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NO. 25341

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

HENRY H. ANGUAY, Defendant-Appellant  
(NO. 25341 (CR. NO. 01-1-2829))

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

HENRY H. ANGUAY, Defendant-Appellant  
(NO. 25339 (CR. NO. 92-1238))

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

HENRY H. ANGUAY, Defendant-Appellant  
(NO. 25340 (CR. NO. 00-1-1452))

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

HENRY H. ANGUAY, Defendant-Appellant  
(NO. 25342 (CR. NO. 01-1-2052))

---

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

HENRY H. ANGUAY, Defendant-Appellant  
(NO. 25343 (CR. NO. 99-2409))

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APPEALS FROM THE FIRST CIRCUIT COURT  
(CR. NOS. 01-1-2829; 92-1238; 00-1-1452; 01-1-2052; 99-2409)

SUMMARY DISPOSITION ORDER

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

In this consolidated appeal, Defendant-Appellant Henry H. Anguay (Appellant) appeals from the judgments and sentences entered in Criminal Nos. 92-1238, 99-2409, 00-1-1452, 01-1-2052, and 01-1-2829.

In Cr. No. 92-1238, on December 16, 1992, the first circuit court<sup>1</sup> (the court) sentenced Appellant to five years of probation and 60 days in jail with credit for time served for one count of forgery in the first degree, a class B felony, Hawai'i Revised Statutes (HRS) § 708-851 (1985 & Supp. 1992), and one count of theft in the second degree, HRS § 708-831 (1985 & Supp. 1992), to run concurrently. On February 8, 1996, the court<sup>2</sup> found that Appellant had failed to comply with the terms and conditions of probation and resentenced him.

In Cr. No. 99-2409, on August 30, 2000, the court<sup>3</sup> sentenced Appellant to five years' probation on one count of unauthorized entry into a motor vehicle, HRS § 708-836.5 (Supp. 2002), a class C felony. On August 30, 2000, after Appellant's conviction in Cr. No. 99-2409, the court revoked probation in Cr. No. 92-1238. Appellant was resentenced in Cr. No. 92-1238 to

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<sup>1</sup> Judge Gail C. Nakatani presided.

<sup>2</sup> Judge Dexter D. Del Rosario presided.

<sup>3</sup> Judge Wilfred K. Watanabe presided.

five years' probation to run concurrently with the sentence imposed in Cr. No. 99-2409.

In Cr. No. 00-1-1452, Appellant was charged on July 14, 2000 with burglary in the second degree, HRS § 708-811 (1993), a class C felony. In Cr. No. 01-1-2052, on September 20, 2001, Appellant was charged with promoting a dangerous drug in the third degree, HRS § 712-1243 (1993 & Supp. 2002), a class C felony. In Cr. No. 01-1-2829, on December 21, 2001, Appellant was charged with promoting a dangerous drug in the third degree, HRS § 712-1243, and unlawful use of drug paraphernalia, HRS § 329-43.5(a) (1993). On February 1, 2002, Appellant pled no contest to all four foregoing charges.<sup>4</sup>

In Cr. Nos. 00-1-1452, 01-1-2052, and 01-1-2829, on July 5, 2002, Plaintiff-Appellee State of Hawai'i (the prosecution) filed a motion to sentence Appellant as a repeat offender under HRS §§ 706-606.5 (1993 & Supp. 2002) and 706-620(3) (1993 & Supp. 2002).<sup>5</sup> On August 21, 2002, the court<sup>6</sup>

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<sup>4</sup> Judge Wilfred K. Watanabe presided.

