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NO. CAAP-24-0000547

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MICAIAH H. SMITH, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3CPC-23-0000305)

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, Wadsworth and McCullen, JJ.)
Defendant-Appellant Micaiah H. Smith (**Smith**) appeals
from the June 24, 2024 Judgment of Conviction and Sentence;
Notice of Entry of Judgment (**Judgment**) entered by the Circuit
Court of the Third Circuit (**Circuit Court**).¹

Plaintiff-Appellee State of Hawaii (the **State**) charged
Smith by way of Indictment with one count of Electronic
Enticement of a Child in the First Degree (**Count 1**), in violation
of Hawaii Revised Statutes (**HRS**) § 707-756(1) (2014),² and one

¹ The Honorable Robert D.S. Kim presided.

² HRS § 707-756 provides:

§ 707-756 Electronic enticement of a child in the first degree. (1) Any person who, using a computer or any other electronic device:
(a) Intentionally or knowingly communicates:
(i) With a minor known by the person to be under the age of eighteen years;
(ii) With another person, in reckless disregard of the risk that the other person is under
(continued...)

count of Attempted Promoting Pornography for Minors (**Count 2**), in violation of HRS §§ 705-500(1)(a)³ and 712-1215(1)(a) (2014).⁴ The Circuit Court held a jury trial, resulting in Smith's conviction on both Counts. The Circuit Court sentenced Smith to, *inter alia*, a ten-year prison term.

Smith raises six (6) points of error on appeal, contending that: (1) Count 1 of the Indictment failed to give notice of the correct state of mind for HRS § 707-756(1)(b); (2) the Count 2 jury instructions erroneously failed to include the phrase "pornographic for minors;" (3) the Circuit Court failed to

²(...continued)

the age of eighteen years, and the other person is under the age of eighteen years; or
(iii) With another person who represents that person to be under the age of eighteen years;
(b) With the intent to promote or facilitate the commission of a felony:
(i) That is a murder in the first or second degree;
(ii) That is a class A felony; or
(iii) That is another covered offense as defined in section 846E-1, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time,
is guilty of electronic enticement of a child in the first degree.

³ HRS § 705-500 provides:

§ 705-500 Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:
(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be[.]

⁴ HRS § 712-1215 provides:

§ 712-1215 Promoting pornography for minors. (1) A person commits the offense of promoting pornography for minors if:
(a) Knowing its character and content, the person disseminates to a minor material which is pornographic for minors[.]

protect Smith's due process right to assert lack of penal responsibility as a defense by failing to conduct a colloquy with Smith pursuant to State v. Glenn, 148 Hawai'i 112, 468 P.3d 126 (2020); (4) Count 2 failed to allege a state of mind for the conduct "disseminate;" (5) the Count 1 jury instructions failed to include a state of mind for "communicate with another person;" and (6) Smith received ineffective 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, we resolve Smith's points of error as follows:

(1) & (4) The Hawai'i Supreme Court recently re-affirmed their case law regarding challenges to convictions based on allegedly defective charges. Relevant here, the supreme court explained:

In a post-conviction challenge to a charge, the charge is presumed valid and will be invalidated only if the defendant can show (1) the charge cannot reasonably be construed to allege a crime; or (2) the defendant was prejudiced: Under the Motta/Wells rule, charges challenged for the first time on appeal are presumed valid. Accordingly, we will only vacate a defendant's conviction under this standard if the defendant can show: (1) that the charge cannot reasonably be construed to allege a crime; or (2) that the defendant was prejudiced.

State v. Bekkum, 158 Hawai'i 507, 513, 595 P.3d 83, 89 (2026) (citation omitted).

Here, because Smith challenges the sufficiency of the charges for the first time on appeal, the Motta/Wells rule applies. Therefore, the only bases for a challenge are that:

(1) the charges cannot reasonably be construed to allege crimes; or (2) Smith was prejudiced.

With respect to Count 1, Smith argues neither, instead arguing that Count 1 of the Indictment failed to give notice of the correct state of mind for HRS § 707-756(1)(b).

HRS § 707-756 includes three distinct elements with separate mens rea requirements: (a) intentionally or knowingly communicating with a Minor; (b) agreeing to meet the Minor with the intent to promote or facilitate the commission of a felony; and (c) intentionally or knowingly traveling to the agreed meeting place at the agreed time.

State v. Alangcas, 134 Hawai'i 515, 525-26, 345 P.3d 181, 191-92 (2015).

