



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ROY KEITH PABLO,
Defendant-Appellant.

Supreme Court Case No.: CRA15-012
Superior Court Case No.: CF0603-13

OPINION

Cite as: 2016 Guam 11

Appeal from the Superior Court of Guam
Argued and submitted on October 20, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Defendant-Appellant Roy Keith Pablo was convicted of one charge each of Manufacturing a Schedule I Controlled Substance, Possession of a Schedule I Controlled Substance with Intent to Deliver, Conspiracy to Manufacture a Schedule I Controlled Substance, Child Abuse, Possession of a Schedule I Controlled Substance, and Official Misconduct. On appeal, he asserts that the performance of his defense counsel was deficient by failing to object to the introduction of the search warrant as hearsay, and that such deficiency prejudiced his defense. For the reasons herein, we affirm Pablo’s convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Roy Keith Pablo, who was a law enforcement officer at the time of his arrest, was indicted for one count each of Manufacturing a Schedule I Controlled Substance, Possession of a Schedule I Controlled Substance with Intent to Deliver, Conspiracy to Manufacture a Schedule I Controlled Substance, Child Abuse, Official Misconduct, and Possession of a Schedule I Controlled Substance. Pablo pleaded guilty to the charge of Official Misconduct and was convicted of the remaining five charges after a jury trial.

[3] At trial, the People presented evidence of an investigation that the Guam Police Department conducted that initially focused on a suspect by the name of Ah Rum Kim. While testifying at trial, former Guam Police Department (“GPD”) and Federal Bureau of Alcohol, Tobacco, and Firearms Task Force Officer Yeon Uk Kim described the investigation, which included observations of Ah Rum Kim making stops at “various establishments for short periods

of time and meeting up with various people,” and that she “appeared to be exchanging items we suspect[ed] to being [sic] narcotics.” Transcript (“Tr.”) at 48 (Jury Trial, Day 1, Sept. 25, 2014). He also described witnessing frequent traffic to Ah Rum Kim’s residence during the investigation that involved cars pulling up to her house, short interactions between Ah Rum Kim and the drivers of the cars, and then the subsequent departure of the cars, which was consistent with narcotics trafficking. The officer further testified that he knew Ah Rum Kim to be the common-law spouse¹ of Pablo and that he witnessed both Pablo and his motor vehicles repeatedly present at the residence.

[4] During Officer Kim’s testimony, the People asked questions to provide a foundation to move for the admission of his affidavit for the search warrant and the attached search warrant for Ah Rum Kim’s residence. There was no hearsay objection by Pablo to the admission of the affidavit or the search warrant into evidence. Officer Kim described the process of obtaining the search warrant, which included him drafting the affidavit that outlined the probable cause basis for the search warrant. The affidavit consisted of a statement by him describing the information he received from several informants and his subsequent observations of Ah Rum Kim and the activities surrounding her residence.

[5] The search warrant was executed on the day it was issued. Officer Kim testified that while at the residence, he and other officers found several jars of marijuana, mushrooms and prescriptions pills. There also appeared to be a room dedicated to a marijuana growing operation with dozens of plants, heating supplies and lights, as well as a room for processing the marijuana

¹ Guam does not recognize common law marriage, but referring to someone as a common law spouse usually describes a couple who is cohabiting.

to sell. Ah Rum Kim and her brother, along with four children, were found in the residence at the time, but Pablo was not present.²

[6] Detective Nesmith from GPD then testified that while the search warrant was being executed at Ah Rum Kim’s residence, he was tasked with locating Pablo. Detective Nesmith found Pablo and conducted an interview with him and had him write a statement after he was advised of and waived his rights. Detective Nesmith began the interview by asking Pablo if he smoked any illegal drugs, to which Pablo responded that he did smoke marijuana. Detective Nesmith testified that Pablo then admitted to growing his own marijuana at his residence. Detective Nesmith then claimed that although Pablo did not admit to knowing any details regarding any drug transactions that Ah Rum Kim had participated in, he did admit to having knowledge of them and that he had even been present during at least one. Pablo’s written statement was then admitted into evidence.

[7] Pablo himself took the stand at trial and admitted that he knew Ah Rum Kim was selling marijuana and that he himself had grown marijuana. He also admitted that Ah Rum Kim had access to the marijuana he had grown and that he thought she might be selling it.

[8] During Pablo’s closing argument, defense counsel stated:

[The People have] called all these witness [sic], [the People have] introduced all these exhibits, while I mostly sat over there saying, “No objection,” “No objection,” and “No objection,” again. Now it’s not that I am lazy, it’s just that I do not have the burden of proving anything. So even if I sat through the trial over there working on crossword puzzles, or asleep, or not even here, if [the People] fail[] to meet [their] burden of proof, you have to find Mr. Pablo not guilty.

Tr. at 15 (Jury Trial, Closing Arguments, Jury Instructions, Oct. 2, 2014).

² GPD decided to execute the search warrant at a time when they knew Pablo would not be present because as a law enforcement officer, Pablo possessed a service-issued firearm.

[9] Pablo was convicted of all charges, judgment was entered, and Pablo timely appealed.

II. JURISDICTION

[10] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-114 (2015)); 7 GCA §§ 3107, 3108(a) (2005); *see also* 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[11] Claims of ineffective assistance of counsel are reviewed *de novo*. *People v. Ueki*, 1999 Guam 4 ¶ 5 (citing *People v. Quintanilla*, 1998 Guam 17 ¶ 8).

IV. ANALYSIS

[12] The United States Supreme Court has established a two-part test for determining whether a defendant can prevail on an ineffective assistance of counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* This court has adopted that test. *People v. Meseral*, 2014 Guam 13 ¶ 45 (citing *Ueki*, 1999 Guam 4 ¶ 6). This court has also required that the “record [be] sufficiently complete to make a proper finding” in order to review such a claim. *Ueki*, 1999 Guam 4 ¶ 5. Further, such a review is conducted *de novo*. *Id.*

[13] The first prong of this test requires the defendant to “show[] that counsel made errors so serious . . . as to deprive the defendant of a fair trial.” *Strickland*, 466 U.S. at 687. “To fulfill the first prong of the *Strickland* test, [the defendant] must show that ‘the behavior complained of falls below prevailing professional norms.’” *Meseral*, 2014 Guam 13 ¶ 46 (quoting *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996)). The “court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Once it is determined that the conduct constituted deficient performance, the second prong requires a showing that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the [trial] would have been different." *Meseral*, 2014 Guam 13 ¶ 47 (quoting *Strickland*, 466 U.S. at 693).

[14] It appears that Pablo asserts only one instance of ineffective assistance of counsel. See Appellant's Br. at 19 (July 6, 2015). His brief seems to highlight the inadmissibility of the affidavit for the search warrant that was admitted into evidence without objection by the defense counsel. *Id.* at 20-21 (citing Guam R. Evid. 802, 803, 807). Pablo's argument is vague and does not specify exactly how the deficient performance prejudiced him, but instead claims the prejudice "is self-evident." *Id.* at 19.

[15] Rather than addressing whether the defense counsel's performance was deficient, this court will first examine whether Pablo was prejudiced by counsel's performance. See *People v. Campbell*, 2006 Guam 14 ¶ 49 ("However, we need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Rather, if an ineffectiveness claim may be disposed of on the ground of lack of sufficient prejudice, that course should be followed."). Therefore, this court will first determine whether Pablo was prejudiced by the admission of the search warrant that contained hearsay.

[16] All of the allegations made by the unknown declarants found in the affidavit were also exposed at trial by other witnesses, including Pablo himself. When cumulative hearsay evidence is erroneously admitted, it is much less prejudicial than unique hearsay evidence. *People v. Roten*, 2012 Guam 3 ¶ 43. The admissible evidence presented at trial separate and apart from the statements in the affidavit provided a strong case against Pablo that would sustain his convictions.

