NOT FOR PUBLICATION

Nos. 24901, 24968, 24969, 24970, 24971, 25301

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee v.
TERRY MICHAEL TURNER, Defendant-Appellant

Nos. 24968, 24969, 24970
APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. Nos. 01-1-1385, 98-1231, 99-0332)

and

No. 24901
APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. No. 1P401-00845)

and

No. 24971
APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. No. 00-1-1615)

and

No. 25301
APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. HPD No. 01-329063)

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

Six appeals are presented involving the same criminal defendant, Terry M. Turner (Turner), and raising similar legal issues. The supreme court consolidated three of the appeals -- Nos. 24968, 24969 and 24970. We consolidated the other three -- Nos. 24971, 24901 and 25301 -- for disposition purposes. Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 3(b) (West 2002).

In No. 24968 (Cr. No. 01-1-1385), Turner appeals the February 19, 2002 judgment of the circuit court of the first circuit[1] that convicted him, upon his no contest plea, of the petty misdemeanor harassment, a violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(b) (Supp. 2002), and sentenced him to thirty days in jail. Turner was originally charged with the misdemeanor terroristic threatening in the second degree, a violation of HRS §§ 707-715(1) & 717(1) (1993), and was in the circuit court by way of his demand for a jury trial.

In Nos. 24969 (Cr. No. 98-1231), 24970 (Cr. No. 99-0332) and 24971 (Cr. No. 00-01-1615), Turner appeals two orders and a judgment, respectively, issuing out of a single hearing.[2] In each of Nos. 24969 and 24970, Turner appeals the February 27, 2002 order of the circuit court of the first circuit that revoked his probation and re-sentenced him to a five-year, indeterminate term of imprisonment, both sentences to run concurrently. In No. 24971, Turner appeals the February 27, 2002 judgment of the circuit court of the first circuit that sentenced him to a five-year, indeterminate term of imprisonment, also to run concurrently. In Cr. No. 98-1231 (No. 24969), Turner was originally convicted, upon his no contest plea, of the class C felony of promoting a dangerous drug in the

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[1] The Honorable Derrick H. M. Chan, judge presiding.

[2] The Honorable Wilfred K. Watanabe, judge presiding.

third degree, a violation of HRS § 712-1243 (1993). In Cr. No. 99-0332 (No. 24970), Turner was originally convicted, upon his no contest plea, of the class C felony of theft in the second degree, a violation of HRS § 708-831(1)(b) (1993 & Supp. 2002). In Cr. No. 00-01-1615 (No. 24971), Turner was convicted, upon his no contest plea, of the class C felony of unlawful use of drug paraphernalia, a violation of HRS § 329-43.5(a) (1993).[3]

In No. 24901 (HPD Report No. 01329063), Turner appeals the December 28, 2001 judgment of the district court of the first circuit[4] that convicted him of the petty misdemeanor harassment, a violation of HRS § 711-1106(1)(a) (Supp. 2002), and sentenced him to thirty days in jail, with credit for time already served.[5] On April 23, 2002, Turner filed a motion to dismiss the prosecution and for civil commitment, purportedly pursuant to HRS § 706-607 (1993). The district court[6] granted Turner's motion on August 23, 2002. In No. 25301, the State appeals the district court's order of dismissal and

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[3] In Cr. No. 00-01-1615, Terry M. Turner (Turner) was also charged with the class C felony of promoting a dangerous drug in the third degree, a violation of Hawaii Revised Statutes (HRS) § 712-1243 (1993). Upon a motion filed by Turner, the court dismissed this charge as *de minimis*.

[4] The Honorable John Campbell, Jr., judge presiding.

[5] The district court initially sentenced Turner to 30 days in jail with credit for time already served, along with six months of probation under terms and conditions, including mental health and drug treatment. However, on March 22, 2002, the court granted Turner's motion to correct illegal sentence by eliminating the term of probation.

[6] The Honorable Lawrence R. Cohen, judge presiding.

civil commitment.

After a painstaking review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we resolve the points of error presented as follows:

(1) In Nos. 24968, 24969, 24970 and 24971, Turner contends the circuit court lacked personal and subject matter jurisdiction. Because he claims he was mentally ill, Turner argues that the family court, and not the circuit court, had exclusive jurisdiction, pursuant to HRS § 571-14(a)(5) (Supp. 2001).[7] This argument lacks merit. Based upon the plain language of HRS § 571-14, see State v. Diaz, 100 Hawai'i 210, 218, 58 P.3d 1257, 1265 (2002) ("Absent specific reasoning by the legislature, this court must adopt an interpretation [of a statute] that is in accord with the plain

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[7] HRS § 571-14 (Supp. 2001) provided, in pertinent part:

> (a) Except as provided in sections 603-21.5 and 604-8, the [family] court shall have exclusive original jurisdiction:
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> (1) To try any offense committed against a child by the child's parent or guardian or by any person having the child's legal or physical custody, and any violation of section 707-726, 707-727, 709-902, 709-903, 709-903.5, 709-904, 709-905, 709-906, or 302A-1135, whether or not included in other provisions of this paragraph or paragraph (2).
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> . . . .
>
> (5) For commitment of an adult alleged to be mentally defective or mentally ill.
>
> . . . .
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> (b) The [family] court shall have concurrent jurisdiction with the district court over violations of sections 707-712, 707-717, 708-822, 708-823, 711-1106, and 711-1106.5 when multiple offenses are charged through complaint or indictment and at least one offense is a violation of an order issued pursuant to chapter 586 or a violation of section 709-906.

meaning of the statute." (Citation omitted.)), we conclude the circuit court did not lack jurisdiction merely because Turner was, *arguendo*, mentally ill. First, none of these cases was a civil commitment proceeding. Second, the circuit court properly exercised its jurisdiction in these criminal cases pursuant to HRS §§ 603-21.5 (Supp. 2002) and 604-8 (Supp. 2000),[8] the purviews of which HRS §

[8] HRS § 603-21.5 (Supp. 2002) provides, in pertinent part:

> (a) The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:
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> (1) Criminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;
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> . . . .
>
> (b) The several circuit courts shall have concurrent jurisdiction with the family court over:
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> (1) Any felony under section 571-14, violation of an order issued pursuant to chapter 586, or a violation of section 709-906 when multiple offenses are charged through complaint or indictment and at least one other offense is a criminal offense under subsection (a)(1); and
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> (2) Any felony under section 571-14 when multiple offenses are charged through complaint or indictment and at least one other offense is a violation of an order issued pursuant to chapter 586, a violation of section 709-906, or a misdemeanor under the jurisdiction of section 604-8.

HRS § 604-8 (Supp. 2000) provided:

> (a) District courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine. They shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury.
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> In any case cognizable by a district court as aforesaid in which the accused has the right to a trial by jury in the first instance, the district court, upon demand by the accused, for such trial by jury, shall not exercise jurisdiction over such case except violations under section 291-4, but shall examine and discharge or commit for trial the accused as provided by law, but if in any such case the accused does not demand a trial by jury on the date of arraignment or within ten days thereafter, the district court may exercise jurisdiction over the same, subject to the right of appeal as provided by law. Trial by jury for violations under section 291-4 may be heard in the district court.

571-14(a) specifically excepts from exclusive, original family court jurisdiction. Third, "'before a party can claim that an act or statute has the effect of divesting jurisdiction which has regularly and fully vested, the law in favor of such divestment must be clear and unambiguous.'" State v. Dwyer, 78 Hawai'i 367, 370, 893 P.2d 795, 798 (1995) (internal brackets omitted) (quoting State v. Villados, 55 Haw. 394, 397, 520 P.2d 427, 430 (1974)). Turner cites no such law.

(2) In Nos. 24969, 24970 and 24971, Turner claims that the circuit court abused its discretion in failing to civilly commit him in lieu of prosecution pursuant to HRS § 706-607.[9] We disagree.

> (b) The district court shall have concurrent jurisdiction with the family court of any violation of an order issued pursuant to chapter 586 or any violation of section 709-906 when multiple offenses are charged and at least one other offense is a criminal offense within the jurisdiction of the district courts.

[9] HRS § 706-607 (1993) provides:

> (1) When a person prosecuted for a class C felony, misdemeanor, or petty misdemeanor is a chronic alcoholic, narcotic addict, or person suffering from mental abnormality and the person is subject by law to involuntary hospitalization for medical, psychiatric, or other rehabilitative treatment, the court may order such hospitalization and dismiss the prosecution. The order of involuntary hospitalization may be made after conviction, in which event the court may set aside the verdict or judgment of conviction and dismiss the prosecution.
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> (2) The court shall not make an order under subsection (1) unless it is of the view that it will substantially further the rehabilitation of the defendant and will not jeopardize the protection of the public.

The Commentary on HRS § 706-607 explains that "[t]he section does not itself create the authority for the involuntary hospitalization of certain types of offenders, but rather it acknowledges that where the defendant is subject by law to involuntary hospitalization, the court may order the hospitalization in lieu of prosecution or sentence." HRS § 334-60.2 (1993) provides:

> A person may be committed to a psychiatric facility for involuntary hospitalization, if the court finds:

Upon our review of the whole record, we conclude that the circuit court did not abuse its discretion in this respect. Besides, there was no involuntary hospitalization here involved -- Turner asked to be civilly committed by reason of his purported mental illness. Seen for what it is, Turner's request was "[f]or commitment of an adult alleged to be mentally defective or mentally ill[,]" over which, Turner acknowledges, the family court, and not the circuit court, has exclusive, original jurisdiction. HRS § 571-14(a)(5).

(3) Turner's Opening Brief for Nos. 24968, 24969 and 24970 contains the following two passages:

(a) "Defendant also states that the circuit court and district court should not have considered his military court martials [(sic)] for Awols [(sic)] and discharge in the presentence report because he was insane at that time."

Opening Brief at 11. However, the circuit court "generally has broad discretion in imposing a sentence[,]" Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995) (citations omitted), and "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [the circuit court] may

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(1) That the person is mentally ill or suffering from substance abuse;
(2) That the person is imminently dangerous to self or others, is gravely disabled or is obviously ill; and
(3) That the person is in need of care or treatment, or both, and there is no suitable alternative available through existing facilities and programs which would be less restrictive than hospitalization.

consider, or the source from which it may come[,]" including information contained in the pre-sentence report. State v. Pantoja, 89 Hawai'i 492, 498, 974 P.2d 1082, 1088 (App. 1999) (citation and internal quotation marks omitted). See also HRS § 706-601(1) (1993 & Supp. 2002) (the court "shall . . . accord due consideration" to the pre-sentence report before sentencing). Turner nowhere explains why his military record, in whatever light his alleged insanity might shine upon it, should be excepted from this general rule. Further, we observe that the circuit court properly considered a variety of other information contained in the pre-sentence report, reflecting Turner's "history of delinquency or criminality, physical and mental condition, family situation and background, economic status . . . and personal habits[,]" HRS § 706-602(1)(b) (1993), including approximately twenty-four prior arrests in Hawai'i.

(b) "Defendant in the present case fall [(sic)] squarely within the new bill on drug treatment and should be released into a drug program but prison authorities and parole authorities refuse to do this and insist on labeling defendant a sex offender without Jurisdiction to do so." Opening Brief at 17. Here, Turner is referring to HRS § 706-622.5 (Supp. 2002),[10] which became effective

[10] HRS § 706-622.5 (Supp. 2002) provides:

> (1) Notwithstanding any penalty or sentencing provision under part IV of chapter 712, a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating

July 1, 2002. 2002 Haw. Sess. L. Act 161, § 12 at 572. Because the circuit court handed down each of the sentences appealed in Nos. 24968, 24969 and 24970 prior to July 1, 2002, and because there is no indication that the legislature intended that Act 161 have retroactive application in this context, see HRS § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended."), this argument lacks merit as applied to the sentences Turner appeals. With respect to the alleged failure of

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compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5, who is non violent, as determined by the court after reviewing the:

(a) Criminal history of the defendant;

(b) Factual circumstances of the offense for which the defendant is being sentenced; and

(c) Other information deemed relevant by the court;

shall be sentenced in accordance with subsection (2); provided that the person does not have a conviction for any violent felony for five years immediately preceding the date of the commission of the offense for which the defendant is being sentenced.

(2) A person eligible under subsection (1) shall be sentenced to probation to undergo and complete a drug treatment program. If the person fails to complete the drug treatment program and if no other suitable treatment is amenable to the offender, the person shall be returned to court and subject to sentencing under the applicable section under this part. As a condition of probation under this subsection, the court shall require an assessment as to the treatment needs of the defendant, conducted by a person certified by the department of health to conduct the assessments. The drug treatment program for the defendant shall be based upon the assessment. The court may require the person to contribute to the cost of the drug treatment program.

(3) For the purposes of this section, "drug treatment program" means drug or substance abuse services provided outside a correctional facility, but the services do not require the expenditure of state moneys beyond the limits of available appropriations.

(4) The court, upon written application from a person sentenced under this part, shall issue a court order to expunge the record of arrest for that particular conviction; provided that a person shall be eligible for one time only for expungement under this subsection.

(5) Nothing in this section shall be construed to give rise to a cause of action against the State, state employee, or treatment provider.

prison and parole authorities to grant Turner release to a drug treatment program, see 2002 Haw. Sess. L. Act 161, § 9 at 575,[11] and their alleged labeling of him as a sex offender, Turner fails to direct us in the record in these respects, HRAP Rule 28(b)(4) (West 2002) (each point of error "shall state . . . where in the record the alleged error occurred"), and our independent review of the record reveals nothing to support these allegations. Hence, we cannot address these points, "[b]ecause the factual basis of [Turner's] alleged point[s] of error is not part of the record on appeal[.]" State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (citation omitted). Accordingly, on these points we treat the presumption of regularity on appeal as conclusive:

> Every presumption that a court may rightfully entertain in a criminal cause is in favor of the record and the regularity of the proceedings of the trial court. The duty is incumbent on the petitioner alleging error to make the same manifest by bringing the record before the appellate court so as to disclose either that the things complained of were not done in the manner provided by law or were done in a manner prejudicial to the rights of the petitioner. We cannot presume error in the absence of the record.

Id. (citations and internal quotation marks and block quote format omitted).

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[11] 2002 Haw. Sess. L. Act 161, § 9 at 575 provides:

> The Hawaii paroling authority shall conduct a review of all current incarcerated persons serving a sentence for conviction under section 712-1243, [HRS], to determine if they are eligible for the drug treatment program under section 3 of this Act [(HRS § 706-622.5)]. If the Hawaii paroling authority determines that a person is eligible for the drug treatment program rather than further incarceration, the authority shall grant parole to any person who has served at least thirty days of incarceration, with the mandatory condition of undergoing and completing drug treatment program.

(4) Issues unique to No. 24971 include the following:

(a) That the circuit court committed plain error in taking Turner's no contest plea without ensuring that he understood the nature of the charge against him. We disagree. The record clearly indicates that Turner's plea was intelligent, knowing and voluntary, and that the circuit court personally engaged Turner in a colloquy sufficient to establish that he understood the charge against him. Cf. State v. Vaitogi, 59 Haw. 592, 601-2, 585 P.2d 1259, 1264-65 (1978); State v. Davia, 87 Hawai'i 249, 254-55, 953 P.2d 1347, 1352-53 (1998). See Hawai'i Rules of Penal Procedure Rule 11(c) & (d) (West 2002).

(b) That the circuit court erred in sentencing Turner without first formally accepting his no contest plea. This argument lacks merit because the circuit court impliedly accepted Turner's plea when it entered a judgment of conviction on February 27, 2002.

(5) In No. 24901, Turner appeals the district court's December 28, 2001 judgment. However, Turner's appellate briefs in No. 24901 do not target that judgment; they instead attack the district court's August 23, 2002 order for dismissal and civil commitment, the order that Turner himself requested. We do not countenance such antics. See Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some

internal quotation marks omitted)). Besides, Turner attacks the order with arguments based upon HRS §§ 571-14(a)(5) and 706-607 that we have concluded lack merit, arguments that by the same reasoning lack merit here as well. At any rate, Turner's failure to present discernible argument with specific respect to the judgment he appeals leaves us no choice but to affirm that judgment. HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

(6) In No. 25301, the State claims the district court lacked jurisdiction to enter its August 23, 2002 order granting Turner's April 23, 2002 motion for dismissal and civil commitment, because Turner had already filed his January 9, 2002 notice of appeal (in No. 24901) from the court's December 28, 2001 judgment. The State is correct. "Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 265, 990 P.2d 713, 735 (1999) (citations omitted). See also State v. Ontiveros, 82 Hawai'i 446, 448-49, 923 P.2d 388, 390-91 (1996).

Therefore,

IT IS HEREBY ORDERED that the February 19, 2002 judgment (No. 24968) and the February 27, 2002 orders and judgment (Nos. 24969, 24970 and 24971, respectively) of the circuit court are affirmed, the December 28, 2001 judgment (No. 24901) of the district

court is affirmed, and the August 23, 2002 order of dismissal and civil commitment (No. 25301) of the district court is reversed.

DATED: Honolulu, Hawai‘i, May 30, 2003.

Chief Judge

Associate Judge

Associate Judge

On the briefs:

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