

NO. 25106

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
MICHAEL P. SWAM, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 98-1617)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Michael P. Swam (Swam) appeals from the Order of Resentencing/Revocation of Probation and Mittimus filed April 15, 2002 in the Circuit Court of the First Circuit (circuit court).<sup>1</sup>

On appeal, Swam argues: (1) the circuit court abused its discretion by denying his motion for a continuance of his probation revocation hearing (revocation hearing) because the denial of the motion resulted in his defense counsel being ineffective at the hearing, (2) he was denied his constitutional right to due process when the circuit court would not allow him time to call witnesses to testify at the revocation hearing, and (3) the circuit court abused its discretion by sentencing him to an indeterminate term of twenty years imprisonment.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

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<sup>1</sup> The Honorable Sandra A. Simms presided.

the arguments advanced and the issues raised by the parties, we resolve Swam's points of error as follows:

(1) Swam contends the circuit court abused its discretion by denying his motion for a continuance of his revocation hearing because the denial resulted in his defense counsel being ineffective at the hearing. The circuit court did not abuse its discretion by denying Swam's motion for a continuance because defense counsel had adequate notice of Swam's alleged probation violations, had adequate time to prepare for the revocation hearing, and satisfactorily cross-examined the State's witness. When viewed as a whole, the assistance provided by Swam's defense counsel "was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

(2) Swam contends his constitutional right to due process was violated because the circuit court would not allow him to call witnesses to testify on his behalf at the revocation hearing. Swam was not denied his constitutional right to due process because he did not exercise due diligence in obtaining the attendance of potential witnesses, his potential witnesses would not have testified to substantial favorable evidence, he did not make an offer of proof that witnesses were available and willing to testify, and the denial of the continuance did not

materially prejudice him. State v. Lee, 9 Haw. App. 600, 604-05, 856 P.2d 1279, 1282 (1993).

(3) Swam contends the circuit court abused its discretion by resentencing him to an indeterminate term of twenty years of imprisonment. The circuit court did not abuse its discretion by resentencing Swam to an indeterminate term of twenty years of imprisonment because the court considered relevant factors under HRS § 706-621 (1993) in determining whether or not to resentence Swam to probation. A resentence of an indeterminate term of twenty years was mandatory absent a resentencing to probation. HRS §§ 706-620 (Supp. 2002), 706-659 (Supp. 2002).

Therefore,

IT IS HEREBY ORDERED that Order of Resentencing/Revocation of Probation and Mittimus filed on April 15, 2002 in the Circuit Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, December 16, 2003.

On the briefs:

James S. Tabe,  
Deputy Public Defender,  
for defendant-appellant.

Chief Judge

Daniel H. Shimizu,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

Associate Judge

Associate Judge