<sup>5</sup> HRS § 706-606.5, entitled "Sentencing of repeat offenders," reads in pertinent part as follows:

(1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of . . . any of the following class C felonies: . . . 708-811 relating to burglary in the second degree . . . and who has a prior conviction or prior convictions for the following felonies, . . . a class B felony . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

(a) One prior felony conviction:

. . . .  
(iv) Where the instant conviction is for a class C felony enumerated above one year, eight months;

(b) Two prior felony convictions:

(continued...)

sentenced Appellant in Cr. Nos. 00-1-1452, 01-1-2052, and 01-1-2829. Additionally, the court found that Appellant had failed to comply with the terms and conditions of probation in Cr. Nos. 92-1238 and 99-2409. Appellant was sentenced to the following concurrent terms of incarceration:

1. Cr. No. 92-1238: ten years' imprisonment on Count I (forgery), and five years' imprisonment on Count II (theft).
2. Cr. No. 99-2409: five years' imprisonment.
3. Cr. No. 00-1-1452: five years' imprisonment.
4. Cr. No. 01-1-2052: five years' imprisonment.
5. Cr. No. 01-1-2829: five years' imprisonment for both Count I (promoting a dangerous drug) and Count II (unlawful use of drug paraphernalia).

The court also granted the prosecution's motion for sentencing as a repeat offender, and sentenced Appellant to a reduced mandatory minimum term of six months' imprisonment.

Appellant filed a notice of appeal on September 20, 2002. On appeal, Appellant's only contention is that the court should have sentenced him as a "first-time, non-violent drug offender" pursuant to HRS § 706-622.5 rather than as a repeat offender pursuant to HRS § 706-606.5.

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<sup>5</sup>(...continued)

- . . . .
- (iv) Where the instant conviction is for a class C felony offense enumerated above-three years, four months . . . .

(Emphases added.)

HRS § 706-620, entitled "Authority to withhold sentence of imprisonment," reads in pertinent part as follows:

A defendant who has been convicted of a crime may be sentenced to a term of probation unless:

- . . . .
- (3) The defendant is a repeat offender under section 706-606.5[.]

<sup>6</sup> Judge Wilfred K. Watanabe presided.

Initially, it may be noted that Appellant was arrested on two different occasions for promoting a dangerous drug in the third degree, HRS § 712-1243; however, Appellant pled no contest to both charges on the same day. The court sentenced Appellant on both charges during one proceeding. If Appellant's conviction under HRS § 712-1243 in Cr. No. 01-1-2052 constitutes a prior drug conviction with respect to his conviction under HRS §§ 712-1243 and 329-43.5 in Cr. No. 01-1-2829, then Appellant could not have been sentenced as a first-time drug offender pursuant to HRS § 706-622.5 (Supp. 2003). Assuming arguendo, he could be treated as a first time drug offender, the court did not err. In State v. Smith, 103 Hawai'i 228, 234, 81 P.3d 408, 414 (2003), this court construed the repeat offender statute, HRS § 706-606.5, as trumping HRS § 706-622.5:

In the present matter, HRS § 706-606.5(1) states that the repeat offender statute applies "notwithstanding . . . any other law to the contrary. . . ." See *supra* note 3. Although HRS § 706-622.5 does contain a similar phrase, the language of the first-time drug offender statute, as compared to the foregoing wording of the repeat offender statute, is markedly narrower in scope: "notwithstanding any penalty or sentencing provision *under part IV of chapter 712 . . .*" See *supra* note 4 (emphasis added). Thus, inasmuch as the plain and unambiguous language of HRS § 706-606.5 requires application of the repeat offender statute over "any other law to the contrary," we hold that the circuit court did not err in sentencing Smith as a repeat offender pursuant to HRS § 706-606.5. Furthermore, we hold that, in all cases in which HRS § 706-606.5 is applicable, including those in which a defendant would otherwise be eligible for probation under HRS § 706-622.5, the circuit courts must sentence defendants pursuant to the provisions of HRS § 706-606.5.

Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs

submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's August 21, 2002 orders of resentencing in Cr. Nos. 92-1238 and 99-2409, and the judgments in Cr. Nos. 00-1-1452, 01-1-2052, and 01-1-2829, from which the appeals are taken, are affirmed.

DATED: Honolulu, Hawai'i, February 11, 2004.

On the briefs:

George A. Burke, Deputy  
Public Defender, for  
defendant-appellant.

Mangmang Qiu Brown, Deputy  
Prosecuting Attorney,  
City & County of Honolulu,  
for plaintiff-appellee.