IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

ERIK ERNES, Petitioner/Defendant-Appellant.

SCWC-17-0000507

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000507; CASE NO. 1DCW-16-0004208)

JUNE 17, 2020

DISSENTING OPINION BY RECKTENWALD, C.J.,
WITH WHOM NAKAYAMA, J., JOINS

The majority holds that "under the totality of the circumstances," the district court's colloquy with Erik Ernes about his right to a jury trial was insufficient. Majority at 2-3. Because I conclude that the district court properly advised Ernes of his right to a jury trial and that Ernes

knowingly, intelligently and voluntarily waived that right, I respectfully dissent.

"Where it appears from the record that a defendant has voluntarily waived a constitutional right to a jury trial, the defendant carries the burden of demonstrating by a preponderance of the evidence that [their] waiver was involuntary." State v. Friedman, 93 Hawaiʻi 63, 69, 996 P.2d 268, 274 (2000). As the majority recognizes, "the validity of the waiver of a right to a jury trial is reviewed 'under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct.'" State v. Gomez-Lobato, 130 Hawaiʻi 465, 470, 312 P.3d 897, 902 (2013) (emphasis omitted) (quoting Friedman, 93 Hawaiʻi at 70, 996 P.2d at 275). Majority at 9.

In Gomez-Lobato, we explained that when a language barrier exists, the trial court must take "additional steps to ensure the defendant understands the right that he or she is waiving." Id. at 472, 312 P.3d at 904. These "additional steps" could include asking the defendant if they understand the court's advisement to "expressly confirm" the defendant's understanding that "he had a right to trial by jury and that he was waiving that right," or asking the defendant to explain "what the document he signed meant to him, which would have required more than a yes or no answer and would have allowed the

court to assess whether [the defendant] truly understood the right he was waiving." Id.

Here, the transcript of the district court's colloquy demonstrates that Ernes validly waived his right to a jury trial. The district court explained to Ernes that if he chose not to waive his right, at trial he would "help select 12 people from the community" to serve as jurors, the State would have to prove its case "beyond a reasonable doubt to all 12 jurors," and the jury's verdict would have to be a unanimous ("all 12 jurors must agree before you can be found guilty"). The district court then asked Ernes if this description was consistent with Ernes's understanding of a jury trial, and Ernes, through the interpreter, affirmed that it was. Thus, the district court "expressly confirm[ed]" that Ernes understood what a jury trial entailed when he signed the jury trial waiver form, as required by Gomez-Lobato, 130 Hawaiʻi at 472, 312 P.3d at 904.

In addition to confirming Ernes's understanding about what happens during a jury trial, the district court's colloquy established that (1) Ernes signed a jury trial waiver form; (2) he discussed the jury trial waiver form with his attorney, who explained what a jury trial was; (3) his mind was clear during the colloquy; (4) he had a high school education; and (5) no one was forcing Ernes to waive his right to a jury trial. Unlike in State v. Han, 130 Hawaiʻi 83, 91, 306 P.3d 128, 136 (2013), in

which the trial court read the defendant a Tachibana advisement without asking the defendant for "any acknowledgment of his understanding of these propositions," the district court not only asked Ernes if he understood the court's description of a jury trial, but also determined that he had voluntarily signed the jury trial waiver form and consulted with his attorney, not just about the form, but about what a jury trial entailed.[1] Under our case law, this was sufficient to establish that Ernes's waiver was valid.

Moreover, the fact that Ernes was represented by counsel is significant. In Gomez-Lobato, we explained that "where a defendant needs the assistance of an interpreter, defense counsel is obligated to explain any waiver of the defendant's constitutional rights through an interpreter." 130 Hawaiʻi at 472 n.8, 312 P.3d at 904 n.8 (emphasis omitted). In that case, the district court failed to ascertain what information defense counsel had explained to the defendant, id. at 472 n.7, 312 P.3d at 904 n.7 ("The district court could have used 'this' to refer to the waiver form, the general concept of

[1] The majority is correct that "the record does not indicate that the [jury trial waiver] form was sight-translated into Chuukese for him." Majority at 17. There is no doubt that it would have been preferable for the record to reflect that the form had been translated for Ernes. However, the majority uses that omission to implicitly conclude that the waiver form should not factor into the totality of the circumstances at all. The majority's analysis discounts the fact that Ernes was represented by counsel, who reviewed the form with him prior to the colloquy. See Majority at 17-19.

a waiver of a right to a jury trial, or the fact that he placed his initials and signature on the form."), and it was similarly unclear whether it had been defense counsel, or the interpreter, who had explained the right to a jury trial to the defendant. Id. at 472 n.8, 312 P.3d at 904 n.8.

