

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JACKERY B. WHITE,
Defendant-Appellant.

Supreme Court Case No.: CRA04-001
Superior Court Case No.: CF0065-93

OPINION

Filed: November 14, 2005

Cite as: 2005 Guam 20

Appeal from the Superior Court of Guam
Submitted on January 14, 2005
Hagåtña, Guam

For Plaintiff-Appellee:
Lewis W. Littlepage
Asst. Attorney General
Office of the Attorney General
287 West O'Brien Dr.
Hagåtña, Guam 96910

For Defendant-Appellant:
Jackery B. White, *Pro Se*
Department of Corrections
P.O. Box 3236
Hagåtña, Guam 96932

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

TORRES, J.:

[1] Respondent-Appellant Jackery B. White, *pro se*, appeals from the trial court's denial of his post-conviction Motion to Dismiss Grand Jury Indictment and request for counsel.

[2] We hold that, first, White waived objection to the institution of the prosecution and defects in the indictment by failing to raise the issues in a pre-trial motion or show cause; and secondly, the trial court did not err in denying White's request for counsel.

I.

[3] This court has jurisdiction over the instant matter pursuant to 48 U.S.C. 1424-1(a)(1) (Westlaw through Pub. L. 109-76 (2005)) and Title 8 GCA § 130.15 (Westlaw through Guam Pub. L. 28-037 (2005)).

II.

[4] White was arrested and incarcerated in 1986 for the crimes of robbery and burglary.¹ While incarcerated, White allegedly heard the admissions of another inmate and became an informant for the government in a murder case. White was released on bond pending resolution of the cases.

[5] On October 19, 1989, the Guam Legislature passed Public Law No. 20-111:2, now codified as Title 9 GCA § 80.37.5 (Westlaw through Guam Pub. L. 28-037 (2005)). Subsection (a) of this statute authorizes the imposition of a sentence enhancement for the commission of a felony while

¹ This court recounted portions of the facts and procedural history below in *White v. Klitzkie*, 1998 Guam 31.

on release for felony charges. Title 9 GCA § 80.37.5(a).

[6] In March of 1993, while the 1986 robbery and burglary charges were still pending, White was arrested for robbery in two new cases. The indictments in those cases contained a special allegation of felon-on-release pursuant to Title 9 GCA § 80.37.5.

[7] On April 20, 1993, White entered into a plea agreement with the government wherein he pled guilty to four counts of burglary contained in the 1986 indictment. For each count, White received a three year sentence, to run concurrently.

[8] In August of 1993, pursuant to another plea agreement, White pled guilty to one of the two 1993 robberies. The trial court sentenced White to ten years of imprisonment for the robbery and twenty years for committing the robbery while on release.

[9] Approximately a year later, White filed a petition for writ of habeas corpus in the Superior Court. After evidentiary hearings, the Superior Court denied the petition.

[10] White appealed the Superior Court's decision to this court. The court treated White's appeal as an original petition for writ of habeas corpus and subsequently denied the petition. *White v. Klitzkie*, 1998 Guam 31.

[11] Later, White filed a petition for writ of habeas corpus in the Federal District Court of Guam. The District Court denied the petition on procedural grounds. The Ninth Circuit Court of Appeals affirmed the District Court judgment based on other procedural grounds stating, "[w]e affirm the district court's dismissal of White's petition without reaching the grounds upon which the district court dismissed it." *White v. Klitzkie*, 281 F.3d 920, 922 (9th Cir. 2002), *reh'g denied*, 298 F.3d 885 (9th Cir.2002).

[12] Subsequently, White filed a Motion to Dismiss Grand Jury Indictment in the Superior Court. White argued that the trial court should dismiss the indictments because prosecution thereunder violated the Ex Post Facto Clause and the Fifth Amendment of the United States Constitution.

Specifically, White alleged that: (1) the twenty year sentence enhancement for committing a felony while on release violated the prohibition against ex post facto laws; and (2) the government put him in double jeopardy by prosecuting him in 1993 for the pending 1986 offenses.

[13] The trial court denied White's request for the appointment of counsel in the matter and denied the Motion to Dismiss Grand Jury Indictment. This appeal followed.

III.

[14] This court *sua sponte* raises whether White waived his objections to the institution of the prosecution and the indictment by failing to raise the issues in a pre-trial motion. *See People v. Mesa*, Crim. No. 89-00161A, 1990 WL 320355, at *1 (D. Guam App. Div. Oct. 24, 1990) (raising issue of waiver *sua sponte*). Under Title 8 GCA § 65.15, objections based on defects in the institution of the prosecution and defects in the indictment must be raised prior to trial.² *Id.* at *2. Title 8 GCA § 65.45 provides that failure to comply with the timeliness requirements of section 65.15 results in a waiver of those objections, unless the defendant can show good cause.³ *People v. Grajo*, Crim. No. 163F-84, 1987 WL 109393, at *3 (D. Guam App. Div. Feb. 12, 1987). A trial court's grant or denial of relief from a section 65.45 waiver is reviewed for an abuse of discretion

² Title 8 GCA § 65.15 states in relevant part:

The following shall be raised prior to trial:

- (a) Defenses and objections based on defects in the institution of the prosecution;
- (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

Title 8 GCA § 65.15 (Westlaw through Guam Pub. L. 28-037 (2005)).

