NO. 26000

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
FRANK LOHER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-1621)

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

On July 18, 2001, a judgment upon a jury's verdict entered in the circuit court of the first circuit in Cr. No. 99-1621.[1] The judgment convicted Frank Orlando Loher (Loher or Defendant) of the offense of attempted sexual assault in the first degree (Count I),[2] and sentenced him to an extended prison

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[1] The Honorable Dexter D. Del Rosario presided.

[2] Hawaii Revised Statutes (HRS) § 705-500 (1993) provides, in relevant part:

> (1) A person is guilty of an attempt to commit a crime if the person:
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> . . . .
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
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> . . . .
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

HRS § 705-502 (1993) provides that, "An attempt to commit a crime is an offense of the same class and grade as the most serious offense which is attempted."

(continued...)

term of life with the possibility of parole,[3] subject to a mandatory minimum term of thirteen years and four months as a

[2](...continued)

HRS § 707-730(1)(a) (1993 & Supp. 2004) provides that, "A person commits the offense of sexual assault in the first degree if: The person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]" (Enumeration omitted; format modified.) HRS § 707-700 (1993) defined "sexual penetration" as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, analingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense." HRS § 707-700 (1993 & Supp. 2004) defines "strong compulsion" as "the use of or attempt to use one or more of the following to overcome a person: (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped; (2) A dangerous instrument; or (3) Physical force." (Format modified.) HRS § 707-730(2) (1993 & Supp. 2004) provides that, "Sexual assault in the first degree is a class A felony." In the ordinary course, a class A felony carries a mandatory, indeterminate term of imprisonment of twenty years. HRS § 706-659 (Supp. 2004).

[3] HRS § 706-661 (Supp. 2004) provides in pertinent part that, "In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows: . . . . For a class A felony - indeterminate life term of imprisonment[.]" (Enumeration omitted; format modified.)

HRS § 706-662(1) (Supp. 2004) provides that, "A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria: The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older." (Enumeration omitted; format modified.)

repeat offender,[4] to be served consecutively[5] to Loher's concurrent, twenty-year sentences for three previous felony convictions. The three previous felony convictions were: sexual

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[4] HRS § 706-606.5(1)(b)(ii) (Supp. 2004) provides, in relevant part, that "any person . . . who is convicted of attempting to commit . . . any class A felony . . . and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: . . . a class A felony . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows: . . . . Two prior felony convictions: . . . . Where the instant conviction is for a class A felony - thirteen years, four months[.]" (Enumeration omitted; format modified.)

[5] HRS § 706-668.5 (1993) provides that, "If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently. The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606." (Enumeration omitted; format modified.)

HRS § 706-606 (1993) provides:

> The court, in determining the particular sentence to be imposed, shall consider:
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> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) The need for the sentence imposed:
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> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
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> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and
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> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
>
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

assault in the first degree, upon a true bill found on March 30, 1988, a no contest plea tendered and accepted on April 3, 1990, and a judgment entered on May 16, 1990, in Cr. No. 88-0507; and attempted sexual assault in the first degree and kidnapping, upon a true bill found on November 1, 1988, a no contest plea tendered and accepted on April 3, 1990, and a judgment entered on May 16, 1990, in Cr. No. 88-1973. The jury found that the other charge in this case, an attempted kidnapping charge (Count II),[6] had merged.

Loher appealed on August 15, 2001. This court affirmed, State v. Loher, No. 24489 (Haw. App. filed April 21, 2003) (mem.), and filed a notice and judgment on appeal on June 19, 2003.

Meanwhile, a newly *pro se* Loher had filed a May 20, 2003 motion for correction of illegal sentence under Hawai‘i Rules of Penal Procedure (HRPP) Rule 35 (2002).[7] Loher averred

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[6] HRS § 707-720(1)(d) (1993) provides that, "A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . . Inflict bodily injury upon that person or subject that person to a sexual offense[.]" (Enumeration omitted; format modified.) HRS § 707-700 (1993 & Supp. 2004) provides, in pertinent part, that "restrain" means "to restrict a person's movement in such a manner as to interfere substantially with the person's liberty: By means of force, threat, or deception[.]" (Enumeration omitted; format modified.) HRS § 707-720(2) (1993) provides, in relevant part, that "kidnapping is a class A felony."

[7] Cf. Stanley v. State, 76 Hawai‘i 446, 447 n.1, 879 P.2d 551, 552 n.1 (1994) ("[Hawai‘i Rules of Penal Procedure (HRPP)] Rule 40 has since been amended. However, because Appellant's petition which [sic] was filed prior to April 28, 1994, the effective date of the amendments, we will apply the 1985 and 1989 versions of HRPP Rule 40 to the present analysis."). HRPP Rule 35 was amended effective July 1, 2003. HRPP Rule 35 (2004). HRPP Rule 35 (2002) provided:

(continued...)

the trial court had erred in extending his prison term, in running the term consecutively to his three continuing prison terms, and in imposing a mandatory minimum term upon him as a repeat offender.

Insofar as we can parse his Rule 35 motion, Loher based his averment first upon the alleged absence of any express authority for piling the enhanced sentencing provisions upon the twenty-year prison term imposed in the ordinary course. Second, Loher summarily asserted that a subsection of the repeat offender sentencing statute, Hawaii Revised Statutes (HRS) § 706-606.5(4)(a) (1993),[8] precluded extended term and repeat offender sentencing. Third, Loher noted that the trial court had granted his pretrial motion in limine against the use at trial of evidence of his "prior criminal record and/or prior convictions."