Count 1 of the Indictment states:

On or about the 1st day of April, 2023, in the County and State of Hawai'i, MICAIAH HOOMAIKAI SMITH, using screen name "K," using a computer or any other electronic device, did intentionally or knowingly communicate with Detective John Surina, using screen name "Gillian," who represented themselves to be a minor under eighteen years of age, specifically representing that they were fifteen years of age, and MICAIAH HOOMAIKAI SMITH did knowingly agree to meet with Detective John Surina, and MICAIAH HOOMAIKAI SMITH had the intent to promote or facilitate the commission of a felony that is another covered offense as defined in Section 846E-1 of the Hawai'i Revised Statutes, specifically, sexual penetration, that is, vaginal intercourse and/or cunnilingus with a minor, who was at least fourteen years old but less than sixteen years old, and MICAIAH HOOMAIKAI SMITH was not less than five years older than the minor and not legally married to the minor, which is Sexual Assault in the First Degree, in violation of Section 707-730(1)(c), Hawai'i Revised Statutes, and MICAIAH HOOMAIKAI SMITH did intentionally or knowingly travel to the agreed-upon meeting place, at the agreed-upon meeting time, thereby committing the offense of Electronic Enticement of a Child in the First Degree, in violation of Section 707-756(1), Hawai'i Revised Statutes, as amended.

Smith challenges the Count 1 clause "did knowingly agree to meet with Detective John Surina," arguing that "knowingly" does not fulfill the "intent" state of mind specified in HRS § 707-756(1)(b). However, the next clause states that Smith "had the intent to promote or facilitate the commission of a felony[.]" This language is consistent with HRS § 707-756(1)(b).

Smith further argues that Count 1 is defective because it failed to include the state of mind for Sexual Assault in the

First Degree, HRS § 707-730(1)(c). However, "it cannot logically be said that specifying the particular crime intended to be committed is, under our statutes, an essential element which must be alleged[.]" See State v. Robins, 66 Haw. 312, 315, 660 P.2d 39, 41 (1983) (reversing dismissal of burglary indictment where prosecution did not specify underlying felony intent). Under HRS § 707-756(1)(b), "agreeing to meet the Minor with the intent to promote or facilitate the commission of a felony" does not require actual commission of a felony. See Alangcas, 134 Hawai'i at 526, 345 P.3d at 192. In this case, the State alleged that Smith communicated with "Gillian" (Maui Police Department Detective Surina) with the intent to commit Sexual Assault in the First Degree. The elements of that second underlying offense, including the state of mind, need not be alleged.

Smith's argument that Count 1 cannot reasonably be construed to state an offense is without merit. Smith makes no argument that he was prejudiced by alleged defects in Count 1.

Smith also argues that Count 2 of the Indictment failed to allege a state of mind for the conduct "disseminate" and therefore cannot reasonably be construed to state an offense. HRS § 712-1215(1)(a) states that "[a] person commits the offense of promoting pornography for minors" if, "[k]nowing its character and content, the person disseminates to a minor material that is pornographic for minors[.]" Count 2 of the Indictment states that Smith "did disseminate to a minor material which is pornographic for minors, while knowing its character and content, specifically a digital picture of a penis[.]" The language of the Count 2 charge is almost verbatim with HRS § 712-1215(1)(a).

We conclude Count 2 can be reasonably construed as to allege a crime. The indirect reference to state of mind does not, on its own, render the charge defective. See State v. Moore, 82 Hawai'i 202, 216, 921 P.2d 122, 136 (1996). Thus, we conclude that Count 2 of the Indictment of Smith was not deficient. Smith makes no argument that he was prejudiced by alleged defects in Count 2.

Accordingly, Smith is not entitled to relief based on alleged defects in the Indictment.

(3) Smith argues that the Circuit Court: erred by not conducting a Glenn colloquy; had a statutory duty to colloquy Smith pursuant to HRS § 704-407.5(1)-(2) (Supp. 2020); and by not doing so, failed to protect Smith's due process right to assert lack of penal responsibility by failing to make sure that his waiver of this defense was knowing, intelligent, and voluntary.

The penal-responsibility defense stands in stark contrast from all other affirmative defenses. While other defenses may negate a defendant's criminal liability, lack of penal responsibility eliminates a defendant's moral culpability as well. Moreover, unlike other affirmative defenses, a defendant who prevails on the penal-responsibility defense does not simply walk free – the determination of irresponsibility becomes part of the defendant's record, and can result in the defendant's commitment to an appropriate institution or supervision through conditional release. Given the significant consequences that can result, from a practical standpoint, a determination of lack of penal responsibility is more akin to a guilty plea than an affirmative defense.

Glenn, 148 Hawai'i at 124, 468 P.3d at 138 (cleaned up).

When a defendant seeks to waive the penal-responsibility defense, the trial court must conduct an on-the-record colloquy to confirm the "knowing, intelligent, and voluntary" waiver of that right. Id. The Glenn Court adopted the New Jersey Supreme Court's approach in State v. Gorthy, 145

A.3d 146, 157 (N.J. 2016), which outlined the following parameters:

The court should explain to the defendant the nature and purpose of the defense. It should generally describe the evidence relevant to that defense, including expert opinion that could be used to support or counter that defense. The court should inform the defendant of his or her sentencing exposure in the event of a conviction. It should describe [] commitment and the other potential dispositions that are prescribed by [HRS § 704-411] in the event of an acquittal by reason of insanity. The court should confirm the defendant's understanding of the insanity defense as it may affect the outcome of the trial, defendant's risk of incarceration and the prospect of civil commitment.