Here, by contrast, Ernes confirmed during the colloquy that his attorney "explain[ed] to [him] what a jury trial is[.]" And the parties stipulated that on the jury trial waiver form, defense counsel certified that she had explained the contents of the waiver form to Ernes, which included a description of a jury trial, as well as an explanation that if Ernes waived a jury, he would be tried by a single judge.[2] Even if the majority is willing to believe that Ernes would tell the court his attorney explained what a jury trial is when the conversation actually took place in a language Ernes did not speak, it strains credulity to contend that his attorney would certify that she

[2] In the parties' stipulation about Ernes's missing jury trial waiver form, the parties provided an example form containing a full advisement about the defendant's right to a jury trial, as well as a "Certificate of Counsel," which read:

> I certify that I have explained the foregoing "Waiver of Trial by Jury" form to the Defendant; that I believe Defendant understands the document in its entirety; that the statements contained therein are in conformity with my understanding of Defendant's position; that I believe Defendant's waiver is made voluntarily and with intelligent understanding of the nature of the charge(s) and consequences of said waiver; and that Defendant signed the foregoing in my presence.

The parties stipulated that Ernes's defense attorney signed the certification before the form was filed.

"believe[d] Defendant understands the document in its entirety" if her discussion with him took place in a language that Ernes did not understand. See Assocs. Fin. Servs. Co. of Hawaiʻi v. Mijo, 87 Hawaiʻi 19, 31, 950 P.2d 1219, 1231 (1998) ("Courts presume that attorneys abide by their professional responsibilities[.]"). Thus, the fact that Ernes was represented by counsel who advised him on his right to a jury trial is a strong indicator that Ernes's waiver of that right was knowing, intelligent, and voluntary.

The majority points to no facts demonstrating that Ernes's waiver was in fact unknowing or involuntary. Instead, the majority contends that the district court's colloquy was "confusing," despite its succinct and clear explanation of what a jury trial entails. Moreover, the majority relies on the facts that Ernes needed an interpreter and did not attend college to infer that he could not have understood what he was doing, even though he discussed the issue with his attorney, signed the jury trial waiver form, and told the court that he understood what the right to a jury trial meant. Majority at 19-20. I find the majority's reliance on these facts problematic.

First, the district court's description of a jury trial was clear and accurate. Our caselaw establishes that a trial court should explain three things about what happens

during a jury trial in order for a defendant's waiver to be valid: "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, [and] (3) a jury verdict must be unanimous[.]" Gomez-Lobato, 130 Hawai'i at 471, 312 P.3d at 903 (quoting United States v. Duarte-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1997)). The district court explained these three things, and added the fact that at a jury trial, the prosecution must prove its case beyond a reasonable doubt to the jury.

The majority contends that the district court's advisement was "confusing" because it "conflat[ed] jury selection with a jury trial[.]" Majority at 18. However, the district court listed the three necessary aspects of a jury trial, as required. The majority neither explains in what way the district court's advisement "conflat[ed]" the features of a jury trial, nor provides any guidance as to how a trial court is supposed to satisfy the requirements of Gomez-Lobato without being "confusing."[3]

[3] I recognize that the district court did not advise Ernes that if he waived his right to a jury trial, "the court alone decides guilt or innocence[.]" Duarte-Higareda, 113 F.3d 1002. However, that omission alone is not determinative. In Friedman, we explained, "Rather than adhering to a rigid pattern of factual determinations, we have long observed that the validity of a waiver concerning a fundamental right is reviewed under the totality of the facts and circumstances of the particular case." 93 Hawai'i at 69, 996 P.2d at 274. Here, the district court properly explained that if Ernes did not waive his right to a jury trial, the jury would be the factfinder and would have to reach a unanimous verdict — by implication, if

(continued . . .)

Second, while a language barrier is a "salient fact" that necessitates a colloquy, Gomez-Lobato gave trial courts two examples of colloquies that would be sufficient: (1) ask questions to "expressly confirm" Ernes understood "that he had a right to trial by jury and that he was waiving that right," or (2) ask Ernes open-ended questions requiring more than a yes or no answer. 130 Hawai'i at 472, 312 P.3d at 904. The district court was in the best position to choose what questions would be most appropriate for Ernes because it had the opportunity to assess Ernes's demeanor and communication skills during the hearing. Id. ("Trial courts are best situated to determine what questions need to be asked of individual defendants."). The district court chose the first option, asking Ernes questions and receiving Ernes's express confirmation that he understood he had the right to a jury trial and that he was waiving that

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Ernes waived his right to a jury, the converse would be true and the jury would no longer be the factfinder.

