

NO. 23713

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ROSS GUTHRIE, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 98-0044(1))

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Ross Guthrie (Guthrie), pro se, appeals the Decision and Order Denying Rule 40 Petition¹ filed in the Family Court of the Second Circuit (family court) on August 9, 2000. On appeal, Guthrie argues that (1) his prison sentence is illegal and violated his plea agreement; (2) his conviction for the included offense of Sexual Assault in the Second Degree barred his conviction for Sexual Assault in the First Degree; and (3) the multiple charges should have been separately tried.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

¹The Honorable Artemio C. Baxa presided.

the arguments advanced and the issues raised by the parties, we resolve Guthrie's points of error as follows:

(1) Guthrie's sentence was not illegal and did not violate the plea agreement where (a) the sentence was for thirty years of imprisonment, not 900 years as stated in Guthrie's brief, (b) the plea was voluntarily made, (c) Guthrie was informed that the court was not bound by the plea agreement, and (d) Guthrie was sentenced to no more than the maximum amount of time agreed to by the State. Hawai'i Rules of Penal Procedure (HRPP) Rule 11(e). Furthermore, Guthrie asks this court to make all terms of imprisonment concurrent. This court is without power to fashion a sentence on appeal. Barnett v. State, 91 Hawai'i 20, 28-29, 979 P.2d 1046, 1054-55 (1999).

(2) Sexual Assault in the Second Degree is not an included offense of Sexual Assault in the First Degree where (a) Sexual Assault in the Second Degree requires proof of compulsion while Sexual Assault in the First Degree requires proof of the victim's age, and (b) each distinct act of sexual assault constitutes a separate offense under the Hawai'i Penal Code.

Hawaii Revised Statutes (HRS) § 701-109(1)(a) (1993);² State v. Arceo, 84 Hawai'i 1, 21, 928 P.2d 843, 863 (1996).

(3) Guthrie pleaded no contest and was not tried for his offenses. Therefore, HRS § 701-109(3) (1993)³ is not applicable. Even if HRS § 701-109(3) were applicable, the statute does not mandate separate trials but allows for discretionary separate trials when the court finds that "justice so requires." There is no such requirement in this case. Furthermore, there is no evidence that Guthrie or the State applied for separate trials.

²HRS § 701-109 provides, in pertinent part:

§701-109 Method of prosecution when conduct establishes an element of more than one offense. (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (4) of this section[.]

. . . .

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

³HRS § 701-109(3) provides:

(3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

Guthrie's allegations show no colorable claim for relief. Therefore,

IT IS HEREBY ORDERED that the Family Court of the Second Circuit's August 9, 2000 Decision and Order Denying Rule 40 Petition is affirmed.

DATED: Honolulu, Hawai'i, June 19, 2002.

On the briefs:

Ross Guthrie
defendant-appellant, pro se.

Chief Judge

Simone C. Polak,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge