NO. 25874

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WESLEY D. CHING, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2568)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant Wesley D. Ching (Ching) appeals from the Judgment entered on May 19, 2003, by the Circuit Court of the First Circuit (circuit court). Ching was charged with promoting a dangerous drug in the third degree for knowingly possessing methamphetamine in violation of Hawaii Revised Statutes (HRS) § 712-1243 (Supp. 2002) (Count 1) and with unlawful use of drug paraphernalia in violation HRS § 329-43.5(a) (1993) (Count 2). Ching waived his rights to the assistance of counsel and trial by jury and represented himself, with the help of standby counsel, at a bench trial before circuit court Judge Karen S.S. Ahn. Judge Ahn found Ching guilty of both counts. She sentenced Ching to concurrent five-year terms of imprisonment on each count with a mandatory minimum 30 days imprisonment on Count 1.

On appeal, Ching contends that: 1) the circuit court committed plain error in admitting drug evidence without proof of a sufficient chain of custody; 2) the circuit court erred in

denying his motion for a sentence of probation as a first-time drug offender; and 3) the circuit court committed plain error in failing sua sponte to dismiss Count 1 as a de minimis infraction. We affirm the circuit court's Judgment.

BACKGROUND

On November 16, 2002, at about 9:00 p.m., Honolulu Police Department (HPD) Officers Wesley Fujita and Raymond Craig checked the Maui Divers' parking structure for trespassers. The officers were in plain clothes and were inspecting the parking structure at the owner's request. Officer Fujita saw Ching sitting in front of an elevator several feet away from a woman. Officer Fujita walked towards Ching and saw Ching with a lighter emitting a flame in one hand and a glass pipe in the other hand. Ching appeared to be using the lighter to heat the bulb end of the glass pipe. Officer Fujita identified himself as a police officer and showed Ching his badge. He told Ching to place the glass pipe and lighter on the ground. Ching complied with Officer Fujita's request.

The glass pipe was four inches long, had a bulb at one end, and had residue and a liquid inside. Based on his training and experience, Officer Fujita recognized the glass pipe as a device used to smoke narcotics. Officer Fujita did not touch the pipe because he believed it might be hot. He moved Ching away from the pipe and subsequently arrested him.

HPD Officers Michael Tamashiro and Nelson Tamayori arrived to assist with Ching's arrest. Officer Tamashiro searched Ching incident to arrest and recovered a small ziplock bag from the pocket of Ching's aloha shirt. There was a crystallized substance in the ziplock bag that resembled crystal methamphetamine. Officer Tamashiro handed the ziplock bag to Officer Tamayori who was assigned to collect evidence. At Officer Fujita's direction, Officer Tamayori also recovered the glass pipe from the ground in front of the elevator. Officer Fujita testified that no one touched the pipe from the time Ching placed it on the ground until it was recovered by Officer Tamayori. Officer Tamayori dusted the pipe and ziplock bag for fingerprints but was unable to lift any latent fingerprints.

Officer Tamayori maintained custody of the glass pipe and ziplock bag until he placed them into a locked evidence locker. The HPD evidence custodian retrieved the items from the evidence locker and secured them in the HPD evidence room until she transferred custody of the items to HPD Criminalist Hassan Mohamed for drug analysis. Criminalist Mohamed, who is a trained chemist, testified that he dissolved the residue from the glass pipe and that it had a net dry weight of 0.028 grams. He also removed a crystalline substance which weighed 0.001 grams from the ziplock bag. After conducting standard tests, Criminalist Mohamed determined that the substances obtained from the glass pipe and the ziplock bag both contained methamphetamine.

After Criminalist Mohamed conducted his analysis, he sealed the glass pipe, ziplock bag, and methamphetamine not consumed in the analysis in a plastic bag and returned the items to the evidence room. On the day of Ching's trial, Officer Tamayori retrieved these items from the evidence room and brought them to court, where the items were admitted in evidence.

At the close of the evidence, Judge Ahn found Ching guilty of promoting a dangerous drug in the third degree based on his possession of the methamphetamine contained in the glass pipe and ziplock bag. She also found Ching guilty of unlawful use of drug paraphernalia, which she identified as the glass pipe and the ziplock bag.

DISCUSSION

A. This Court Will Not Consider Ching's Chain-of-Custody Claim Which He Raises For the First Time on Appeal.

Ching argues that the trial court committed plain error in admitting the drugs, the drug analysis testimony, the glass pipe, and the ziplock bag because the required chain of custody was deficient. In particular, Ching contends there was a fatal gap in the chain because the glass pipe was left unattended before it was seized by Officer Tamayori.

The trial record refutes Ching's claim of a fatal gap in the chain of custody. Officer Fujita testified that no one touched the glass pipe from the time Ching placed it on the ground until it was recovered by Officer Tamayori. Officer

Tamashiro testified that he gave the ziplock bag to Officer Tamayori after recovering it from Ching's shirt pocket. Officer Tamayori in turn placed the glass pipe and ziplock bag in a locked evidence locker, where they were retrieved by an HPD evidence custodian. HPD maintained custody over the glass pipe and ziplock bag while substances were extracted from them, analyzed, and found to contain methamphetamine. The glass pipe, ziplock bag, and methamphetamine not consumed in the analysis were taken directly from HPD custody and introduced at Ching's trial.[1]

Ching, moreover, did not object to the admission of the drugs, drug analysis testimony, glass pipe, and ziplock bag at trial.

> It is the general rule that evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute grounds (sic) for reversal. It is equally established that an issue raised for the first time on appeal will not be considered by the reviewing court.

State v. Naeole, 62 Haw. 563, 570-71, 617 P.2d 820, 826 (1980) (internal citations omitted). Because Ching failed to raise his chain-of-custody claim below, we will not consider it on appeal.

[1] As part of his deficient chain-of-custody claim, Defendant-Appellant Wesley D. Ching (Ching) notes the absence of his fingerprints on the pipe and the ziplock bag. However, the absence of Ching's fingerprints on these items had no bearing on whether a sufficient chain of custody had been established. Nor did it establish, as Ching suggests, that he had not touched these items since a person may touch an item without leaving recoverable fingerprints.

B. The Circuit Court Properly Rejected Ching's Motion to Be Sentenced to Probation As a First-Time Drug Offender.

At the time Ching was sentenced, Section HRS § 706-622.5 (2003 Supp.) provided in relevant part as follows:

> **Sentencing for first-time drug offenders; expungement.** (1) Notwithstanding any penalty or sentencing provision under part IV of chapter 712 [Offenses Related to Drugs and Intoxicating Compounds], a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use . . . of any dangerous drug . . . or involving possession or use of drug paraphernalia . . ., who is nonviolent, as determined by the court after reviewing the:
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> (a) Criminal history of the defendant;
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> . . . .
>
> (c) Other information deemed relevant by the court;
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> 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. . . . [2]

As detailed in his presentence report, Ching has an extensive criminal history. At the time of his sentencing, Ching had been arrested 76 times and had been convicted of 4 felonies and 16 misdemeanors. He had numerous prior arrests for promoting dangerous drugs in the third degree and unlawful possession of drug paraphernalia, and he had several terms of probation revoked

[2] The 2004 Hawai'i Legislature amended Hawaii Revised Statutes (HRS) § 706-622.5 (2003 Supp.) effective July 1, 2004. 2004 Haw. Sess. Laws Act 44, Part II, § 11 at ___. The purpose of the amendment was to broaden the group of eligible offenders and provide the court with discretion in sentencing eligible offenders to probation.

for failure to comply with conditions relating to drug treatment. However, because he had no prior drug conviction, Ching was a first-time drug offender under HRS § 706-622.5.

The circuit court denied Ching's motion to be sentenced to probation under HRS § 706-622.5, finding that he failed to meet the statute's "nonviolent" requirement. The circuit court found that Ching was violent based on his prior convictions for two counts of robbery in the second degree in 1990, two counts of unlawful imprisonment in 1990, abuse of a family and household member in 1994, and terroristic threatening in the second degree in 2002.

On appeal, Ching argues that the circuit court erred in concluding that he was violent. Ching apparently contends that because the State of Hawaii (the State) did not introduce evidence that his prior convictions involved the actual use of physical violence, the court could not rely on these convictions in finding that he was violent. We disagree.

Ching's prior convictions included offenses which required proof of the use or threatened use of force or the infliction of bodily injury. The court properly relied on Ching's prior convictions. It did not clearly err in determining that Ching was violent and therefore was not eligible for probation under HRS § 706-622.5.

C. Ching Cannot Seek the Dismissal of Count 1 as a De Minimis Infraction for the First Time on Appeal.

Ching did not move in the circuit court to dismiss Count 1, which charged him with promoting a dangerous drug in the third degree, as a de minimis infraction pursuant to HRS § 702-236 (1993). Nevertheless, he invites us on appeal to rule that the circuit court committed plain error in failing sua sponte to dismiss Count 1 under HRS § 702-236. We decline that invitation.

HRS § 702-236 provides in relevant part that:

> **De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
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> . . . .
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; . . .

HRS § 702-236 is not a defense to a criminal charge. State v. Ornellas, 79 Hawai‘i 418, 423, 903 P.2d 723, 728 (App.), cert. denied, 80 Hawai‘i 187, 907 P.2d 773 (1995). The decision on whether to dismiss pursuant to HRS § 702-236 rests in the sound discretion of the trial court. Id. In exercising that discretion, the court is required to consider and make factual determinations regarding the nature of the defendant's conduct and the circumstances surrounding the defendant's commission of the offense. State v. Fukagawa, 100 Hawai‘i 498, 504, 60 P.3d 899, 905 (2002). Indeed, it would be an abuse of discretion for

a court to dismiss a prosecution as de minimis without considering the particular circumstances surrounding the defendant's offense. Id. The defendant has the burden of showing his entitlement to relief under HRS § 702-236. Id. at 507, 60 P.3d at 908.

As a general rule, appellate courts will not consider an issue not raised below unless justice so requires. Earl M. Jorgensen Co. v. Mark Const., Inc., 56 Haw. 466, 475-76, 540 P.2d 978, 985 (1975). Because Ching did not move below to dismiss Count 1 based on HRS § 702-236, the circuit court did not make factual findings or any other determination concerning whether it was appropriate to apply HRS § 702-236. Due to Ching's inaction, we do not know what facts the circuit court would have found or how it would have exercised its discretion. We conclude that the issue of whether Ching was entitled to the dismissal of Count 1 pursuant to HRS § 702-236 is not properly before this court on appeal.

Moreover, assuming arguendo that the issue was properly before us, the circuit court did not commit plain error in failing sua sponte to dismiss Count 1. Ching's sole argument is that his Count 1 offense was de minimis because of the small amount of methamphetamine he possessed. The aggregate weight of the substances containing methamphetamine recovered from Ching

was .029 grams (.028 grams in the glass pipe and .001 grams from the ziplock bag). In State v. Fukagawa, 100 Hawai‘i at 504-07, 60 P.3d at 905-08, the Hawai‘i Supreme Court upheld the trial court's refusal to dismiss under HRS § 702-236 where the defendant possessed only .018 grams of a substance containing methamphetamine.

In addition, the evidence indicated that Ching was about to ingest the methamphetamine by smoking it immediately before he was arrested. The use of illicit drugs and the accompanying social harms are among the evils sought to be prevented by Hawai‘i's drug statutes. Id. at 504, 60 P.3d at 905. Under these circumstances, Ching has not shown that he was entitled to the dismissal of Count 1 under HRS § 702-236.

CONCLUSION

The May 19, 2003, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai‘i, October 25, 2004.

On the briefs:

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Michael G.M. Ostendorp, Esq.
and Shawn A. Luiz, Esq.
for defendant-appellant.

Chief Judge

Associate Judge

Associate Judge