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[7](...continued)

> 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 the 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.

[8] HRS § 706-606.5(4)(a) (1993) has been renumbered, but not amended, at HRS § 706-606.5(7)(a) (Supp. 2004), which provides that, "For purposes of this section: Convictions under two or more counts of an indictment or complaint shall be considered a single conviction without regard to when the convictions occur[.]" (Enumeration omitted; format modified.) We will refer to the renumbered subsection in the balance of this opinion, infra.

This, Loher maintained on due process grounds, likewise prevented the use of his prior felony convictions at sentencing. Finally, Loher argued that Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, prohibited the trial court -- as opposed to the jury -- from finding the facts necessary to impose his extended term. Accordingly, Loher prayed "that this court resentence Loher, to the Statutory maximum that the jury convicted him for, which is one twenty year prison term."

It does not appear from the record that the State filed an answer or any other kind of response to Loher's Rule 35 motion. On July 16, 2003, the Rule 35 court[9] entered an order summarily denying the Rule 35 motion:

> The Court having reviewed the Defendant's Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 filed on May 20, 2003, and the records and files of this case notes that Defendant was found guilty of Attempted Sexual Assault in the First Degree following a jury trial on November 11, 2000 and sentenced on July 18, 2001. The Defendant's arguments in support of his motion are without merit.
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> IT IS HEREBY ORDERED that the Defendant's Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 is summarily denied.

On July 28, 2003, Loher, continuing *pro se*, filed his notice of this appeal of the denial of his Rule 35 motion.

On appeal, Loher again references HRS § 706-606.5(7)(a) (Supp. 2004), and appears to argue that its command, that "[c]onvictions under two or more counts of an indictment or complaint shall be considered a single conviction without regard

[9] The Honorable Sandra A. Simms presided.

to when the convictions occur[,]" precluded the use of his prior convictions to support the various sentence enhancements. The reasoning seems to be that each sentence enhancement constituted a separate and discrete sentence, but that HRS § 706-606.5(7)(a) merged his prior convictions and his conviction in this case into "a single conviction" for which there can be only one sentence -- a twenty-year indeterminate term of imprisonment. If this is indeed what Loher is averring, his averment is without merit, for he was sentenced only once, and for only one conviction under a single count of the indictment, whereas his prior convictions were entered under two different indictments, such that HRS § 706-606.5(7)(a) can have no application in our case in any event. In what we believe is the same connection, Loher quotes State v. Cornelio, 84 Hawai'i 476, 480, 935 P.2d 1021, 1025 (1997):

> For the reasons set forth below, we hold: (1) that HRS § 706-606.5 mandates that adjudications of guilt with respect to multiple counts charged in the same indictment must be treated as a single "conviction" for purposes of sentencing thereunder; (2) that any mandatory minimum terms of imprisonment imposed pursuant to HRS § 706-606.5 in connection with a multicount indictment must be served concurrently with one another[.]

But to no avail, because the same reasons we set forth above also preclude Cornelio's application in our case in any event.

Loher's next argument on appeal, we surmise, is that he was stripped of the protections of the double jeopardy clause, because he was punished twice for the same offense where the attempted sexual assault and the attempted kidnapping both stemmed from the same criminal conduct. The problem with this

argument is that Loher was convicted of, and sentenced for, only the attempted sexual assault. The jury found that the attempted kidnapping had merged. It appears, then, that Loher was indeed afforded the protections of the double jeopardy clause.

Citing Hawai‘i Rules of Civil Procedure (HRCP) Rules 8(b) and 8(d), Loher contends the State was required to answer his Rule 35 motion, and because the State did not, his averments should have been deemed admitted and his motion granted. See HRCP Rule 8(b) (2004) ("A party shall state in short and plain terms defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."); HRCP Rule 8(d) (2004) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."). We disagree. The rule Loher chose to employ, HRPP Rule 35 (2002), did not contain a provision requiring the State to answer or otherwise respond to a motion brought thereunder. HRPP Rule 35 (2002), *passim*. We also note that HRPP Rule 35 has since been amended, and if its current incarnation had governed Loher's motion, the motion would have been subject to the procedural provisions of HRPP Rule 40, HRPP Rule 35(a) (2004) ("A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of

these rules."), which do not require a responsive pleading from the State. HRPP Rule 40(d) (2004) ("the respondent may answer or otherwise plead, but the court may require the State to answer at any time"). In this regard, Loher also contends the Rule 35 court abused its discretion by answering the motion for the State. This contention is patently incorrect. The court did not answer Loher's motion. The court summarily denied it.

As he did below, Loher argues on appeal that the trial court's grant of his motion in limine barred the use of his prior convictions not only at trial, but at sentencing. This argument is devoid of merit. Loher's motion in limine asked the trial court to exclude the evidence only "from use at trial[.]"

For his final point of error on appeal, Loher again contends Apprendi was offended when the trial court -- as opposed to the jury -- found the facts necessary to impose the extended term sentence. This contention is foreclosed by State v. Rivera, No. 26199, slip op. at 7 (Haw. Dec. 22, 2004).

Based on the foregoing reasons, we affirm the July 16, 2003 order that denied Loher's Rule 35 motion.

DATED: Honolulu, Hawaii, February 11, 2005.

On the briefs:

Frank Loher, *pro se*
defendant-appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge