

NO. 23722

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

TONY JOHNSON, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2002)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.;
Intermediate Court of Appeals Chief
Judge Burns, assigned by reason of vacancy;
and Acoba, J., concurring separately)

Defendant-appellant Samuel A. Carter, also known as Tony Johnson,¹ appeals from the August 28, 2000 judgment of conviction and sentence of the Circuit Court of the First Circuit, the Honorable John C. Bryant presiding, adjudging him guilty of theft in the second degree, in violation of Hawaii Revised Statutes (HRS) § 708-831(1)(a) (Supp. 2000)² (Count 1); promoting a dangerous drug in the third degree, in violation of

¹ Throughout the proceedings, the defendant is referred to by his real name, Carter. The circuit court file indicates that the case was renamed to reflect the defendant's true identify pursuant to an order filed on June 22, 2001, but no order appears in the file.

² HRS § 708-831(1)(a) provides that a person commits the offense of theft in the second degree "if the person commits theft . . . [o]f property from the person of another[.]"

HRS § 712-1243 (1993 and Supp. 2000)³ (Count 2); and prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993)⁴ (Count 3). On appeal, Carter alleges that the circuit court erred in denying his motions (1) to dismiss Count 1 as a de minimis infraction; (2) for a judgment of acquittal on the promoting a dangerous drug and theft counts based on the insufficiency of the evidence; (3) for a new trial based on prosecutorial misconduct during closing argument; and (4) for a post-verdict mental examination. As to the jury instructions, Carter argues that the circuit court failed to properly instruct the jury on possession of illicit items and failed to instruct the jury on accomplice liability in response to the jury's first communication. Finally, as to his sentence, Carter claims that the circuit court erred in imposing consecutive terms of imprisonment.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the issues raised and the arguments presented, we hold that: (1)

³ HRS § 712-1243 provides in pertinent part, "A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."

⁴ HRS § 329-43.5(a) provides:

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

the circuit court did not err in denying Carter's motions to dismiss Count 2 based upon the pharmacological effect standard and the evidence presented, see State v. Fukagawa, 100 Hawai'i 498, 506, 60 P.3d 899, 907 (2002); (2) the circuit court did not err in denying Carter's motions for judgment of acquittal, see HRS §§ 708-831(1)(d) and 712-1252(1) (1993), State v. Batson, 73 Haw. 236, 254, 831 P.2d 924, 934 (1992), State v. Modica, 58 Haw. 249, 251, 567 P.2d 420, 422 (1977); (3) the circuit court properly denied the motions for new trial, see State v. Cordeiro, 99 Hawai'i 390, 425, 56 P.3d 692, 727 (2002), State v. Mara, 98 Hawai'i 1, 16-17, 41 P.3d 157, 172-73 (2000), State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999), State v. Melear, 63 Haw. 488, 496, 630 P.2d 619, 626 (1981); (4) the circuit court did not abuse its discretion in denying Carter's motion for a post-verdict mental examination, see HRS § 704-404(1) (1993), State v. Castro, 93 Hawai'i 424, 426, 5 P.3d 414, 416 (2000); (5) the circuit court's instructions as to Counts 2 and 3 were not prejudicially insufficient, erroneous, inconsistent, or misleading, see HRS § 712-1243, State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995); (6) the circuit court's response to the jury's first communication was not erroneous, see State v. Jones, 96 Hawai'i 161, 181, 29 P.3d 351, 371 (2001); and (7) the circuit court did not abuse its discretion in sentencing Carter to two concurrent 10-year indeterminate maximum terms of imprisonment with a third 10-year indeterminate maximum term

running consecutively to the other two, and two 5-year mandatory minimum terms of imprisonment running concurrently with one another, see HRS §§ 706-606.5, 706-661 and 706-662 (1993 & Supp. 2000), State v. Jenkins, 93 Hawai'i 87, 114-15, 997 P.2d 12, 40-41 (2000), State v. Cornelio, 84 Hawai'i 476, 493, 935 P.2d 1021, 1038 (1997), State v. Okumura, 78 Hawai'i 383, 413, 894 P.2d 80, 110 (1995), State v. Freitas, 61 Haw. 262, 268, 602 P.2d 914, 920 (1976). Therefore,

IT IS HEREBY ORDERED that the August 28, 2000 judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 4, 2003.

On the briefs:

Dwight C. H. Lum,
for defendant-appellant

Loren J. Thomas,
Deputy Prosecuting Attorney,
for plaintiff-appellee

CONCURRENCE BY ACOBA, J.

I concur in the result only.