NO. 24242

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
JERRY RULEY, also known as Gerald Ruley,
Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-0548)

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

Defendant-Appellant Jerry Ruley, aka Gerald Ruley, (Ruley) appeals from the Amended Judgment[1] filed April 18, 2001 in the Circuit Court of the First Circuit (circuit court).[2] A jury found Ruley guilty as charged on Count I, Robbery in the First Degree in violation of Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2002)[3]; Count II, Burglary in the

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[1]/Ruley was charged with HRS §§ 708-840(1)(b)(ii), 708-810(1)(c), and 707-720(1)(e), and the jury found Ruley guilty as charged. However, the April 18, 2001 Amended Judgment fails to set forth any of the HRS subsections under which Ruley was charged and convicted. The circuit court is hereby ordered to file a Second Amended Judgment setting forth the particular HRS subsections of which Ruley was convicted.

[2]/The Honorable Dexter D. Del Rosario presided.

[3]/HRS § 708-840(1)(b)(ii) provides in relevant part:

> **§708-840 Robbery in the first degree.** (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
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> . . . .
>
> (b) The person is armed with a dangerous instrument and:
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> . . . .
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> (ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

(continued...)

First Degree, in violation of HRS § 708-810(1)(c) (1993)[4]; and Count IV, Kidnapping,[5] in violation of HRS § 707-720(1)(e) (1993).[6] The jury acquitted Ruley of Count V (Extortion in the First Degree). The circuit court dismissed Count III (Kidnapping) based on the jury's answer to a special interrogatory.

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[3/](...continued)

(2) As used in this section, "dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

(3) Robbery in the first degree is a class A felony.

[4/]HRS § 708-810(1)(c) provides in relevant part:

**§708-810 Burglary in the first degree.** (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

. . . .

(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

. . . .

(3) Burglary in the first degree is a class B felony.

[5/]Based on the evidence presented at trial, the State concurred with the circuit court's position that Count VI (Terroristic Threatening) merged into Count IV (Kidnapping); after the State proceeded with the greater offense in Count IV, the circuit court dismissed the charge in Count VI.

[6/]HRS § 707-720(1)(e) provides in relevant part:

**§707-720 Kidnapping.** (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:

. . . .

(e) Terrorize that person or a third person[.]

. . . .

(3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial.

The circuit court sentenced Ruley to an extended term of life imprisonment with the possibility of parole on Count I, with a mandatory minimum of fifteen years for commission of the act with a firearm; an extended term of twenty years of imprisonment on Count II; and an extended term of twenty years of imprisonment with a mandatory minimum term of ten years on Count IV -- all terms to run concurrently.

On appeal, Ruley contends the circuit court plainly erred (1) during the extended term sentencing hearing when the court consolidated all of the sentencing matters before the court, took judicial notice of the presentence report, and did not allow Ruley an opportunity to object to the first phase of sentencing; and (2) during the trial when the circuit court admitted hearsay evidence. We disagree with Ruley's contentions and affirm the April 18, 2001, Amended Judgment of the circuit court.

Upon careful review of 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 resolve Ruley's points of error as follows:

(1) The sentencing court properly applied the following two-step procedure when considering an extended term sentence. "The first step involves a finding by the court that the defendant is within the class of offenders to which the

particular subsection applies," State v. Okumura, 78 Hawai‘i 383, 412, 894 P.2d 80, 109 (1995) (quoting State v. Huelsman, 60 Haw. 71, 76, 588 P.2d 394, 398 (1978), reh'g denied, 60 Haw. 308, 558 P.2d 407 (1979)), where the "rules of evidence apply to the proof of such facts in an extended term sentence hearing." Huelsman, 60 Haw. at 77, 588 P.2d at 399. The second step of the process requires that the sentencing court find that a multiple offender's incarceration for an extended term "is necessary for the protection of the public." Okumura, 78 Hawai‘i at 413, 894 P.2d at 110 (internal quotation marks omitted).

At the hearing on the motion for extended term, after Ruley indicated there were no corrections or comments to be made to the contents of the presentence report, the circuit court found that Ruley was both a current offender with multiple felony convictions and a prior offender. The circuit court based the extended term sentence on, inter alia, (1) the three felony convictions in the present case, (2) a prior felony conviction in Nevada for which Ruley was currently under parole, (3) the similarity of the offense in Nevada to the present offenses, (4) the fact that Ruley traveled to Hawai‘i in contravention of the terms of his parole and committed the present offenses, (5) the egregious nature and manner in which Ruley committed the present offenses, (6) the fact that a firearm was used in the commission

of the offenses, and (7) the purely financial motive for committing the offenses.

Ruley's contention that the circuit court plainly erred in taking judicial notice of his presentence report is without merit. Hawaii Revised Statutes § 706-602(1)(b) (1993)[7] provides that the presentence report shall include a "defendant's history of delinquency or criminality." Ruley's prior criminal history was relevant to his sentencing.

Furthermore, after Ruley received a hearing, as required by HRS § 706-604 (1993),[8] where he indicated there were

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[7]/HRS § 706-602(1)(b) (1993) provides as follows:

> **§706-602 Pre-sentence diagnosis, notice to victims, and report.** (1) The pre-sentence diagnosis and report shall be made by personnel assigned to the court, intake service center or other agency designated by the court and shall include:
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> . . . .
>
> (b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habits[.]

[8]/HRS § 706-604 (1993) provides:

> **§706-604 Opportunity to be heard with respect to sentence; notice of pre-sentence report; opportunity to controvert or supplement; transmission of report to department.** (1) Before imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition.
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> (2) The court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them.

(continued...)

no corrections or comments to be made to the contents of the presentence report, Ruley waived his right to controvert the circuit court's taking judicial notice of the presentence investigation report.

Ruley's contention that the circuit court plainly erred by consolidating all of the sentencing matters is also without merit. He was given an opportunity to argue against the motion for extended term sentencing. Ruley fails to show how he suffered prejudice from the consolidation of the sentencing matters.

Based on this record we cannot say that the circuit court, after determining that Ruley was within the relevant class of offenders and an extended term was necessary for the protection of the public, "frustrated [Ruley's] ability to object to the various phases" of the extended term sentencing hearing or

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[8/](...continued)

(3) In all circuit court cases, the court shall afford a fair opportunity to the victim to be heard on the issue of the defendant's disposition, before imposing sentence. The court, service center, or agency personnel who prepare the pre-sentence diagnosis and report shall inform the victim of the sentencing date and of the victim's opportunity to be heard. In the case of a homicide or where the victim is otherwise unable to appear at the sentencing hearing, the victim's family shall be afforded the fair opportunity to be heard.

(4) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination shall be transmitted immediately to the department of public safety or, when the defendant is committed to the custody of a specific institution, to that institution.

committed plain error in sentencing him pursuant to HRS § 706-662 (Supp. 1998).[9]

(2) The record in this case establishes that (1) David Knittle (Knittle) was unavailable as a witness following his assertion of his fifth amendment right; and (2) Knittle's out-of-court statements were so palpably against his interest "that he must have realized it to be so when he made the statement," Shea v. City & County of Honolulu, 67 Haw. 499, 509, 692 P.2d 1158, 1166 (1985) (internal quotation marks omitted); Hawai'i Rules of Evidence Rule 804(b)(3).[10] Therefore, assuming arguendo that

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[9]/HRS § 706-662 (1998) provides in relevant part:

> **§706-662 Criteria for extended terms of imprisonment.** A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
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> (1) The 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.
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> . . . .
>
> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
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> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony[.]

[10]/**Rule 804 Hearsay exceptions; declarant unavailable.**

> . . . .
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> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person

(continued...)

Knittle's statements were hearsay, we cannot say the circuit court erred in admitting Knittle's statements.

Accordingly, the April 18, 2001 Amended Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 28, 2003.

On the briefs:

Christopher R. Evans
for defendant-appellant.

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge

[10/](...continued)
in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.