Id. at 126, 468 P.3d at 140.

If the waiver is knowing, intelligent, and voluntary, "the trial court must respect the decision of a competent defendant who is represented by counsel." Id.

As with other fundamental rights, the right to assert lack of penal responsibility cannot be waived by counsel. It is solely the defendant's prerogative. Cf., e.g., State v. Vaitogi, 59 Haw. 592, 601, 585 P.2d 1259, 1265 (1978) (guilty plea); State v. Ibuos, 75 Hawai'i 118, 121, 857 P.2d 576, 578 (1993) (trial by jury); Tachibana v. State, 79 Hawai'i 226, 235-36, 900 P.2d 1293, 1302-03 (1995) (right to testify); State v. Murray, 116 Hawai'i 3, 21, 169 P.3d 955, 973 (2007) (right to have each element proven to a jury beyond a reasonable doubt); State v. Hernandez, 143 Hawai'i 501, 515, 431 P.3d 1274, 1288 (2018) (no-contest plea); State v. Torres, 144 Hawai'i 282, 284-85, 439 P.3d 234, 236-37 (2019) (right to remain silent); see also Treece v. State, 547 A.2d 1054, 1062 (Md. 1988) ("The decision is one for the defendant to make, after proper consultation with counsel, just as a competent defendant must, ultimately, decide the wisdom of self-representation or of a plea of guilty.").

"[A]s with a Tachibana colloquy, the [trial] court's only inquiry should be whether the defendant's decision to waive lack of penal responsibility as a defense is knowing, intelligent and voluntary - not whether it is wise." Glenn, 148 Hawai'i at 126, 468 P.3d at 140 (emphasis added). Thus, our inquiry focuses on whether the Circuit Court adequately advised Smith of his fundamental right to assert, or waive, this defense.

The record on appeal shows at least two instances where the Circuit Court acknowledged Glenn. First, at trial, on the morning of April 16, 2024, outside the jury's presence, the State referred to the January 29, 2024 Notice of Defenses, saying, "there had been a defense of mental disease, disorder or defect filed." Further, "[t]he discussion with defense counsel this morning is she does not intend to rely upon it in a formal sense." The prosecutor voiced "concerns" over Glenn's applicability, stating that Glenn "said if a defendant who has a colorable defense under mental disorder or defect chooses not to invoke it, there's a colloquy to be done about the ramifications of those decisions." The State's position, prior to the discussion with defense counsel, was "[Smith] should also have a colloquy to know what the ramifications are if he was found acquitted by version of mental disorder or defect, which is commitment to State Hospital for the rest of his life, being found dangerous, registration as a sex offender. All those kind of things." The prosecutor explained, "I think there are questions raised about how you have to colloquy the defendant or advise him of those ramifications." The prosecutor had a copy of

Glenn for the Circuit Court's review. The Circuit Court said, "I'll take a look at it."

Glenn was raised a second time in the afternoon on April 16, 2024, also outside the jury's presence. The Circuit Court stated:

THE COURT: So let me -- I'm going to provide you with a -- first, I read the case.

It says that, Mr. Smith, you're making a defense which was set forth in your designation of notice of general defenses that you are making a defense of evidence of physical or mental disease, disorder or defect, admissible when relevant to state of mind pursuant to Hawaii Rules of Penal Procedure 16 (c) (3).

So in that case, basically, you're claiming an insanity defense; that he didn't have the state of mind to be able to formulate the requisite state of mind.

That's what you're asking. Right, counsel?

While not explicitly stated, it appears the Circuit Court was beginning to colloquy Smith. However, defense counsel responded, "Your Honor, we can withdraw that defense." The Circuit Court did not proceed with a Glenn colloquy and instead moved on to Tachibana.

"The due process guarantee of the Hawai'i Constitution serves to protect the right of an accused in a criminal case to a fundamentally fair trial, and central to the protections of due process is the right to be accorded a meaningful opportunity to present a complete defense." Glenn, 148 Hawai'i at 119-20, 468 P.3d at 133-34 (citation omitted). We conclude that the Circuit Court erred when it failed to colloquy Smith as Glenn requires.

Accordingly, on this basis, we vacate Smith's conviction. As our resolution of Smith's third point of error is dispositive, we decline to reach Smith's further arguments.

For these reasons, the Circuit Court's June 24, 2024 Judgment is vacated and this case is remanded to the Circuit Court for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, October 28, 2026.

On the briefs:	/s/ Katherine G. Leonard Presiding Judge
Henry P. Ting, Deputy Public Defender, for Defendant-Appellant	/s/ Clyde J. Wadsworth Associate Judge
Charles E. Murray III, Deputy Prosecuting Attorney, County of Hawai'i, for Plaintiff-Appellee	/s/ Sonja M.P. McCullen Associate Judge