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Intermediate Court of Appeals
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NO. CAAP-14-0000833

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
KEVIN PAUL KIM, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 12-1-0363)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Kevin Paul Kim (Kim) appeals from the April 30, 2014 Judgment of Conviction and Sentence for Criminal Trespass in the First Degree in violation of Hawaii Revised Statutes (HRS) § 708-813 (2014), Terroristic Threatening in the Second Degree in violation of HRS § 707-717 (2014), and Assault in the Third Degree in violation of HRS § 707-712(1)(a) (2014), entered by the Circuit Court of the First Circuit (Circuit Court).¹

Kim appears to argue² that the Circuit Court erred

¹ The Honorable Karen S.S. Ahn presided.

² Kim's Opening Brief is in violation of Hawaii Rules of Appellate Procedure (HRAP) Rule 28 in many respects, most notably that its "Statement of Points Relied Upon" does not comply with HRAP Rule 28(b)(4) insofar as it does not provide record citations for the challenged actions of the Circuit Court nor for the preservation of these errors for appeal. "[S]uch noncompliance offers sufficient grounds for the dismissal of the appeal." Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999). See also Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001); Bettencourt v. Bettencourt, 80 Hawai'i 225, 228, 909 P.2d 553, 556 (1995). Counsel is cautioned that future violations of the rules may result in sanctions.

(continued...)

(1) when it conducted the end-of-trial Tachibana colloquy because it "did not fully advise [Kim] of his rights and because it was not a true exchange[;]" and (2) when it allegedly "intimidated" Kim throughout the trial and thus allegedly influenced Kim's decision not to testify at his trial.

After a careful review of the points raised and arguments made by the parties, the applicable legal authority and the record, we resolve Kim's points as follows and affirm.

1. Kim argues that the Circuit Court's end-of-trial Tachibana colloquy was inadequate because it "did not fully advise [Kim] of his rights and because it was not a true exchange."

The Circuit Court fully advised Kim of the five rights³ required by the Tachibana colloquy.

The Tachibana colloquy conducted by the Circuit Court adequately fulfilled the reasons for the colloquy. The two purposes of the Tachibana colloquy are "(1) the protection of a defendant's personal right to testify; and (2) the minimization of post-conviction disputes over the actual waiver of the right to testify." State v. Lewis, 94 Hawai'i 292, 295, 12 P.3d 1233, 1236 (2000). The Circuit Court read Kim's rights to him then

²(...continued)

Nevertheless, we recognize that our appellate courts have "consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible," Schefke, 96 Hawai'i at 420, 32 P.3d at 64 (citation and internal quotation marks omitted; emphasis supplied), and in several instances have addressed the merits of an appeal, noncompliance with the appellate rules notwithstanding. See, e.g., Housing Fin. & Dev. Corp., 91 Hawai'i at 85-86, 979 P.2d at 1111-12; O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994). Therefore, we will endeavor to do so here, to the extent possible.

³ [(1)] that he or she has a right to testify, [(2)] that if he or she wants to testify that no one can prevent him or her from doing so, and [(3)] 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 [(4)] that he or she has a right not to testify and [(5)] that if he or she does not testify then the jury can be instructed about that right.

Tachibana v. State, 79 Hawai'i 226, 236 n.7, 900 P.2d 1293, 1303 n.7 (1995) (citation omitted, brackets and block format altered).

engaged in a colloquy in which Kim acknowledged he understood those rights and ultimately that he had chosen not to testify.

After engaging in a discussion with Kim, the Circuit Court clearly articulated its assessment that, "he look[ed] very cognizant and alert" and understood the Tachibana colloquy and its implications. "To determine whether a waiver of a fundamental right was voluntarily and intelligently undertaken, this court will look to the totality of the facts and circumstances of each particular case." State v. Christian, 88 Hawai'i 407, 420, 967 P.2d 239, 252 (1998) (quoting State v. Merino, 81 Hawai'i 198, 221, 915 P.2d 672, 695 (1996)) (internal quotation marks omitted, formatting altered). Taking the record as a whole, we conclude that the Circuit Court adequately advised Kim of his rights and obtained a knowing and voluntary waiver of his right to testify.

2. Kim argues that the Circuit Court erred when it allegedly "intimidated" Kim throughout the trial and thus allegedly influenced Kim's decision not to testify at his trial. Kim argues that "[t]he trial court even went so far as threatening to admonish [Kim] in front of the jury and to eject him from the courtroom and to have the trial without [Kim.]"

Over the course of Kim's two-day trial, the Circuit Court twice admonished Kim not to make faces, gestures, or otherwise attempt to communicate to the jury from his seat during proceedings. The Circuit Court first admonished him after jury selection voir dire and next admonished him during defense counsel's cross-examination of witness Lewis. Kim did not deny that he engaged in this conduct. Neither warning was in front of the jury and at neither point did defense counsel object to the Circuit Court admonishing Kim.

A trial court is well within its discretion to warn a Defendant that he could lose his right to be present at trial, if after he has been warned by the judge that he will be removed if he continues his disruptive behavior and then persists in the conduct. See Illinois v. Allen, 397 U.S. 337, 343 (1970). Without more, we cannot conclude that the Circuit Court's warnings in an effort to maintain order were sufficiently

intimidating as to affect Kim's decision to waive his right to testify.

Therefore, the April 30, 2014 Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 16, 2016.

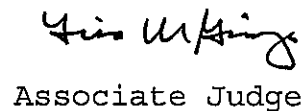
On the briefs:

Tae Won Kim,
for Defendant-Appellant.


Presiding Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge