge." We note that "[t]rial counsel is not required to make futile objections . . . merely to create a record impregnable to assault for claimed inadequacy of counsel." State v. Antone, 62 Haw. 346, 351, 615 P.2d 101, 106 (1980) (citation omitted). A trial counsel's "decision to refrain from objecting [may] constitute[] a legitimate tactical choice." Id. at 352, 615 P.2d at 106. Attorneys "require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case." Id. "Defense counsel's tactical decisions at trial generally will not be questioned by a reviewing court." State v. Onishi, 64 Haw. 62, 63, 636 P.2d 742, 743 (1981) (citing id.). But, "[w]here trial counsel makes a critical tactical decision which would not be made by diligent, ordinarily prudent lawyers in criminal cases, the right to effective assistance of counsel may be denied." Antone, 62 Haw. at 352, 615 P.2d at 106 (citation omitted). However, even if an error is shown, the error alone does not constitute ineffective assistance; a defendant must also show that the error resulted in

the possible impairment of a potentially meritorious defense. Wakisaka, 102 Hawaiʻi at 514, 78 P.3d at 327.

Upon review of each of Lasater's contentions, we cannot conclude that any (or all) of counsel's purported errors resulted in the possible impairment of a potentially meritorious defense. Even the most substantive of these assertions, essentially that counsel could have done a better job pursuing the "no constructive possession" defense, is highly speculative and ignores the strong evidence – including the physical evidence, Bontecou's testimony, and Lasater's own testimony – that supported Lasater's conviction.

For these reasons, the Circuit Court's April 16, 2015 Judgment is affirmed.

DATED: Honolulu, Hawaiʻi, May 20, 2016.

On the briefs:

Frank L. Miller,
for Defendant-Appellant.

Chief Judge

Linda L. Walton,
Deputy Prosecuting Attorney,
County of Hawaiʻi,
for Plaintiff-Appellee.

Associate Judge

Associate Judge