

NO. 23033

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
COLSON KANEKOA, Defendant-Appellant,
and TALAMOTU LEIATO, also known as
Talalemotu Leiato, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-1933)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Colson Kanekoa (Kanekoa) appeals the November 26, 1999, circuit court judgment that found Kanekoa, pursuant to a jury trial, guilty of Promoting a Dangerous Drug in the Third Degree (in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2000)). Kanekoa was sentenced to a five-year term of imprisonment with a mandatory minimum of one year and eight months as a repeat offender.¹

Kanekoa contends on appeal that: the verdict is not supported by the evidence, the circuit court abused its discretion in allowing rebuttal testimony, and the trial court erred in denying him a conditional discharge. We disagree with Kanekoa and affirm the November 26, 1999, judgment of the circuit court.

¹ Kanekoa's prior conviction was on April 27, 1992, for Robbery in the First Degree (HRS § 708-840(1)(b) (1993)), a class A felony.

I. BACKGROUND

Honolulu Police Department (HPD) Officer Leo Kang (Officer Kang) testified that he was assigned to bicycle detail in downtown Honolulu in a high-crime drug area on August 28, 1998. As he was departing a building from which he was conducting surveillance, Officer Kang noticed Kanekoa parked in a green MPV vehicle on the east side of Maunakea Street. Co-defendant Talamotu Leiato (Leiato) was standing next to the open driver's window of Kanekoa's car. The two men appeared to be talking to each other.

Officer Kang testified that he saw Kanekoa place his left hand, palm up, out through his car window and Leiato drop what appeared to be rock cocaine into Kanekoa's hand. Officer Kang grabbed Kanekoa's wrist, and the rock cocaine fell to the sidewalk. Leiato fled while Kanekoa was in his car with the ignition on, the car still in drive. Officer Kang ordered Kanekoa two or three times to turn off the car engine. Although Officer Kang had hold of Kanekoa, Kanekoa continued to try and pull away. Concerned he might be dragged away by Kanekoa's car, Officer Kang drew his gun, at which point Kanekoa stopped struggling and got out of his car. Officer Kang took Kanekoa to the ground and handcuffed him. Officer Kang then recovered the rock cocaine from the sidewalk and issued an all points bulletin for Leiato.

Officer Kang testified that he found Leiato in a sundry store about two blocks away and called Leiato out of the store.

As Leiato walked out, he set down a black fanny pack. Officer Kang recovered the fanny pack and found more rock cocaine in ziplock bags, approximately \$270 in cash, a cell phone, and two or three picture ID's with Leiato's name. The rock Officer Kang recovered from the sidewalk and the rock found in the black fanny pack tested positive as crack cocaine.

Kanekoa and Leiato were tried together and testified at their trial. Kanekoa denied that a drug transaction or any discussion of a drug transaction took place. Kanekoa denied throwing anything out the car window. Leiato claimed he did not possess crack cocaine. Leiato testified that on August 8, 1998, Kanekoa addressed Leiato in Samoan, saying "Manuia Talofa" [sic] which means "Hello, how are you?" and Leiato went over to Kanekoa and shook his hand. According to the two, that is when Officer Kang grabbed Kanekoa. Leiato testified that he ran away because he was scared he was going to be arrested.

Kanekoa and Leiato were convicted as charged. Kanekoa was convicted of one count of Promoting a Dangerous Drug in the Third Degree and received a five-year term of imprisonment with a mandatory minimum of one year and eight months as a repeat offender.

II. STANDARDS OF REVIEW

A. Sufficiency of the Evidence

We review the sufficiency of evidence as follows:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction;

the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

B. Rebuttal Evidence

"The introduction of evidence in rebuttal and in surrebuttal is a matter within the discretion of the trial court and appellate courts will not interfere absent abuse thereof."

Takayama v. Kaiser Foundation Hospital, 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996) (internal quotation marks omitted).

"A . . . court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." In the Matter of the Estate of Carmen Corrine Herbert, 90 Hawai'i 443, 454, 979 P.2d 39, 50 (1999) (internal quotation marks omitted).

C. Motion for Conditional Discharge

"The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed." State v. Mitsuda, 86 Hawai'i 37, 46, 947 P.2d 349, 358 (1997) (internal quotation marks omitted).

However, where the defendant is a repeat offender faced with a mandatory minimum sentence, the granting of a motion for conditional discharge no longer remains a matter within the discretion of the trial court. State v. Chun, 93 Hawai'i 389, 398, 4 P.3d 523, 532 (App. 2000). On appeal, the denial of a motion for conditional discharge must then be reviewed as a question of law, not for an abuse of discretion.

We review questions of law de novo under the right/wrong standard. Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999). "Under the right/wrong standard, this court 'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it.'" Id. (internal quotation marks omitted).

III. DISCUSSION

A. There Was Substantial Evidence to Support the Verdict.

"A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."² HRS § 712-1243(1) (1993). Kanekoa contends there was insufficient evidence to convict him of Promoting a Dangerous Drug in the Third Degree because there were "discrepancies that created reasonable doubt" and the "evidence was lacking." We disagree.

