IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

RICHARD SAVITZ, Defendant-Appellant

and

KAREN SAVITZ, Defendant

NO. 23153

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2277)

JANUARY 29, 2002

MOON, C.J., NAKAYAMA, AND RAMIL, JJ.;
WITH ACOBA, J., DISSENTING SEPARATELY, AND
WITH WHOM LEVINSON, J., JOINS

OPINION OF THE COURT BY RAMIL, J.

Defendant-appellant Richard Savitz appeals the sentencing court's denial of his request for probation with respect to his conviction of promoting a dangerous drug in the first degree, in violation of Hawai‘i Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 1999). On appeal, Savitz contends that because drug use is not a prerequisite for probation under HRS § 706-659 (Supp. 1999), the sentencing court abused its discretion when it denied his request for probation based solely on the fact that he was not a drug user. We hold that HRS

§ 706-659 does not require "drug use" as a prerequisite to eligibility for probation. In this case, however, because the sentencing court did not predicate its decision exclusively on the fact that Savitz is a drug seller, rather than a drug user, and in light of the absence of strong mitigating circumstances favoring probation, the sentencing court did not abuse its discretion. Accordingly, we affirm the court's sentence.

I. BACKGROUND

On August 16, 1999, Savitz pled guilty to charges of possession of ammunition by a person convicted of certain crimes (Count I), in violation of HRS § 134-7(b) & (h) (1993), promoting a dangerous drug in the first degree (Count II), in violation of HRS § 712-1241(1)(a)(i), and unlawful use of drug paraphernalia (Count IV), in violation of HRS § 329-43.5(a) (1993).

At Savitz's sentencing hearing on January 18, 2000, the prosecution argued that the court should impose a twenty-year sentence, given that Savitz would not benefit from probation:

> We're asking for 20 years . . . in Count II . . . . [I]t seems the only appropriate sentence -- given he hasn't benefitted [sic] and continues to commit crime and then sort of gloss over it, sugarcoat it, if you will, and then justify it through his children does not lead the State to believe that he's going to do well if given a chance on probation.

Savitz's counsel responded that, given his old age and poor health, probation would be more appropriate:

> Basically, the bottom line, Your Honor, is that we ask for you to give Mr. Savitz a chance on probation for the reason that he is an older person. He recognizes that he's done wrong. He's made a mistake. He's facing a 20-year term of imprisonment at a minimum if he was to violate probation, which for him at his age and health conditions, would be a

> life sentence. And so there's a[n] extremely powerful motivating factor to do well. He has the support of his children and some other people in the community who he's helped, although that doesn't justify anything he may have done wrong and the laws he may have broken. He only, I think, offered that as an explanation, not an excuse, for why he's here before the court. He's helped many people over the years, and now there are people that want to help him. We'd ask, Your Honor, that you give him a chance on probation.

Savitz, himself, added, "I'm sorry for what I did. I did a stupid thing, you know. And I just ask you to give me a chance, you know."

The court then sentenced Savitz to concurrent, indeterminate terms of incarceration: Count I for five years; Count II for twenty years; and Count IV for five years. In reaching its decision, the sentencing court considered several factors, including: (1) the availability of probation; (2) the amount of cocaine and its likely use in this case; and (3) sentences given in related cases:

> [W]e're down to three charges that you pled to. And so one of them is a class A felony in which -- which, under the law, requires that the court impose a mandatory 20-year jail term. Probation is available for that offense in those situations where the court were -- and this is a new option that's available for Count II -- where it appears that probation, particularly drug treatment, will have some benefit for that person who is convicted of a class A felony involving drugs. And I looked at that, Mr. Savitz, and I looked at the facts and circumstances in this case, the Pre-Sentence Investigation Report, and unfortunately, you don't fall into that category, persons for whom the probation for the class A felony would be available, the concern I have being that this is a search warrant case.
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> . . . . The amount that we're talking about is an extremely large amount of cocaine to have in one's home. It leaves well the inference that it is to be sold rather than to be used.
>
> So you, of course, have acknowledged your ownself [sic] that you are not on drugs. None of your children are. You seem to be a really good father and grandfather and taken really good care of your family. But it appears that your activities have resulted in other people outside of your family having considerable trouble because you're selling drugs to them, and that kind of bothers me. That

> really bothers me, that you have managed to keep your own family clean, keep yourself clean, but you had 170 plus grams cocaine in your house. You weren't using it. Your family's not using it. Your kids are not using it. Somebody else is, and that makes you real dangerous in my estimation. I do recognize, like you said, you've done some good things for your family. But you sold drugs, looks like. That's what it looks like. It's not good. So even if the option of probation were considered, what we're looking at is for that person who is hopelessly addicted to drugs to be able to get treatment. That's not you either because you're not on drugs. You're just selling them. Appears you have them in your house, and you're selling to other people. And that really bothers me obviously. It really does.
>
> So in any event, I have reviewed this. And have read the letters from your family members and friends, and that's all good. And I think those are things that may have some impact on what the Paroling Authority will intend to do as well as your health considerations as well. But I think considering the kinds of sentences that we're having to impose for drug offenses and the kinds of people that we have come in here on a regular basis, it is really unfair and it would really be inequitable for you, with the facts in this case, to not serve any time at all. We're having to send people away who do considerably less and don't have 170 grams of cocaine sitting around their house.

