

NO. 27526

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
HENRY LEO KAISER, also known as Henry
Fujimoto, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 OCT -9 AM 7:47

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-0122)

MEMORANDUM OPINION

(By: Lim, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Henry Leo Kaiser, also known as Henry Fujimoto, (Kaiser) appeals from the Judgment in Cr. No. 04-1-0122 entered on August 29, 2005 in the Circuit Court of the First Circuit.^{1/} After Kaiser entered a plea of guilty, the circuit court convicted him of Theft in the First Degree (Count I), in violation of Hawaii Revised Statutes (HRS) § 708-830.5(1)(a) (1993) and Unlicensed Activity (Count II), in violation of HRS § 436B-27 (1993).

On appeal, Kaiser argues that the circuit court (1) failed to properly consider the factors set forth in HRS § 706-606 (1993) when it sentenced him to a ten-year term of imprisonment and (2) did not sufficiently determine whether he was able to pay the \$42,500 free-standing order of restitution.

^{1/} The Honorable Steven S. Alm presided.

I. BACKGROUND

In 2003-2004, the State of Hawai'i (the State) filed two criminal cases in the circuit court against Kaiser:

Cr. No. 03-1-1404^{2/}

On June 26, 2003, the State charged Kaiser via an Indictment with one count of Theft in the Second Degree, in violation of HRS § 708-831(1)(b) (Supp. 2005). The indictment alleged that on or about January 23, 2002 Kaiser did obtain or exert control over the property of Selective Stone, LLC, the value of which exceeded \$300, by deception, with intent to deprive Selective Stone, LLC, of the property. On June 30, 2003, the circuit court issued a grand jury bench warrant. Kaiser was arrested on July 17, 2003. On February 3, 2004, Kaiser entered a no contest plea to the charge. The circuit court set aside bail and released Kaiser on his own recognizance pending a sentencing hearing. On March 31, 2004, the State filed a Motion for an Extended term of Imprisonment of a Persistent Offender.

Cr. No. 04-1-0122

On January 21, 2004, the State charged Kaiser via an Indictment with Theft in the First Degree (Count I) and Unlicensed Activity (Count II). As to Count I, the State alleged that on or about November 2, 2001 through February 7, 2002, as

^{2/} This court takes judicial notice of the records and files in Supreme Court No. 27525 and Cr. No. 03-1-1404 (Circuit Court of the First Circuit).

one scheme and continuing course of conduct, Kaiser did obtain or exert control over the property of Cy Matsuoka (Matsuoka), the value of which exceeded \$20,000, by deception, with intent to deprive Matsuoka of the property. As to Count II, the State alleged that on or about November 2, 2001 through February 7, 2002, Kaiser did intentionally, knowingly, or recklessly engage in an activity requiring a license issued by the applicable licensing authority and failed to obtain the required license, and/or used any word, title or representation to induce the false belief that Kaiser was licensed to engage in the activity, concerning work done for Matsuoka.

On January 22, 2004, the circuit court issued a grand jury bench warrant. Kaiser was arrested on February 3, 2004. On March 31, 2004, the circuit court set aside bail and released Kaiser on his own recognizance. The State filed a Motion for an Extended Term of Imprisonment of a Persistent Offender on July 28, 2004. On September 13, 2004, Kaiser appeared before the circuit court and entered guilty pleas to both counts. The circuit court scheduled sentencing for November 22, 2004 and set Kaiser's sentencing in Cr. No. 03-1-1404 for the same date.

At the November 22, 2004 sentencing, Kaiser failed to appear and his counsel made no representation regarding Kaiser's absence. The circuit court noted for the record that Kaiser had failed to participate in a presentence interview by missing three

scheduled appointments. The circuit court issued bench warrants for Kaiser on both cases. Some eight months later, Kaiser was arrested on July 13, 2005.

On August 29, 2005, Kaiser appeared for sentencing on both cases. The circuit court denied the State's motions for extended terms and sentenced Kaiser as follows:

Cr. No. 03-1-1404

A term of imprisonment of five years and payment of a \$100 crime victim compensation fee.

Cr. No. 04-1-0122

A term of imprisonment of ten years on Count I and one year on Count II and payment of a \$100 crime victim compensation fee and a \$42,500 free-standing order of restitution to Matsuoka.