Officer Kang testified that he saw Leiato drop a piece of rock cocaine into Kanekoa's hand. Officer Kang then grabbed

² Cocaine is a dangerous drug as defined by HRS § 712-1240 (1993) and § 329-16(b) (4) (Supp. 2000).

Kanekoa's wrist and saw the rock fall from Kanekoa's hand to the sidewalk. Officer Kang recovered the rock, and subsequent chemical testing determined the substance was cocaine. Kanekoa repeatedly tried to pull his arm away from Officer Kang while Kanekoa's car was still running and in drive.

On appeal we review the evidence in the light most favorable to the prosecution. Richie, 88 Hawai'i at 33, 960 P.2d at 1241. It was not necessary to prove Kanekoa's intent by direct evidence. "Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient." State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996). There is substantial evidence to support a jury verdict finding Kanekoa guilty of Promoting a Dangerous Drug in the Third Degree.

B. The Circuit Court Did Not Abuse Its Discretion in Allowing Rebuttal Testimony.

Kanekoa argues that the trial court erred by allowing the State to present rebuttal evidence because it was cumulative. The introduction of evidence in rebuttal is a matter within the discretion of the trial court. Takayama, 82 Hawai'i at 495, 923 P.2d at 912.

Officer Kang testified under direct examination that Kanekoa's car was parked next to the curb, and Officer Kang made a green X on a map indicating the place where Kanekoa's arrest took place. Kanekoa testified he was in his car at an intersection waiting for a traffic light to change. After

Kanekoa and Leiato rested, the State requested permission to recall Officer Kang to rebut Kanekoa's version of the events by testifying to the specific position of Kanekoa's car on Maunakea Street.³

The court allowed Officer Kang's rebuttal testimony on the position of Kanekoa's car up against the curb (not in the middle of the street) and for clarification of the green mark Officer Kang had made on the map. This testimony contradicted Kanekoa's earlier testimony and was not cumulative. Allowing Officer Kang's rebuttal testimony did not exceed "the bounds of reason or disregard[] rules or principles of law or practice to the substantial detriment of a party" and was therefore not an abuse of discretion by the circuit court judge. Herbert, 90 Hawai'i at 454, 979 P.2d at 50 (internal quotation marks omitted).

C. The Trial Court Did Not Err in Denying a Conditional Discharge.

Kanekoa argues that he was eligible for a conditional discharge and the trial court erred in denying his motion for conditional discharge.

Hawai'i Revised Statutes § 712-1255 (1993), in relevant part, provides the trial court with the discretion to grant a conditional discharge:

§712-1255 Conditional discharge. (1) Whenever any person who has not previously been convicted of any offense

³ The State also called Officer Kang back for rebuttal on some of the circumstances Leiato testified to regarding Fred's Sundries and the location of Fred's Sundries, but these events only involved Leiato and are not relevant to Kanekoa's case on appeal.

under this chapter or chapter 329 or under any statute of the United States or of any state relating to a dangerous drug, harmful drug, detrimental drug, or an intoxicating compound, pleads guilty to or is found guilty of promoting a dangerous drug, harmful drug, detrimental drug, or an intoxicating compound under section 712-1243, 712-1245, 712-1246, 712-1248, 712-1249, or 712-1250, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place the accused on probation upon terms and conditions.

Hawai'i Revised Statutes § 706-606.5 (Supp. 2000)

mandates minimum sentences for repeat offenders of certain crimes as follows:

§706-606.5 Sentencing of repeat offenders. (1)

Notwithstanding section 706-669 and any other law to the contrary, any person convicted of . . . the following class C felonies: . . . 712-1243 relating to promoting a dangerous drug in the third degree . . . who has a prior conviction or prior convictions for . . . a class A felony . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole . . . as follows:

(a) One prior felony conviction:

. . . .

(iv) Where the instant conviction is for a class C felony offense enumerated above-one year, eight months[.]

While the conditional discharge statute is discretionary in its application, the repeat offender statute removes discretion from the sentencing court.

Kanekoa contends, despite his prior felony conviction for Robbery in the First Degree (a class A felony), that his conviction for violating HRS § 712-1243 (Promoting a Dangerous Drug in the Third Degree) does not preclude him from being granted conditional discharge because "there is nothing in the law which prohibits conditional discharge where a defendant has prior convictions which are not drug-related."

In State v. Chun, supra, this court held that a defendant with a previous felony conviction, who was convicted of Promoting a Dangerous Drug in the Third Degree, must receive a mandatory minimum sentence and was not eligible for a conditional discharge. Chun, 93 Hawai'i at 397-98, 4 P.3d at 531-32. The sentence at issue in Chun is not distinguishable from Kanekoa's sentence. Hawai'i Revised Statutes § 706-606.5 is not limited to prior drug-related felonies. Kanekoa cites no authority to the contrary.

IV. CONCLUSION

The November 26, 1999, judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, March 1, 2001.

On the briefs:

Stuart N. Fujioka
for Defendant-Appellant.

Acting Chief Judge

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

Associate Judge

Associate Judge