II. STANDARDS OF REVIEW

A. Statutory Interpretation

"[T]he interpretation of a statute is a question of law reviewable de novo." State v. Wang, 91 Hawai'i 140, 141, 981 P.2d 230, 231, reconsideration denied, 90 Hawai'i 441, 978 P.2d 879 (1999) (quoting Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (citations and ellipses omitted)).

B. Sentencing

"[A] sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision." Keawe

v. State, 79 Hawai‘i 281, 284, 901 P.2d 481, 484 (1995) (citations omitted). Factors that indicate a "plain and manifest abuse of discretion" are "arbitrary or capricious actions by the judge and a rigid refusal to consider the defendant's contentions." State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 17 (1979). In general, "to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Keawe, 79 Hawai‘i at 284, 901 P.2d at 484 (quoting State v. Gaylord, 78 Hawai‘i 127, 144, 890 P.2d 1167, 1184 (1995) (quotation omitted)) (internal quotation marks omitted).

III. DISCUSSION

Savitz's claim that the sentencing court abused its discretion in denying his request for probation is predicated on two arguments: (1) drug use is not a precondition to qualifying for probation under HRS § 706-659; and (2) the sentencing court, in this case, excluded him from consideration for probation solely because he admitted he was not a drug user.

A. Statutory Interpretation

HRS § 706-659 prescribes in relevant part:

> Notwithstanding part II; sections 706-605, 706-606, 706-606.5, 706-660.1, 706-661, and 706-662; and any other law to the contrary, a person who has been convicted of a class A felony, except class A felonies defined in chapter 712, part IV, shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation. . . . A person who has been convicted of a class A felony defined in chapter 712,

> part IV,[1] may be sentenced to an indeterminate term of imprisonment, except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders.

(Emphases added.) This court has well-established rules regarding statutory construction:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

State v. Kotis, 91 Hawai‘i 319, 327, 984 P.2d 78, 86 (1999) (quotation and internal citation marks omitted). Thus, the use of "may" in the plain language of the statute demonstrates that the sentencing court is given discretion to sentence the defendant to a prison term. Moreover, the legislature's use of the mandatory "shall," rather than the permissive "may," in the same section with regard to non-drug-related, class A felonies, supports the statutory reading that grants discretion in situations concerning drug-related, class A felonies. See Gray, 84 Hawai‘i at 149, 931 P.2d at 591. In addition, the statute does not appear to make drug use a prerequisite for consideration of probation. Not only does the statute refrain from expressly requiring it, but the statute's general language referring to all drug offenders ("[a] person who has been convicted of a class A felony defined in chapter 712, part IV") implies that drug sellers are not excluded from such consideration.

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[1] Part IV addresses offenses related to drugs and intoxicating compounds, including HRS § 712-1241(1)(a)(i).

Even if we were to regard the language of HRS § 706-659 as ambiguous, the legislative history not only affirms the sentencing court's wide discretion in granting probation, but also fails to clearly exclude drug sellers from such consideration. See Kotis, 91 Hawai'i at 327, 984 P.2d at 86 (describing "the use of legislative history as an interpretive tool") (quotation and internal citation marks omitted). In 1994, the state legislature amended this statute "to allow the court discretion to sentence a defendant convicted of a class A felony drug offense to probation for a period of ten years." Sen. Conf. Comm. Rep. No. 62, in 1994 Senate Journal, at 724. The conference committee report explains that, "in certain instances, the public is better served by allowing judges some discretion in evaluating all appropriate sentencing and treatment alternatives available for drug offenders." Sen. Conf. Comm. Rep. No. 62, in 1994 Senate Journal, at 724 (emphasis added). Similarly, the Senate standing committee highlighted the broad discretion, without a requirement of drug use, given to the sentencing court in granting probation:

> It is not the intent . . . to decrease the penalties of any crime or to condone criminal activity, but to award wide discretion to the courts in sentencing defendants. The courts are in the best position to determine what each defendant deserves and what manner of punishment or rehabilitation to impose. The courts can still impose the maximum sentence under the law as the minimum sentence the defendant will serve if it deems it necessary.