[17] The search warrant's first unidentified declarant claims to have witnessed an unidentified female participating in thirty "hand offs" which were assumed to be drug-dealing transactions while utilizing a car that police identified to belong to Ah Rum Kim. Ex. 53 at 2 (Aff. for Search Warrant). Pablo told police and the jury that he was aware that Ah Rum Kim participated in drug trading. Tr. at 23 (Jury Trial, Day 2, Sept. 29, 2014); Tr. at 44 (Jury Trial, Day 3, Oct. 1, 2014). The same declarant told police that Pablo was Ah Rum Kim's common law spouse. Ex. 53 at 2 (Aff. for Search Warrant). Pablo also testified that he lived at the residence with Ah Rum Kim. Tr. at 34-35 (Jury Trial, Day 3). All of these facts were also observed by former Officer Kim, who testified at trial. Tr. at 47-50, 53 (Jury Trial, Day 1).

[18] The next unidentified declarant was observed by police making a transaction with Ah Rum Kim and admitted buying marijuana from Ah Rum Kim about four or five times and had smoked marijuana with Ah Ru Kim and Pablo. Ex. 53 at 4 (Aff. for Search Warrant). The police then asked this declarant to make a "Controlled Buy/Walk" in which the declarant bought marijuana from Ah Rum Kim while being observed by multiple officers, one of which testified to observing multiple controlled buys involving Ah Ru Kim. Ex. 53 at 5 (Aff. for Search Warrant); Tr. at 82-83 (Jury Trial, Day 1).

[19] The third unidentified declarant is credited with providing police information that Ah Rum Kim wanted to sell marijuana to the declarant, and this declarant also participated in another “Controlled Buy/Walk.” Ex. 53 at 5 (Aff. for Search Warrant); Tr. at 82-83 (Jury Trial, Day 1). The rest of the affidavit’s statements regarding this declarant are related to the observations of another controlled buy, which is cumulative evidence of the officer’s testimony related to the multiple controlled buys he witnessed. Ex. 53 at 5-6 (Aff. for Search Warrant); Tr. at 82-83 (Jury Trial, Day 1).

[20] The statements made by these three declarants only provided information regarding Ah Rum Kim’s alleged drug transactions and the relationship between Ah Rum Kim and Pablo. If this affidavit had been excluded, the same facts would have been revealed through either Officer Kim or Pablo himself. This court finds that Pablo was not prejudiced by the admission of the affidavit because it was cumulative and did not contain any unique evidence.

[21] Additionally, when police searched Pablo’s residence, they found a room dedicated to growing marijuana complete with dozens of plants, special heating supplies, lights, and ventilations. Tr. at 63-64 (Jury Trial, Day 1). Another room housed processing paraphernalia including large jars with dried marijuana, packaging material, and other narcotics. *Id.* at 63. This evidence coupled with Pablo’s own admissions in court and to police that he lived at the residence, knew about Ah Rum Kim’s selling activities, and even grew marijuana himself make a very strong case for sustaining the convictions against him and therefore, the prejudice caused by counsel’s alleged deficient performance is not apparent. Tr. at 21, 23 (Jury Trial, Day 2); Tr. at 33 (Jury Trial, Day 3).

[22] Because Pablo failed to show how he was prejudiced by the failure of his defense counsel to object to the admission of the affidavit for the search warrant, his ineffective assistance of counsel claim fails.

V. CONCLUSION

[23] Based on the foregoing, we find that Pablo does not prevail in his ineffective assistance of counsel claim because he failed to show how he was prejudiced by the failure of his defense counsel to object to the admission of the affidavit for the search warrant. Therefore, we **AFFIRM** Pablo's convictions.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

KATHERINE A. MARAMAN
Associate Justice

/s/

ROBERT J. TORRES
Chief Justice