

NO. 23342

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

JEFFERSON SOLOMON KAUILANI PAU, Defendant-Appellant

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APPEAL FROM THE THIRD CIRCUIT COURT  
(CR. NO. 99-64)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Jefferson Pau appeals from the circuit court's judgment of conviction and sentence for one count of murder in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-701.5(1) (1993), and one count of unauthorized control of a propelled vehicle, in violation of HRS § 708-836(1) (Supp. 1999). On appeal, Pau argues that: 1) the circuit court erred in denying his motion to suppress his shoes and knife and the forensic testing performed on the shoes; 2) the circuit court erred in denying his motion to dismiss based on the prosecution's failure to comply with Hawai'i Rules of Penal Procedure (HRPP) Rule 10(b); 3) there was insufficient evidence to support an enhanced sentence under HRS § 706-657 (Supp. 1999); 4) the jury instructions on whether the murder was "especially heinous, atrocious, or cruel" were prejudicially insufficient; and 5) the cumulative effect of the alleged errors 1-4, when considered with several incidents of prosecutorial misconduct and witness misconduct, denied him a fair trial.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties, we resolve defendant-appellant's arguments as follows: 1) the circuit court did not err in denying Pau's motion to suppress because the recovery of the shoes and knife was not a "search" for constitutional purposes; see State v. Lopez, 78 Hawai'i 433, 441, 896 P.2d 889, 897 (1995);<sup>1</sup> 2) the circuit court did not err in denying Pau's motion to dismiss based on the HRPP Rule 10(b) violation; see HRPP Rule 45(b) ("When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . [,] upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect[.]"); 3) there was sufficient evidence that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity;" 4) the jury instructions during the sentencing hearing were prejudicially insufficient because the jury was not instructed according to State v. Young, 93 Hawai'i 224, 231, 999 P.2d 230, 237 (2000); see State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001); and 5) there is

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<sup>1</sup> Because we hold that the recovery of the shoes and knife was not a "search" for constitutional purposes, we do not address Pau's arguments that: Soleta did not have actual authority to consent to their search; Soleta was acting as an agent of the police; the inevitable discovery exception to the exclusionary rule does not apply; and the forensic testing of the shoes should have been suppressed under the fruit of the poisonous tree doctrine.

no cumulative effect of errors that warrants a new trial.

THEREFORE, IT IS HEREBY ORDERED that the circuit court's judgment of conviction and Pau's sentence for unauthorized control of a propelled vehicle are affirmed. However, Pau's sentence of life imprisonment without the possibility of parole for Count I is vacated, and the case is remanded for resentencing. The prosecution may elect to conduct a new HRS § 706-657 hearing or consent to resentencing without the enhancement.

DATED: Honolulu, Hawai'i, May 31, 2001.

On the briefs:

G. Kay Iopa for  
defendant-appellant

Linda L. Walton, Deputy  
Prosecuting Attorney,  
for plaintiff-appellee