Sen. Stand. Comm. Rep. No. 832, in 1993 Senate Journal, at 1084 (emphasis added). Thus, Savitz is correct in arguing that the

statute does not establish "drug use" as a precondition to probation. The legislative history addresses not only treatment, but also sentencing issues with regard to the court's consideration of probation.[2] Similarly, the debate on the floor of the legislature fails to demonstrate legislative intent that this statute apply only to drug users. For example, in speaking against the bill, Senator Matsunaga emphasized its application to "Class A drug felons includ[ing] drug traffickers, dealers and those who distribute dangerous drugs to minors." 1994 Senate Journal, at 643. See also 1993 House Journal, at 589 (noting application to drug dealers in speaking against this bill) (statement of Rep. Thielen). Absent strong legislative history to the contrary, we follow the plain language of the statute.

Nevertheless, the legislative history clarifies that, though the sentencing court has discretion to grant probation to all drug offenders, the legislature was contemplating "strong mitigating circumstances," Sen. Stand. Comm. Rep. No. 832, in 1993 Senate Journal, at 1084, which it viewed as arising in "unusual cases," Sen. Conf. Comm. Rep. No. 62, in 1994 Senate

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[2] The prosecution cites a House Standing Committee's Report mentioning "the treatment, monitoring, and control of certain Class A drug offenders in a setting outside of prison" for the proposition that the statute's intended target was specifically drug "users," and not drug "sellers." Answering Brief (AB) at 15 (quoting Hse. Stand. Comm. Rep. No. 1207, in 1993 House Journal, at 1488). Such statement by the House's standing committee, however, does not necessarily exclude drug sellers. As the committee continued, "[g]iven a particular defendant's unique circumstances and background," the sentencing judge may decide that monitoring and control may be more appropriate than time served for a drug seller. Hse. Stand. Comm. Rep. No. 1207, in 1993 House Journal, at 1488. After all, the foremost concern is that the sentencing judge be given the "discretion in evaluating all sentencing alternatives appropriate for those convicted of drug offenses," whether as a drug user or a drug seller. Id. (emphasis added).

Journal, at 724. Similarly, the House standing committee report recited:

> Given a particular defendant's unique circumstances and background, the sentencing judge should be permitted some discretion in evaluating all sentencing alternatives appropriate for those convicted of drug offenses. Your Committee believes that a longer probationary period should be required to ensure the public's best interest, in those unusual cases where probation is granted.

Hse. Stand. Comm. Rep. No. 1207, in 1993 House Journal, at 1488 (emphases added). Such "circumstances and background" are the factors enumerated in HRS § 706-621 (1993).[3] Therefore, although "drug use" is not a prerequisite to eligiblity for probation under HRS § 706-659, the legislature contemplated, consistent with the factors enumerated in HRS § 706-621, that the trial court would grant probation in cases where strong mitigating circumstances favored it.

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[3] HRS § 706-621 provides:

The court, in determining whether to impose a term of probation, shall consider:
(1) The factors set forth in section 706-606 to the extent that they are applicable;
(2) The following factors, to be accorded weight in favor of withholding a sentence of imprisonment:
  (a) The defendant's criminal conduct neither caused nor threatened serious harm;
  (b) The defendant acted under a strong provocation;
  (c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
  (d) The victim of the defendant's criminal conduct induced or facilitated its commission;
  (e) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
  (f) The defendant's criminal conduct was the result of circumstances unlikely to recur;
  (g) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;
  (h) The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both;
  (i) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependants; and
  (j) The expedited sentencing program set forth in section 706-606.3, if the defendant has qualified for that sentencing program.

B. Application to This Case

Savitz alleges that the sentencing court abused its discretion by failing to consider him for probation based exclusively on the fact that he was not a drug user. Although the sentencing court may have overemphasized the importance of drug treatment in qualifying for probation, the court did not claim that it was the only relevant factor.[4] Indeed, the sentencing court "looked at the facts and circumstances in this case [and] the Pre-Sentence Investigation Report." Specifically, the court considered the egregiously "large amount of cocaine" involved;[5] the likelihood that Savitz was a drug dealer, who therefore posed a danger to others; and the sentences given to drug offenders "who do considerably less."

More importantly, we perceive no "unusual" or "strong mitigating circumstances" in this case. The only reasons Savitz cited in favor of the sentencing court considering probation was his old age and poor health. Though these factors may arguably implicate HRS § 706-621(g) and (h), they do not mandate a probationary sentence.

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[4] The sentencing court stated:

> Probation is available for that offense in those situations where the court were -- and this is a new option that's available for Count II -- where it appears that probation, particularly drug treatment, will have some benefit for that person who is convicted of a class A felony involving drugs.

(Emphases added.)

[5] The prosecution points out that Savitz possessed almost six times the amount of cocaine needed to be convicted as a class A offender.

We hold that the sentencing court acted within its discretion when it denied Savitz's request for probation.

IV. CONCLUSION

Based on the foregoing discussion, we affirm the judgment of the sentencing court.

On the briefs:

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