

*** NOT FOR PUBLICATION ***

NO. 25898

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

RAYMOND KAHOOKELE, SR., Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 01-1-0433(3))

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Raymond Kahookele, Sr. appeals from the judgement of the circuit court of the second circuit, the Honorable Joseph E. Cardoza presiding, filed on May 20, 2003, convicting him of and sentencing him for the following offenses: (1) place to keep a firearm, in violation of Hawai'i Revised Statutes (HRS) § 134-6(c) (1993 & Supp. 2003); (2) promoting a dangerous drug in the third degree, in violation of HRS § 712-1243(1) (1993); (3) unlawful possession of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993); (4) driving a vehicle without a license, in violation of HRS § 286-102 (1993 & Supp. 2001); (5) driving a motorcycle without insurance, in violation of HRS § 431:10G-102 (1993 & Supp. 2003); and (6) driving a vehicle without a certificate of registration, in violation of HRS § 286-47(3)(A) (1993 & Supp. 2003). On appeal, Kahookele contends that the circuit court erred (1) by denying his motions to suppress evidence and statements, inasmuch as they were elicited after he had invoked his right to remain silent and "all communication and interrogation should have ceased[,]"" (2) by

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imposing a mandatory minimum sentence, inasmuch as the indictment, according to Kahookele, did not allege aggravating circumstances, as required by HRS § 706-660.1 (1993), in order for the circuit court to impose an enhanced sentence, and (3) by not sentencing him pursuant to HRS § 706-622.5 (Supp. 2003) instead.

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, we resolve Kahookele's appeal as follows:

(1) Officer Ah Loo's request for Kahookele's permission to search Kahookele's backpack was not a request for information after Kahookele had invoked his right to remain silent by writing "refuse" on the waiver of rights form; it was a request for permission to search, which required a "yes" or "no" response. See State v. Naititi, 104 Hawai'i 224, 236, 87 P.3d 893, 905 (2004). "Although the content of [Kahookele]'s bag was incriminating, the officer's request for permission to search it was not interrogation." State v. Blackshire, 10 Haw. App. 123, 137, 861 P.2d 736, 743 (App. 1993), cert. denied, 75 Haw. 581, 863 P.2d 989 (1993), overruled on other grounds by State v. Ah Loo, 94 Hawai'i 207, 10 P.3d 728 (2000).

(2) Under a plain reading of the indictment against Kahookele, it is apparent that the use of a handgun -- the relevant aggravating circumstance supporting the imposition of enhanced sentencing pursuant to HRS § 706-660.1(2)(d) -- was being charged. Consequently, Kahookele was "given reasonable notice of its intended application and afforded the opportunity to be heard." State v. Schroeder, 76 Hawai'i 517, 531, 880 P.2d 192, 206 (1994).

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(3) The sentencing guidelines contained in HRS § 706-622.5 are relevant only to Kahookele's convictions of promoting a dangerous drug in the third degree, Count III, and prohibited acts related to drug paraphernalia, Count IV. Moreover, HRS § 706-605(2) (1993 & Supp. 2003) provides that "[t]he court shall not sentence a defendant to probation and imprisonment except as authorized by part II of this chapter." HRS § 706-629(1)(a) (1993) provides that "[w]hen the disposition of a defendant involves more than one crime[,] . . . [t]he court shall not impose a sentence of probation and a sentence of imprisonment" Accordingly, Kahookele could not be sentenced both to a term of imprisonment in connection with Count I and to probation in connection with Counts III and IV, and the circuit court correctly sentenced him pursuant to HRS § 712-1243(3). Furthermore, Kahookele specifically stated that he did not oppose the prosecution's motion for the imposition of a mandatory minimum term of imprisonment of two years and six months with respect to Count III, pursuant to HRS § 712-1243(3), and has thereby waived the point as error on appeal.

Therefore, IT IS HEREBY ORDERED that the judgment and sentence of the circuit court from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 25, 2004.

On the briefs:

Gerald T. Johnson, for
defendant-appellant
Raymond Kahookele, Sr.

Arleen Y. Watanabe, deputy
prosecuting attorney, for
the plaintiff-appellee
State of Hawai'i