The circuit court ordered that the sentences for both cases were to run concurrently and filed the Judgment for Cr. No. 04-1-0122 on August 29, 2005. Kaiser timely appealed Cr. No. 04-1-0122 on September 28, 2005. On October 19, 2005, the circuit court entered its "Judgment and Order for Restitution Pursuant to Sections 706-605, 706-644, and 706-647, H.R.S."

II. STANDARD OF REVIEW

"The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless

applicable statutory or constitutional commands have not been observed." Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999) (quoting State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998)).

In other words,

while a sentence may be authorized by a constitutionally valid statute, its imposition may be reviewed for plain and manifest abuse of discretion.

Admittedly, the determination of the existence of clear abuse is a matter which is not free from difficulty, and each case in which abuse is claimed must be adjudged according to its own peculiar circumstances. Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d 682, 688 (1990).

State v. Gaylord, 78 Hawai'i 127, 144, 890 P.2d 1167, 1184 (1995) (brackets omitted); see State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000).

III. DISCUSSION

A. The circuit court did not abuse its discretion by imposing a sentence of imprisonment.

On appeal, Kaiser argues that the circuit court failed to properly consider the factors set forth in HRS § 706-606 when it sentenced him to a ten-year term of imprisonment. HRS § 706-606 provides in relevant part:

§706-606 Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
 - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (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.

By the plain language of HRS § 706-668.5(2), a sentencing court is obligated to consider the factors set forth in HRS § 706-606 when it determines whether multiple terms of imprisonment are to run concurrently or consecutively. State v. Kahapea, 111 Hawai'i 267, 279, 141 P.3d 440, 452, reconsideration denied, 111 Hawai'i 316, 141 P.3d 489 (2006). However, "[t]he fact that a court does not orally address every factor stated in HRS § 706-606 at the time of sentencing does not mean the court failed to consider those factors. The statute contains no requirement that the court expressly recite its findings on the record for each of the factors set forth in HRS § 706-606." State v. Sinagoga, 81 Hawai'i 421, 428, 918 P.2d 228, 235 (App. 1996).

Therefore, absent clear evidence to the contrary, it is presumed that a sentencing court, following the receipt of a pre-sentence report under HRS § 706-601 and a mandated sentencing hearing under HRS § 706-604, will have considered all the factors in HRS § 706-606 before imposing concurrent or consecutive terms of imprisonment under HRS § 706-668.5.

Id.

The circuit court did not abuse its discretion in sentencing Kaiser. The record before the circuit court revealed Kaiser's extensive convictions:

8 Felonies

- (1) (5/19/77) - Robbery in the First Degree
- (2) (5/19/77) - Robbery in the First Degree
- (3) (5/19/77) - Robbery in the Second Degree
- (4) (8/23/82) - Unauthorized Control of a Propelled Vehicle, two counts of Theft in the First Degree, and Possession of a Firearm by a Person Convicted of Certain Crimes
- (5) (11/15/94) - Theft in the Second Degree

Also Promoting a Detrimental Drug in the Third Degree, Resisting Arrest, Contempt of Court, and Disorderly Conduct.

At sentencing, the circuit court judge admonished Kaiser:

[THE COURT:] I've considered all the facts and circumstances. You've got a terrible record, Mr. Kaiser. You have been convicted in the past of Robbery in the First Degree, that's using a gun; Robbery in the Second Degree. You have been revoked on probation; you were convicted of Unauthorized Control of Propelled Vehicle, Theft in the First Degree; Possession of a Firearm; Promoting Detrimental Drugs in the Third Degree; you were sentenced to mandatory time as a repeat offender.

Your adjustment to, when you were later sentenced to probation, was described as extremely poor. This is for theft when you were placed on five years probation in 1994 for theft under a criminal number, you represented JAS Roofing, you contracted a roofing job; and your adjustment to probation was considered extremely poor.

On June 15, 1999, your probation was revoked, you were resentenced again to probation, and you were later convicted of and placed on probation for Assault in the Third Degree in a domestic violence situation; Terroristic Threatening in the Second Degree.

On March 20, 2002, a motion for revocation was filed based on your failure to report to the probation officer. On October 1st, your probation was revoked, a second motion for revocation of probation was filed on January 2nd, 2003.

In spite of all that, Mr. Luiz, your attorney, brought up the fact that you have now changed, you're going to be able to comply with conditions of probation; and I said my inclination when we were first in here on this was that I was thinking about and my inclination was to give you another shot at probation.

THE COURT: The problem is that you have shown -- by failing to report for sentencing and not doing anything, and that was last fall, and not calling up immediately, doing something about it, getting back in here, working with your attorney to get back in here -- that you are not a subject appropriate. You have had your chance, Mr. Kaiser.

[THE COURT:] I was willing to give you another shot here when I looked at it, and it was a stretch, but by your own actions, you've shown that you are not an appropriate candidate for supervision in the community, and I just can't trust you to do that. So the sentence of prison will stand.

Kaiser's extensive criminal record, his failure to attend three scheduled presentence report appointments and the first scheduled sentencing hearing, and his eight-month disappearance afforded the circuit court sufficient latitude to sentence Kaiser accordingly. The circuit court did not abuse its discretion in sentencing Kaiser.

- B. The circuit court erred by not entering findings and conclusions illustrating that Kaiser could afford to pay the \$42,500 free-standing order of restitution.**

Kaiser argues that the circuit court erred when it ordered him to pay \$42,500 in restitution without first entering

on the record its findings and conclusions' illustrating that he could afford to pay that amount. A sentencing court's authority to order restitution is set forth in HRS § 706-605, which provides in relevant part that the court may sentence a convicted defendant "[t]o make restitution in an amount the defendant can afford to pay." HRS § 706-605(1)(d) (Supp. 2005). "Although statutorily authorized by HRS § 706-605(1)(d), a sentencing court's discretion to order restitution is not boundless." State v. Gaylord, 78 Hawai'i 127, 152, 890 P.2d 1167, 1192 (1995). In Gaylord, the Hawai'i Supreme Court held that before a circuit court can impose restitution, it must "enter into the record findings of fact and conclusions that the manner of payment is reasonable and one which the defendant can afford." Id. at 153, 890 P.2d at 1193 (internal quotation marks, citation, and brackets omitted).

In State v. Werner, 93 Hawai'i 290, 1 P.3d 760 (App. 2000), this court vacated a circuit court order for restitution for not complying with this very requirement. Id. at 297, 1 P.3d at 767. The circuit court found that Werner had the ability to make restitution payments in full. Id. at 296-97, 1 P.3d at 766-67. However, this court vacated the circuit court's order because the circuit court did not, in accordance with the Hawai'i Supreme Court's instruction in Gaylord, enter findings and conclusions specifically illustrating that Werner could afford to

pay the \$20,000 in restitution. Werner, 93 Hawai'i at 297, 1 P.3d at 767.

In the instant case, the circuit court did not comply with Gaylord. At Kaiser's sentencing hearing, the State recommended that restitution be set in the amount of \$42,500. Before the circuit court issued its sentence, Kaiser relayed to the circuit court that he was very willing and able to work to repay the amount. It must be noted that before the August 29, 2005 sentencing, the lower court record, including the presentence report, is devoid as to an estimated restitution amount.

After the circuit court issued its order for the restitution amount, Kaiser's counsel objected that the circuit court had not conducted a Gaylord colloquy. The circuit court overruled the objection, stating that Kaiser's own words -- that he was able to pay -- were sufficient to satisfy the requirement under Gaylord.

The circuit court erred for two reasons. First, when Kaiser admitted to the circuit court that he was willing and able to pay the \$42,500 suggested by the State, the circuit court had not yet ordered the specific amount Kaiser was to pay or the manner of payment. Second, as this court held in Werner, even if the circuit court found that Kaiser did possess the ability to pay, the circuit court must nonetheless comply with the

requirement in Gaylord that its findings and conclusions illustrating that Kaiser could afford to pay the restitution amount be entered into the record. The circuit court did not do so.


IV. CONCLUSION

For the foregoing reasons, we vacate the circuit court's (1) August 29, 2005 Judgment as to only the \$42,500 free-standing order of restitution and (2) October 19, 2005 "Judgment and Order for Restitution Pursuant to Sections 706-605, 706-644, and 706-647, H.R.S." and remand this case to the circuit court for further proceedings consistent with this opinion. We affirm the circuit court's August 29, 2005 Judgment as to the terms of imprisonment and fee imposed upon Kaiser by the circuit court.

DATED: Honolulu, Hawai'i, October 9, 2006.

On the briefs:

Shawn A. Luiz
on the opening brief
for Defendant-Appellant.



Presiding Judge

Mary Ann Barnard
on the reply brief
for Defendant-Appellant.



Associate Judge

Deirdre Marie-Iha and
Dorothy D. Sellers,
Deputy Attorneys General,
for Plaintiff-Appellee



Associate Judge