

*** NOT FOR PUBLICATION ***

NO. 25724

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

REGINA SMITH, Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Special Proceedings Prisoner No. 02-1-0051
(FC-CR NO. 93-0001))

SUMMARY DISPOSITION ORDER

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

The petitioner-appellant Regina Smith appeals from the findings of fact, conclusions of law, and order of the first circuit court, the Honorable Michael D. Wilson presiding, denying her petition to vacate, set aside, or correct judgment or to release petitioner from custody [hereinafter, "petition for post-conviction relief"], pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2002). On appeal, Smith contends: (1) that, using the "intrinsic-extrinsic" analysis affirmed by this court's decision in State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), the circuit court erred in finding that the facts relevant to the sentencing court's determination of the applicability of an extended term sentence, pursuant to Hawai'i Revised Statutes (HRS) § 706-662(4) (1993), were "extrinsic" to the offenses of which Smith was convicted; or, in the alternative, (2) that this court's decision in Kaua was wrongly decided, inasmuch as the "intrinsic-extrinsic" analysis is not consonant with the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny.

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Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that the circuit court did not err in denying Smith's motion for post-conviction relief. In Kaua, this court upheld the constitutionality of HRS § 706-662 in light of the United States Supreme Court's decision in Apprendi. 102 Hawai'i at 12-13, 72 P.3d at 384-85. In so doing, this court traced the historical development of the two-step process in which a sentencing court must engage in order to impose an extended term sentence. Id. at 9-13, 72 P.3d at 381-85.

For purposes of a motion for an extended term of imprisonment under HRS § 706-662(4), the first step requires a finding beyond a reasonable doubt "that the defendant is a multiple offender, which finding may not be made unless the defendant is being sentenced for two or more felonies or is under sentence for a felony and the maximum terms of imprisonment authorized for the defendant's crimes meet certain requisites." Id. In the event that the sentencing court finds that the defendant is a multiple offender under subsection (4), the second step requires the sentencing court to determine whether "the defendant's commitment for an extended term is necessary for the protection of the public." Id. at 77, 588 P.2d at 398.

The determination that the defendant is a member of the class of offenders to which the particular subsection of [HRS] § [706-]662 applies involves "historical facts," the proof of which exposes the defendant to punishment by an extended term sentence, similarly to the manner in which the proof of his guilt exposes him to ordinary sentencing. . . . But when the status of the defendant has been established, the process by which the court determines that the defendant's commitment for an extended term is necessary for the protection of the public . . . is one which deals with the subject matter of ordinary sentencing.

[State v. Huelsman, 60 Haw. 71,] 79-80, 588 P.2d [394] 400 [(1979)].

Id. at 9, 72 P.3d at 481 (brackets in original). Moreover, Kaua clarified "the fundamental distinction between the nature of the predicate facts described in HRS §§ 706-662(1), (3), and (4), on

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the one hand, and those described in HRS §§ 706-662(5) and (6), on the other." Id. at 12, 72 P.3d at 484 (internal footnote references omitted).

Specifically, the facts at issue in rendering an extended term sentencing determination under HRS §§ 706-662(1), (3), and (4) implicate considerations completely "extrinsic" to the elements of the offense with which the defendant was charged and of which he was convicted; accordingly, they should be found by the sentencing judge in accordance with Huelsman and its progeny. The facts at issue for purposes of HRS §§ 706-662(5) and (6), however, are, by their very nature, "intrinsic" to the offense with which the defendant was charged and of which he has been convicted; accordingly, they must be found beyond a reasonable doubt by the trier of fact in order to afford the defendant his constitutional rights to procedural due process and a trial by jury.

Id. at 12-13, 72 P.3d at 484-85 (citations omitted).

Contrary to Smith's interpretation of Kaua, the "intrinsic-extrinsic" analysis is relevant only for purposes of the first prong of the two-step process for imposing an extended term sentence -- i.e., whether the defendant is a member of the class of offenders to which extended term sentencing applies. The second phase of the two-step process is a matter of ordinary sentencing, during which the sentencing court is "'afforded wide latitude in the selection of penalties from those prescribed and in the determination of their severity. This authority is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory and constitutional commands have not been observed.'" Id. at 9-10, 72 P.3d at 481-82 (quoting State v. Okumura, 78 Hawai'i 383, 413, 894 P.2d 80,110 (1995)). That being the case, Smith's argument that the family court erred in relying on "intrinsic" facts in its finding that an extended term sentence was "necessary for protection of the public" misinterprets this court's decision in

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Kaua. Moreover, not only does Smith not challenge the family court's FOFs with respect to its finding that an extended term sentence was "necessary for protection of the public," but the record reflects that the family court rendered extensive findings, pursuant to the sentencing factors enumerated in HRS § 706-606 (1993), to support the imposition of an extended term sentence in the present matter. Thus, inasmuch as the family court's imposition of an extended term sentence complied with the procedural safeguards mandated by Kaua and Apprendi, the circuit court did not err in denying Smith's petitioner for post-conviction relief.¹ Therefore,

IT IS HEREBY ORDERED that the order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, February 2, 2004.

On the briefs:

David F. Klein,
for the petitioner-
appellant Regina Smith

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
for the respondent-
appellee State of Hawai'i

¹ Because Smith's arguments on appeal stem primarily from her misinterpretation of the "intrinsic-extrinsic" analysis affirmed by this court in Kaua, we believe that it is unnecessary to revisit Kaua based on the arguments expressed in Smith's opening brief.