³ Title 8 GCA § 65.45 provides in its entirety:

Failure to Raise Defenses or Objections; Consequences. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to §65.15, or prior to any extension thereof made by the court, shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver.

Title 8 GCA § 65.45 (Westlaw through Guam Pub. L. 28-037 (2005)).

or clear legal error. *See United States v. Crowley*, 236 F.3d 104, 110 (2d Cir. 2000) (stating the standard of review of relief from a waiver under Federal Rule of Criminal Procedure 12, which is analogous to sections 65.15 and 65.45). We review the denial of a request for the appointment of counsel in a collateral attack of a criminal conviction for an abuse of discretion. *See* Rules of the Super. Ct. of Guam 13.1(B)(2) (“The court may appoint counsel for a person who is financially unable to obtain representation who is seeking collateral relief from a judgment in a criminal matter”) *as added by* Prom. Order 05-004 (May 3, 2005), *available at* <http://teamsupreme.temp.powweb.com/PROMULGATIONORDERS/PromOrderNo05-004ApptofCounsel050305.pdf>.

IV.

[15] White waived his objections to defects in the indictment and the institution of the prosecution by failing to raise them prior to trial. Title 8 GCA § 65.45. Furthermore, the trial court committed clear legal error by excusing the waiver without a showing of cause as required by Title 8 GCA § 65.45. *See Crowley*, 236 F.3d at 110 (holding that a trial court commits clear legal error by granting relief from a Rule 12 waiver without making a finding of good cause and prejudice). Moreover, White has failed to demonstrate that good cause exists to excuse the waiver of his right to object to the indictment and institution of the prosecution nearly ten years after his conviction and sentencing.

[16] Although the trial court committed clear error by failing to require White to show cause why relief should be granted from his lack of compliance with the timeliness requirements of Title 8 GCA § 65.15, we find it is unnecessary to disturb the trial court’s denial of the Motion to Dismiss the Grand Jury Indictment. As the United States Supreme Court has observed:

If defendants were allowed to flout [Rule 12’s] time limitations . . . there would be little incentive to comply with its terms when a successful attack might simply result

in a new indictment prior to trial. Strong tactical considerations militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when re prosecution might well be difficult.

Davis v. United States, 411 U.S. 233, 241, 93 S. Ct. 1577, 1582 (1973). We hold that failure to raise objections to defects in the indictment or institution of the prosecution in a timely fashion, without good cause, precludes appellate review.⁴ *Mesa*, 1990 WL 320355, at *2 (declining to reach the merits of defendant's objections to indictment on appeal after defendant failed to comply with section 65.15 or show good cause). See also *United States v. Oldfield*, 859 F.2d 392, 396 (6th Cir. 1988) (stating that Rule 12(b) is strictly applied and reiterating its rule that "failure to raise 12(b) motions in a timely fashion precludes appellate review"). As White waived his right to object to the indictment and institution of the prosecution, and the record is clear that cause could not have been established, the trial court's denial of the Motion to Dismiss the Grand Jury Indictment will not be overruled .

[17] Finally, we dispense of White's argument that the trial court erred in denying his request for counsel. Defendants in criminal cases are not constitutionally entitled to appointed counsel in proceedings collaterally attacking their conviction. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987). Under Rule 13.1(B)(2) of the Rules of the Superior Court of Guam, trial courts have the discretion to appoint counsel for defendants seeking collateral relief from a judgment in a criminal matter. White has launched several attacks of his conviction with the aid of appointed counsel and the trial court properly exercised its discretion in declining to appoint White counsel in the instant matter.

⁴ There is a split in the federal circuits on the effect of a district court's consideration of an untimely motion to suppress on an appellate court's ability to review the decision. See *United States v. Vasquez*, 858 F.2d 1387, 1389 (9th Cir. 1988) (holding that when a trial court rules on the merits of an untimely suppression motion "it implicitly concludes that there is adequate cause to grant relief from a waiver of the right to seek suppression"); *United States v. Contreras*, 667 F.2d 976, 978 n.2 (11th Cir. 1982); *United States v. Hicks*, 524 F.2d 1001, 1003 (5th Cir. 1975). Cf. *United States v. Sachs*, 801 F.2d 839, 847 (6th Cir. 1986) (holding a district court's decision to hear an untimely motion to suppress does not alter the fact that the defendant waived the objection). That issue, however, is not before this court.

V.

[18] Based on the foregoing, we hold that White waived objection to the institution of the prosecution and the indictment by failing to comply with the timeliness requirements of Title 8 GCA § 65.15 and is precluded from raising the issues on appeal. Furthermore, Title 8 GCA § 65.45 requires trial courts to make a finding of cause in order to grant relief from a waiver. Finally, we hold that the trial court did not err in declining to appoint counsel for White in the proceeding below. Accordingly, the lower court's decision is **AFFIRMED**.