The majority assumes that Ernes's language barrier signified a complete unfamiliarity with single-judge bench trials because "[m]ost countries, including the Federated States of Micronesia . . ., do not have jury trials," and "[i]n civil law countries, [] although the number may vary by country, trial courts usually sit on panels of three judges." Majority at 19. While that may be true in a general sense, it is not the case here. Criminal trials in the Federated States of Micronesia are not conducted by a panel of three judges – they are conducted by a single judge. See, e.g., Chuuk State R. Crim. P. 31(a) (Micr.), available at http://fsmlaw.org/chuuk/rules/crimtoc.htm. And many of the rules of criminal procedure in the Federated States of Micronesia mirror the rules in the United States. See id.; see also Brian Z. Tamanaha, A Battle Between Law and Society in Micronesia: An Example of Originalism Gone Awry, 21 Pac. Rim L. & Pol'y J. 295, 324 (2012). Thus, while limited English proficiency may sometimes mean a defendant is also unfamiliar with features of the American legal system, the majority should not presume the two go hand-in-hand by default.

right, establishing that Ernes's waiver was knowing, intelligent, and voluntary.

Third, the majority contends that the fact Ernes told the district court he had attended "just [] high school," not college, warranted a "further inquiry." Majority at 20-21. We have never said that not attending college is a "'salient fact' that [gives] notice to the district court that [the defendant's] waiver 'might be less than knowing and intelligent[.]'" Gomez-Lobato, 130 Hawai'i at 471, 312 P.3d at 903 (quoting Duarte-Higareda, 113 F.3d at 1003); see also Friedman, 93 Hawai'i at 70, 996 P.2d at 275 (explaining that a "salient fact" bears upon a defendant's "ability to understand his jury waiver that [] create[s] the need for an extensive colloquy" (emphasis added)).

While I agree with the majority that "[t]he educational level of a defendant can [] be part of the information base that might indicate a further inquiry is in order," Majority at 21, holding that a trial court must conduct "further inquiry" any time it learns a defendant has "just" a high school education incorrectly equates the lack of a college education with an inability to grasp significant concepts. While going to college or receiving a high school diploma may be a sign of intellectual achievement that demonstrates a waiver was made knowingly and intelligently, see United States v. Shorty, 741 F.3d 961, 968 (9th Cir. 2013) (noting that

defendants who are "intellectually sophisticated and highly educated" may not need a detailed colloquy), the opposite is by no means true.

Further, in instructing trial courts to probe defendants about their education level, the majority imports the analysis for colloquies given to pro se defendants. Majority at 21 (quoting State v. Phua, 135 Hawaiʻi 504, 513, 353 P.3d 1046, 1055 (2015) (analyzing waiver of the right to counsel)). When a defendant is not represented by counsel, the defendant's education level is important because the court bears sole responsibility for advising a defendant of "the risks and disadvantages of self-representation in a manner that the defendant will be able to understand." Phua, 135 Hawaiʻi at 513, 353 P.3d at 1055. However, the same level of detailed inquiry is not appropriate where the defendant is represented, and both counsel and the defendant affirm that the defendant was advised about the right being waived.

Finally, in holding that the district court's discussion with Ernes was insufficient to establish a valid waiver, the majority creates an artificial distinction between a "colloquy" and a "true colloquy." According to the majority, since the district court's colloquy was not a "true colloquy," the district court's exchange with Ernes was insufficient. Majority at 23. Further, the majority instructs trial courts to

question defendants about their background, such as their "age, employment, how long [they have] been in the United States, whether [they] had received any schooling in the United States, or whether [they] had any familiarity or experience with jury trials"[4] — yet does not "deign to set out questions that must be asked in each case." Majority at 20, 23 (emphasis added). This only creates confusion and uncertainty.

There will always be more information that could have been elicited during a colloquy, but "a defendant's otherwise knowing and intelligent waiver cannot be rendered unknowing or unintelligent based on the depth of the trial court's background inquiry." Phua, 135 Hawai'i at 519, 353 P.3d at 1061 (Nakayama, J., dissenting). Here, the district court followed the requirements we set forth in Gomez-Lobato: the court accurately advised Ernes of his right to a jury trial, and Ernes verbally confirmed that he understood that right, had discussed it with his attorney, and chose to waive it in writing. As nothing further was required, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[4] All of these factors require a trial court to ask intrusive questions about a defendant's personal life, but it is particularly troubling that the majority wants trial courts to ask defendants how long they have been in the United States as that question may implicate a defendant's immigration status.