NOT FOR PUBLICATION

NO. 26384

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALBERT R. BATALONA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-0787)

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

Defendant-Appellant Albert R. Batalona (Batalona) appeals from the Amended Judgment filed on March 9, 2004 in the Circuit Court of the First Circuit (circuit court)[1/]. A jury found Batalona guilty of: (1) Escape in the Second Degree (Count 1), in violation of Hawaii Revised Statutes (HRS) § 710-1021 (1993); (2) Theft in the Second Degree (Count 4), in violation of HRS § 708-831 (Supp. 2004); and (3) Theft in the Fourth Degree (Count 6), in violation of HRS § 708-833 (1993).

The circuit court sentenced Batalona to (1) five years of imprisonment, which the court extended to ten years of imprisonment, on each of Counts 1 and 4, with a mandatory minimum of one year and eight months as a repeat offender on Count 4; and (2) thirty days of imprisonment on Count 6. The circuit court ordered that all terms of imprisonment were to run concurrently

---

[1/] The Honorable Marie N. Milks presided.

with each other and with the mandatory minimum sentence and consecutively to Cr. No. 99-1549 (for which Batalona was already serving time). On Count 1, the circuit court ordered that Batalona pay a free-standing order of restitution in the amount of one-third of $9,448 (Batalona's share was $3,149.33), jointly and severally with his co-defendants, and a fine of $10,000.

On appeal, Batalona argues the circuit court abused its discretion in sentencing him to an extended term as a multiple offender because the Sixth Amendment to the United States Constitution required that the jury determine whether an extended term was necessary for the protection of the public. He argues that under the Sixth Amendment as interpreted in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the multiple offender factor that an extended term be found "necessary for the protection of the public" is an element of the offense that must be charged and proved beyond a reasonable doubt and not an ordinary sentencing factor that must be proved to a judge by a preponderance of the evidence. Furthermore, he urges this court to re-examine the Hawai‘i Supreme Court's jurisprudence on what constitutes an "element" of a crime that must be charged and proved beyond a reasonable doubt before an enhanced sentence may be imposed under the extended term criteria set forth in HRS § 706-662 (Supp. 2005).

Batalona also contends the circuit court was statutorily barred from ordering restitution for repairs to Halawa Correctional Facility (HCF) resulting from Batalona's escape because the government was not a direct victim.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) Given the Hawai'i Supreme Court's decision in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004), notwithstanding the decision of the United States Court of Appeals for the Ninth Circuit in Kaua v. Frank, No. 05-15059, 2006 WL 51178, at *2 (9th Cir. Jan. 11, 2006), on this point, the circuit court did not abuse its discretion in sentencing Batalona to an extended term as a multiple offender after the court determined that an extended term was necessary for the protection of the public. State v. Simeona, 10 Haw. App. 220, 237, 864 P.2d 1109, 1117 (1993) (this court is not required to follow a decision of the Ninth Circuit).

(2) An application of HRS § 706-646 (Supp. 2005) to the facts in the instant case reveals that the State was a direct victim of Batalona's crime, in that Batalona damaged prison cells and other areas of HCF in the course of his escape from HCF. Therefore, the circuit court was not statutorily barred from ordering restitution to the State for repairs to HCF.

Therefore,

IT IS HEREBY ORDERED that the Amended Judgment filed on March 9, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 24, 2006.

On the briefs:

Mary Ann Barnard
for Defendant-Appellant.

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

James S. Burns
Chief Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge