NO. 23833

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
EUGENE P. GORDON, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2082)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Eugene P. Gordon (Gordon) appeals from the September 27, 2000 Order of Resentencing granting the Motion for Revocation of Probation filed by Plaintiff-Appellee State of Hawaiʻi (the State) and sentencing Gordon to incarceration for ten years. We affirm.

BACKGROUND

Prior to his offenses in the instant case, Gordon had been convicted of the following offenses and sentenced as follows:

DATE	OFFENSE	SENTENCE
April 25, 1980	Burglary First	Probation
April 6, 1981	Burglary First	Imprisonment, ten years
October 1, 1982	Escape Second	Imprisonment, five years
March 3, 1989	Robbery Second	Imprisonment, ten years

In the instant case, on September 15, 1999, Gordon pled guilty to the offenses committed on September 20, 1998, of

Unauthorized Entry into Motor Vehicle, Hawaii Revised Statutes (HRS) § 708-836.5, and Attempted Unauthorized Entry into Motor Vehicle, HRS §§ 705-500 and 708-836.5, and was sentenced by Circuit Court Judge Dexter Del Rosario to probation for five years as to each count. One of the conditions of probation required Gordon to serve a three-hundred-sixty-three-day term of imprisonment, with credit for time served. The judgment was announced on September 15, 1999, and entered on September 17, 1999.

On February 7, 2000, the State moved for revocation of probation.

On May 9, 2000, the State moved for the imposition of an extended term of imprisonment. HRS § 706-662 (Supp. 2001) allows a convicted defendant to

> be subject to an extended term of imprisonment under section 706-661, if the convicted defendant . . . is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.

On May 9, 2000, the State moved for the imposition of a consecutive term of imprisonment.

On August 22, 2000, Gordon moved to withdraw his July 1, 1999 guilty plea on the ground that his plea was not knowing and voluntary and was the result of his former attorney's insistence that he plead guilty.

At the September 27, 2000 hearing, evidence was presented and Gordon admitted that he violated his probation in the following ways:

1. On September 16, 1999, he used "ice."[1]

2. On September 20, 1999, a drug test of him "resulted in positive detection for amphetamine."

3. On October 29, 1999, he was convicted of abuse of a household member.

4. On December 10, 1999, he was convicted of two counts of assault in the third degree.

5. On January 6, 2000, he failed to report for his regularly scheduled appointment with his probation officer, and the probation officer was unable to contact him because he had departed his last known address without leaving a forwarding address.

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[1] At the September 27, 2000 hearing on the motion to revoke probation, Defendant-Appellant Eugene P. Gordon testified, in relevant part, as follows:

> Q You were sentenced September 15, 1999, before Judge Del Rosario; correct?
>
> A Yes, that's correct?
>
> Q On that date you said you would do your best to comply with the terms and conditions of probation?
>
> A Yes. And I did.
>
> Q Isn't it true September 16, the next night, you were smoking ice with the guys at OCCC?
>
> A At OCCC, yes.

6. He failed to obtain, and remain in, substance abuse treatment until clinically discharged.

At the conclusion of the hearing on September 27, 2000, Judge Del Rosario stated, in relevant part, as follows:

> THE COURT: The Court is prepared to rule.
>
> In this case, Mr. Gordon, there is very little that is in dispute. Your criminal record speaks for itself. I also don't dispute your genuineness when you state your desires today the same as you did at the prior hearing. I don't think there is any dispute, at least in your own mind, that you really tried. There is also no dispute that you violated almost every single term and condition of probation. Not only that you violated it, but the shortness in time from the time of your release to the violation. If all we are talking about was one or two conditions, for not doing the program, then we can deal with that. Or testing positive once for drugs. But we have a number of tests, the most serious of which is committing further crimes.
>
> While you have your position for these crimes, I am sure the victims have their position. And the Court in having mercy on you and giving you this opportunity has placed those individuals at risk. Because of the Court's decision to give you another opportunity, at least three people were assaulted. The Court tried to place the structure that is on you for today previously by having review hearings. I think in my previous discussions with you I indicated I was trying to keep you on a short leash, or a short rope. That is why we have these review hearings. I subsequently was transferred to another assignment, so I didn't have further review hearings. I don't know if that would have made a difference. Probably not.
>
> . . . .
>
> But you are here again. Pretty much for the same things. There is no question in the Court's mind that probation is not an alternative for you. The only issue in this case is whether to sentence you to an extended term. And in deciding whether to sentence you to an extended term, the Court's decision has to be based on the evidence.
>
> The State has met its burden of establishing that you are a persistent offender, by the evidence received of four prior felony convictions which occurred after age eighteen over different times. I am sentencing you for the fifth.
>
> I have reviewed the commentary to the Penal Code regarding extended terms. It states: The sections provide for extended terms of imprisonment for the exceptionally difficult offender. Unlike other offenders, these defendants should be subjected to the possible extended terms, because their records or situations indicate that extended incarceration may be necessary to protect

the public. In these cases rehabilitation, if possible, is unlikely to be achieved with an ordinary term.

Of course, this case is particularly -- there is no one in this courtroom who does not want you to succeed. However, the record speaks for itself.

For that reason the Court is going to find that based on the evidence presented the defendant is a persistent offender within the meaning of 706-662(1). The Court is going to grant the State's motion for extended term.

It will be the judgment and sentence of this Court that defendant be sentenced in Count I and Count II to imprisonment for a term of ten years, each to be served concurrently to each other.

Let me say this. This is not a statement by the Court that you should be incarcerated for that entire ten years. The Court believes that you should be under supervision of some type, for the protection of the public, either through parole or furlough. The Court believes you can do well in prison under structure. You have shown that. In deciding whether you should go back into the community. The decision is more appropriately placed with the paroling authority. So my sentence of ten years is not a signal or message to the paroling authority that you be locked up as long as possible. If nothing else it indicates, and you can use the transcript of these statements, that you should be released under their supervision. For example if you get paroled earlier, one or two years --

THE DEFENDANT: May I make a statement? Oh, well --

THE COURT: Well, whenever you get paroled, it is the Court's view that you should be under supervision, for the protection of the public. That is the reason for the Court's sentencing.

Anything further?

MR. TAKEMOTO: Regarding the consecutive, I assume it is denied.

THE COURT: Consecutive sentence will be denied.

MR. TAKEMOTO: I have prepared an order as far as granting of extended term.

THE COURT: That's right.

MR. ROSS: No mandatory time on this thing.

THE COURT: There is no mandatory minimum.

As noted above, the September 27, 2000 Order of Resentencing granted the State's motion for revocation of probation and sentenced Gordon to incarceration for ten years.

On October 4, 2000, the court entered its Findings of Fact, Conclusions of Law and Order Granting State's Motion for Extended Term of Imprisonment.[2] These findings establish that Gordon is a persistent offender. They do not specify the court's reasons for determining that commitment of Gordon for an extended term is necessary for protection of the public.

On October, 26, 2000, the court entered an order denying Gordon's Motion for Reconsideration of Re-Sentencing.

DISCUSSION

A.

POINT ON APPEAL NO. 1

1.

Gordon contends that the resentence of him to imprisonment for ten years was (a) an abuse of discretion and (b) cruel and unusual punishment because the crimes for which Gordon was resentenced were property crimes that did not cause or threaten serious harm to persons and the sentence to an open term of ten years of imprisonment is disproportionate to the conduct for which he was convicted.

Gordon's point lacks merit because this is not a sentence, it is a resentence. Gordon was originally sentenced to probation for five years. As noted by the court, while on probation, Gordon "violated almost every single term and

[2] In light of the entry of the September 27, 2000 Order of Resentencing, the "order" part of this document is superfluous.

condition of probation" and assaulted at least three people. As noted by the court, the law provides

> for extended terms of imprisonment for the exceptionally difficult offender. Unlike other offenders, these defendants should be subjected to the possible extended terms, because their records or situations indicate that extended incarceration may be necessary to protect the public. In these cases rehabilitation, if possible, is unlikely to be achieved with an ordinary term.

In the instant case, the resentence is supported by the record.

2.

Gordon contends that

> [e]ach offense is a C felony which is punishable up to five (5) years of imprisonment. The court should have resentenced [Gordon] to the five (5) years term of imprisonment rather than extending said term of imprisonment to ten (10) years. As the court stated[,] it was of the opinion in sentencing [Gordon] that the court intended [Gordon] to be released and under supervision through parole. It was not the intent of the court to have [Gordon] serve the entire ten (10 years[)]. Nor was it the intent of the court that [Gordon] be locked up for as long as possible. The court's intent of having [Gordon] serve some prison time and be released on parole under supervision could have been effectuated in resentencing [Gordon] to an open term of five (5) years of imprisonment.

(Record citations omitted.)

In this point, Gordon misrepresents "the intent of the court." As noted above, the court stated its intent, in relevant part, as follows:

> I have reviewed the commentary to the Penal Code regarding extended terms. It states: The sections provide for extended terms of imprisonment for the exceptionally difficult offender. Unlike other offenders, these defendants should be subjected to the possible extended terms, because their records or situations indicate that extended incarceration may be necessary to protect the public. In these cases rehabilitation, if possible, is unlikely to be achieved with an ordinary term.
>
> . . . .
>
> It will be the judgment and sentence of this Court that defendant be sentenced in Count I and Count II to imprisonment for a term of ten years, each to be served concurrently to each other.

> Let me say this. This is not a statement by the Court that you should be incarcerated for that entire ten years. The Court believes that you should be under supervision of some type, for the protection of the public, either through parole or furlough. The Court believes you can do well in prison under structure. You have shown that. In deciding whether you should go back into the community. The decision is more appropriately placed with the paroling authority. So my sentence of ten years is not a signal or message to the paroling authority that you be locked up as long as possible. If nothing else it indicates, and you can use the transcript of these statements, that you should be released under their supervision. For example if you get paroled earlier, one or two years --
>
> . . . .
>
> THE COURT: Well, whenever you get paroled, it is the Court's view that you should be under supervision, for the protection of the public. That is the reason for the Court's sentencing.

Clearly, the court decided that Gordon's record demonstrated that, for the protection of the public, Gordon needed to be incarcerated or under supervision for ten years. The record supports the court's decision.

B.

POINT ON APPEAL NO. 2

Gordon contends that the court failed to state the specific reasons for its resentence, thereby preventing the appellate court from reviewing the appropriateness of the resentence.

For this point, Gordon is relying on the requirement stated in the following precedent:

> In order to engage in meaningful review of a sentencing court's decision without involving ourselves unduly in the exercise of the court's discretion, we require the sentencing court to "state on the record its reasons for determining that commitment of the defendant for an extended term is necessary for protection of the public and . . . enter into the record all findings of fact which are necessary to its decision."

State v. Okumura, 78 Hawai‘i 383, 413, 894 P.2d 80, 110 (1995) (citations omitted).

We conclude that the court satisfied the Okumura requirement when it voiced the following three statements:

> (1) "rehabilitation, if possible, is unlikely to be achieved with an ordinary term[;]"
>
> (2) "[t]his is not a statement by the Court that you should be incarcerated for that entire ten years. The Court believes that you should be under supervision of some type, for the protection of the public, either through parole or furlough. The Court believes you can do well in prison under structure. You have shown that. In deciding whether you should go back into the community. The decision is more appropriately placed with the paroling authority[; and]"
>
> (3) "whenever you get paroled, it is the Court's view that you should be under supervision, for the protection of the public. That is the reason for the Court's sentencing."

CONCLUSION

Accordingly, we affirm the September 27, 2000 Order of Resentencing granting the Motion for Revocation of Probation filed by Plaintiff-Appellee State of Hawai‘i and sentencing Defendant-Appellant Eugene P. Gordon to incarceration for ten years.

DATED: Honolulu, Hawai‘i, May 1, 2002.

On the briefs:

Randal I. Shintani
for Defendant-Appellant.

Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge