NO. 24929

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
PUA GALO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 01-1-0186)

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

Defendant-Appellant Pua Galo (Galo) appeals from the January 24, 2002 Judgment entered by the Circuit Court of the First Circuit (the circuit court), Judge Sandra A. Simms presiding, convicting him of Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (1993).[1] Galo argues that the Judgment should be vacated for three reasons:

(1) The circuit court erred in denying his motion to suppress the pre-trial identification of him by police officer Candace Keliikipi (Officer Keliikipi) because the "identification

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[1] Hawaii Revised Statutes (HRS) § 712-1242 (1993) provides, in relevant part:

> **Promoting a dangerous drug in the second degree.**
> (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:
>
> . . . .
>
> (c) Distributes any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the second degree is a class B felony.

was based on a blatantly suggestive arrest photograph and was not supported by any of the minimal factors that test reliability";

(2) The circuit court abused its discretion in sentencing Galo to a mandatory minimum prison sentence of three years and four months as a repeat offender under HRS § 706-606.5 (1993 & Supp. 2002)[2] because there was insufficient foundation laid that he had been previously convicted of burglary to support granting of the motion; and

(3) It was cruel and unusual punishment to sentence him to ten years' imprisonment with a mandatory minimum of three years and four months for giving, not selling, a 0.028 gram piece of rock cocaine to an undercover officer.

Based on our review of the record and the briefs submitted by the parties, and having duly considered the case law and statutes relevant to Galo's arguments, we disagree with Galo.

A.

As to Galo's first argument, this court has previously stated:

[2/] HRS § 706-606.5 (1993 & Supp. 2002) provides, in relevant part:

> **Sentencing of repeat offenders.** (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of . . . any class B felony . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:
>
> (a) One prior felony conviction:
>
> . . . .
>
> (iii) Where the instant conviction is for a class B felony--three years, four months[.]

> When the defendant challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pretrial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced with two questions: (1) whether the procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, the accuracy of prior description, the level of certainty, and the elapsed time, the witness' identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the jury.

State v. DeCenso, 5 Haw. App. 127, 131, 681 P.2d 573, 577-78 (1984) (quoting State v. Tuua, 3 Haw. App. 287, 289, 649 P.2d 1180, 1183 (1982)). In denying Galo's April 20, 2001 motion to suppress, the circuit court considered the above factors and decided that Officer Keliikipi's identification of Galo had been "sufficiently reliable[.]"

> Upon viewing the totality of the circumstances, including the opportunity of [Officer Keliikipi] to view [Galo] at the time of the offense, the degree of [Officer Keliikipi's] attention during the purported drug transaction, the accuracy of her prior description of [Galo], the level of certainty with which she identified [Galo] from the photograph, and the elapsed time between [Officer Keliikipi's] observation of [Galo] and her identification through the arrest photograph, [Officer Keliikipi's] identification is sufficiently reliable so that it is worthy of presentation to and consideration by the trial fact-finder(s).

Our review of the record indicates that there was substantial evidence adduced below to support the circuit court's determination that Officer Keliikipi's identification of Galo was sufficiently reliable to be considered by the jury. The circuit court's ruling was thus not clearly erroneous.

B.

Regarding Galo's second argument, we conclude, based on State v. Pantoja, 89 Hawai‘i 492, 974 P.2d 1082 (App. 1999), that sufficient foundation was laid that Galo had been previously

convicted of burglary and was subject to sentencing as a repeat offender. In filing its Motion for Sentencing of Repeat Offender, Plaintiff-Appellee State of Hawai‘i (the State) based its motion on, among other items, "all the records and files herein, . . . and such evidence as may be adduced at the hearing on this motion."

The records and files in this case included the following documents: (1) the Indictment against "Pua Galo"; (2) the Grand Jury Bench Warrant served on "Pua Galo" as a result of the Indictment; and (3) the "State of Hawai‘i OBTS/CCH Arrest Report" (Arrest Report) for "Galo, Kanana Pua aka Pua[,]" which includes detailed information about Galo, such as his State of Hawai‘i identification number (SID), social security number, date of birth, age, height, weight, hair color, eye color, birthplace, as well as a photograph of Galo.

At the hearing on the State's Motion for Sentencing of Repeat Offender, which was heard at the same time as the State's Motion for Extended Term of Imprisonment, the State offered into evidence certified copies of the following: (1) the Complaint filed on July 11, 1994 in Cr. No. 94-1477 against "Kanana Pua Galo[,]" charging him with Burglary in the First Degree; (2) the Order Appointing Counsel for "Kanana Pua Galo" in Cr. No. 94-1477, filed on July 28, 1994; (3) the jury verdict returned in open court on June 22, 1995, finding "Kanana Pua Galo" guilty as charged of Burglary in the First Degree; (4) the

September 25, 1995 Judgment convicting "Kanana Pua Galo" of, and sentencing him for, Burglary in the First Degree; and (5) two Certificates of Presentence Detention filed on July 10, 1995 and August 16, 1995, respectively, certifying that "Kanana Pua Galo," who had an SID that was identical to the SID listed for Galo in the Arrest Report, had been detained for a total of 455 days as of his date of sentence in Cr. No. 94-1477. Additionally, Galo's probation officer testified that he was supervising Galo with respect to a Robbery in the Second Degree conviction.

Galo himself stated at the hearing:

> Yeah, just I'd like to say that this is getting too much already. Prosecutor accusing me of being a criminal and everything just because of my record. You don't know what kind of person I am, you know that? Of course I did the crimes that I committed and I plead guilty to them. But not this promotion that I been charged and found guilty of. You know that? Your Honor, I would admit to that from the first, you know, from the beginning anyway.
>
> Second of all, I'm awaiting for my -- see the Parole Board for the DUI I plead guilty over here '99 in front of you, which you sentence me to one open five in '99. That's the second -- that's the first one when I came in for my violation, the new charge was one DUI, Class B, five years. And then this promotion came up, I was doing time for the DUI. This happened in '99, this case.

Galo thus acknowledged that he had prior Class B felony convictions.

We conclude that the foregoing evidence was sufficient to establish that the "Kanana Pua Galo" convicted of Burglary in the First Degree in Cr. No. 94-1477 is the same "Pua Galo" convicted in this case.

C.

As to Galo's final argument, we conclude that Galo's sentence was not so disproportionate to the conduct for which he was convicted or of such duration as to "shock the conscience of reasonable persons" or "outrage the moral sense of the community" and constitute cruel and unusual punishment. See State v. Kumukau, 71 Haw. 218, 226-27, 787 P.2d 682, 687 (1990).

For the foregoing reasons, we affirm the January 24, 2002 Judgment from which this appeal was taken.

DATED: Honolulu, Hawai‘i, May 21, 2003.

On the briefs:

Dwight C. H. Lum for
defendant-appellant.

Donn Fudo, Deputy Prosecuting
Attorney, City and County of
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