

NO. 23939

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CRANDALL PENAFLOR, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(Cr. No. 90-0146(2))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Crandall Penaflor (Penaflor) appeals from the "Order Denying [Penaflor's] Motion for Correction of Illegal Sentence Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35[,]" entered by the Circuit Court of the Second Circuit (the circuit court), Judge Rhonda Loo presiding, on October 26, 2000. Penaflor contends that:

(1) The circuit court erred in denying his HRPP Rule 35 Motion for Correction of Illegal Sentence because pursuant to Hawai'i Revised Statutes (HRS) § 701-109(1)(e) (1993),¹ his convictions for burglary, terroristic threatening,

^{1/} Hawai'i Revised Statutes (HRS) § 701-109 (1)(e) (1993) states:

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:

and kidnapping should have been merged with his convictions for sexual assault; and

(2) The consecutive sentences imposed on him by the circuit court "were illegal because they were imposed without any enhanced standard specifically tailored for the imposition of consecutive sentence and thus violated [Penaflor's] constitutional right to due process."

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the issues raised, the arguments presented, and the relevant case law and statutes, we conclude that there is no merit to Penaflor's arguments. Accordingly, we affirm the October 26, 2000 Order.

Nevertheless, "[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." HRPP Rule 52(b) (1993); see State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999); State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993). Based on a thorough review of the record, we also conclude that the facts used to establish one of Penaflor's terroristic threatening offenses were also the facts used to establish

. . . .

- (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

Penalfor's kidnapping offense. Therefore, in accordance with HRS § 701-109(1)(a) and 4(a) (1993)² and our decision in State v. Caprio, 85 Hawai'i 92, 105-06, 937 P.2d 933, 946-47 (App. 1997), we reverse Penafior's conviction for terroristic threatening against the kidnapping victim.

DATED: Honolulu, Hawai'i, October 21, 2002.

On the briefs:

Theodore Y. H. Chinn
for defendant-appellant.

Davelyn M. Tengan,
Deputy Prosecuting Attorney,
County of Maui for
plaintiff-appellee.

^{2/} HRS § 701-109(1)(a) and 4(a) states:

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[.]