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NO. 24441

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALEXANDER DONALD MILHO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 49890)

MEMORANDUM OPINION

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

Defendant-Appellant Alexander Donald Milho (Milho) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Motion for Correction of Illegal Sentence Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35" (Denial Order) entered on August 27, 2001, by Judge Victoria S. Marks. We affirm.

BACKGROUND

On January 26, 1977, Milho was charged by indictment with Murder, Hawaii Revised Statutes (HRS) § 707-701 (1976). A jury found Milho guilty. The court sentenced Milho to life imprisonment with the possibility of parole. Milho appealed and, on June 27, 1978, the Hawai'i Supreme Court affirmed. The Judgment on Appeal was filed on July 9, 1979.

On April 26, 2001, Milho filed a "Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35" (HRPP Rule 35 Motion).

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At the hearing of the HRPP Rule 35 Motion on July 9, 2001, Milho was present via teleconference call and was represented by a deputy public defender (DPD). The Denial Order followed on August 27, 2001.

RELEVANT COURT RULES

HRPP Rule 35 (2003) states as follows:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

HRPP Rule 40(a) (2003) states, in relevant part, as follows:

(1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

. . . .

(iii) that the sentence is illegal;

. . . .

(i) *Indigents*. If the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel, the court shall refer the petition to the public defender for representation as in other penal cases; provided that no such referral need be made if the petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner.

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STANDARDS OF REVIEW

Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (citations and internal quotation marks omitted).

Statutory Interpretation

The Hawai'i Supreme Court has repeatedly stated that a court's

foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, [a court's] only duty is to give effect to [the statute's] plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995)

(citations, brackets, and internal quotation marks omitted).

DISCUSSION

1.

When the offense was committed and when the jury found Milho guilty of the HRS § 707-701 (1976) murder charge, the following statutes stated, in relevant part, as follows:

§706-606 Sentence for offense of murder. The court shall sentence a person who has been convicted of murder to an indeterminate term of imprisonment. In such cases the court shall impose the maximum length of imprisonment as follows:

- (a) Life imprisonment without possibility of parole in the murder of:

- (i) A peace officer while in the performance of his duties, or
- (ii) A person known by the defendant to be a witness in a murder prosecution, or
- (iii) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this subsection, or
- (iv) A person while the defendant was imprisoned.

.

- (b) Life imprisonment with possibility of parole or twenty years as the court determines, in all other cases. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with [HRS] section 706-669.

.

§707-701 Murder. (1) . . . [A] person commits the offense of murder if he intentionally or knowingly causes the death of another person.

(2) Murder is a class A felony for which the defendant shall be sentenced to imprisonment as provided in [HRS] section 706-606.

Effective June 17, 1980, Act 294, Session Laws of Hawai'i, Regular Session of 1980, enacted HRS § 706-659, as follows: "Notwithstanding . . . any other law to the contrary, a person who has been convicted of a class A felony shall be sentenced to an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation." 1980 Haw. Sess. L. Act 294, § 1 at 562.

Effective April 22, 1981, Act 27, Session Laws of Hawai'i, Regular Session of 1981, amended HRS § 706-606(b) to state as follows: "Life imprisonment with possibility of parole in all other cases. The minimum length of imprisonment shall be

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determined by the Hawaii paroling authority in accordance with [HRS] section 706-669." 1981 Haw. Sess. L. Act 27, § 1 at 46.

Effective January 1, 1987, the following statutes were amended by Act 314, Session Laws of Hawai'i, Regular Session of 1986 (Act 314), in relevant part, as follows:

SECTION 1. Sections 701-100 to 701-101, Hawaii Revised Statutes, are amended to read as follows:

. . . .

§ 701-101 Applicability to offenses committed before the effective date of amendments. (1) Except as provided in subsections (2) and (3), amendments made by Act , Session Laws of Hawaii 1986, to this Code [does] do not apply to offenses committed before [its] the effective date[.] of Act , Session Laws of Hawaii 1986. Prosecutions for offenses committed before the effective date of Act , Session Laws of Hawaii 1986, are governed by the prior law, which is continued in effect for that purpose, as if amendments made by Act , Session Laws of Hawaii 1986, to this Code were not in force. For purposes of this section, an offense is committed before the effective date of Act , Session Laws of Hawaii 1986, if any of the elements of the offense occurred before that date.

(2) In any case pending on or commenced after the effective date of amendments made by Act , Session Laws of Hawaii 1986, to this Code, involving an offense committed before that date . . . upon the request of the defendant, and subject to the approval of the court, the provisions of chapter 706 amended by Act , Session Laws of Hawaii 1986, may be applied in particular cases."

. . . .

SECTION 15. [(Repealed HRS § 706-606, governing the sentence for murder, and replaced it with factors to be considered in imposing a sentence.)]

. . . .

SECTION 39. Chapter 706, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§ 706-[(656)] Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

(1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.

. . . .

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(2) Persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority."¹

. . . .

SECTION 49. [(Repealed HRS § 707-701, governing the offense of murder, and replaced it with the offense of murder in the first degree.)]

. . . .

SECTION 50. Chapter 707, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§ 707-[(701.5)] Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-[(656)]."

. . . .

SECTION 78. This Act does not affect rights and duties that matured, penalties that were incurred and proceedings that were begun, before its effective date.

SECTION 79. Statutory material to repealed is bracketed. New statutory material is underscored.

SECTION 80. This Act shall take effect on January 1, 1987. 1986 Haw. Sess. L. Act 314, §§ 1, 15, 39, 49, 50, 78, 79, 80 at 593-629 (footnote omitted; footnote and brackets containing parenthetical material added; all other brackets in original).

In other words, Act 314 repealed HRS § 706-606 (1985). The fact that HRS § 706-606 has not been in existence since January 1, 1987, leads Milho to conclude that only HRS § 706-659 (Supp. 2002) applies and thus, a sentence greater than an

^{1/} Section 1 of Act 15, Session Laws of Hawai'i, Regular Session of 1996, amended Hawaii Revised Statutes § 706-656 by adding language pertaining to repeat offenders. 1996 Haw. Sess. L. Act 15, § 1 at 23.

indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation is no longer authorized. In his opening brief, Milho notes, in his own words, that

[i]ts not a question whether his sentence were legal at the time of his sentencing. The question that is posed before this court is, where is the statute today. And the answer is **REPEALED**. . . . However, while the legislature were trying to figure out how to adequately address the problem of sentencing a legal distinguishing loop-hole squeaked through the cracks, enabling [Milho] to bring into fruition, the wind-fall of having a twenty year term instead of life with or without the possibility of parole.

. . . .

This is the assumption of [Plaintiff-Appellee State of Hawai'i (State)], that [Milho] claimed that his sentence "**Was**" illegal. This is a misrepresentation of the law. No where in the [Milho's] Motion to Correct his Illegal Sentence were ever mentioned the word "**WAS**". [Milho] accentuated that word "**IS**", which is present tense, for bringing his current Motion for the Correction of his Illegal Sentence. The word "**WAS**" is in the pass tense form, and is not the intention of what [Milho] sought to argue in the first place. The [State] missed the mark by guessing of what [Milho] intended to do.

(Emphases in original.)

Milho further states that he "is attacking his sentence now, today currently in the 21st century. The question that is not before this court is, that [Milho's] sentence was legal at time of his sentence. The dispute is whether [Milho's] sentence is illegal. No answer to the actual question before this court."

Milho's point has the following two fatal faults:

- (1) Act 314 expressly does not apply to prosecutions for offenses committed before its express January 1, 1987 effective date and
- (2) if Act 314 applied in this case, it replaced the sentencing mandate in HRS § 706-606 (1985) with a similar mandate in HRS § 706-656.

2.

Milho contends that the court was biased and prejudiced. In his words, "face it, realistically speaking, the judge does not want to be responsible for turning a life sentence to a 20 year term. Even if it means violating the law." In light of our conclusion that the court was correct when it denied Milho's HRPP Rule 35 motion, this point has no merit.

3.

At the hearing of his HRPP Rule 35 Motion, Milho was represented by a DPD. Milho alleges that the DPD who represented him did not support or advocate his position and, as a result, Milho's right not to suffer the ineffective assistance of counsel was violated.² Milho further contends, in his own words, that

[a]lthough, [Milho] does not have a right to Hybrid representation, this scope should be limited to persons out side the scope of incarceration. For instance, if the person in serving time for a criminal act committed to prison, only to find that his mental capacity is diminished whereas his attorney blatantly sent him up the river. Question is, how can a person with that diminished capacity with an I.Q. of 50, be subjected to fein for himself? Further, if an attorney is effectively representing his client, I could see no Hybrid representation. However, if the person is incarcerated with no ways and means to articulate his claim, and the courts refused to appoint him counsel, hybrid representation should be permitted. It can be regulated by an affidavit declaring that the Hybrid is not being paid for his services, which would be consistent with current and relevant HRS statutes. This rule on hybrid representation violates a persons right to choose to represent him in his best interest. In short, if counsel for [Milho] refuses to represent him, [Milho] should be able to expediently resolve his case without delay should the alternative arise. In the case at bar, [Milho] requested that his friend that made the motion can best explain the issue before the court. It was however, rejected by the court, and objected by the [State]. [Milho] could not articulate his claim, neither was [Milho] familiar

^{2/} The question whether Defendant-Appellant Alexander Donald Milho (Milho) had a right to court-appointed counsel is moot because Milho was in fact represented by a deputy public defender.

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with the laws that was cited in his claim. Hybrid pro bono counsel should have been able to coach or to represent the inarticulate person to protect his fundamental rights to bring his claims to court, without any violation of access to the courts.

There being no transcript of the July 9, 2001 hearing in the record on appeal, we conclude that Milho has failed his burden on appeal regarding these issues.

CONCLUSION

Accordingly, we affirm the circuit court's August 27, 2001 "Findings of Fact, Conclusions of Law, and Order Denying Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35."

DATED: Honolulu, Hawai'i, May 2, 2003.

On the briefs:

Alexander Donald Milho,
Defendant-Appellant, *pro se*.

Chief Judge

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

Associate Judge

Associate Judge