

DISSENTING OPINION

(By: Watanabe, J.)

The majority concludes that the Circuit Court of the First Circuit (the circuit court) did not plainly err in sentencing Defendant-Appellant Arthur Samoa Gututala (Gututala) to extended terms of imprisonment as a "persistent offender" under Hawaii Revised Statutes (HRS) § 706-662(1) (Supp. 2005). In light of prior appellate court decisions, I disagree.

In sentencing Gututala as a persistent offender, the circuit court relied on a presentence investigation report prepared by a probation officer that was never introduced into evidence. In State v. Kamae, 56 Haw. 628, 548 P.2d 632 (1976), the Hawai'i Supreme Court held that while a sentencing judge may rely upon information furnished in a presentence report in a proceeding for *ordinary*-term sentencing, id. at 637, 548 P.2d at 638, a hearing to impose an *extended*-term sentence is "a separate criminal proceeding apart from the trial of the underlying substantive offense" and therefore, "all relevant issues should be established by the state beyond a reasonable doubt." Id. at 635, 548 P.2d at 637 (holding that "an extended term sentence should not be compared to 'the routine sentence of a trial judge who is vested with wide discretion in the sources and types of evidence which may be utilized by him [or her] in the proper disposition of convicted offenders'"). Id. at 633-34, 548 P.2d at 636. The supreme court noted that the Hawaii Penal Code "does not expressly permit proof of a prior conviction by hearsay statements in a presentence report[;]" id. at 637, 548 P.2d at 638 and that "[a] substantial portion of the contents of the presentence report was obviously incompetent hearsay." Id. Furthermore, the supreme court stated that at extended-term hearings, "a presentence report, in the absence of stipulation, cannot be used to prove prior convictions." Id. at 638, 548 P.2d at 638 (footnote omitted). The supreme court held:

We conclude that the ordinary rules of evidence should apply to an extended term sentence hearing and the court erred when it admitted into evidence the presentence report over the objection of the appellant.

Moreover, even assuming the presentence report to be admissible, the record in each case is nevertheless glaringly deficient as it does not show that appellant was represented by counsel during any of the alleged prior offenses of which he was convicted, or that he intelligently and voluntarily waived his constitutional right to counsel. To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right. We have also agreed with the precept stated in *Carnley v. Cochran* that presuming waiver of counsel from a silent record is impermissible.

Id. at 638-39, 548 P.2d at 638 (citations, brackets, and quotation marks omitted).

In State v. Freitas,¹ 61 Haw. 262, 602 P.2d 914 (1979), the Hawai'i Supreme Court reiterated its holding in Kamae that "the extended term hearing was a *separate criminal proceeding* apart from the trial of the underlying substantive offense[, and a]ccordingly, . . . the ordinary rules of evidence would apply and . . . all issues relevant to the determination of whether an extended term should be imposed must be established by the State beyond a reasonable doubt." Id. at 276-77, 602 P.2d at 925.

The sentencing statute at issue in Freitas, now codified in HRS § 706-606.5 (Supp. 2006), established mandatory sentences for repeat offenders of specific offenses. The supreme court rejected the argument that Kamae's procedural requirements applied to the repeat-offender statute and held that ordinary sentencing procedures governed. Id. at 277, 602 P.2d at 925. Nevertheless, the supreme court held

that before sentence may be imposed under [the repeat-offender statute], the defendant must be given reasonable notice of the intended application of [the repeat-offender statute]; he must be given the opportunity

¹State v. Freitas involved an appeal consolidated with State v. Karren.

to be heard; the fact of his prior conviction must be established by satisfactory evidence; and he must have been represented by counsel (or have knowingly and intelligently waived representation) at the time of his prior conviction.

Id. The supreme court noted that pursuant to HRS § 706-666(2) (1976),² "[p]roof of prior conviction may consist of 'any evidence, including fingerprint records made in connection with arrest, conviction, or imprisonment, that reasonably satisfies the sentencing court that the defendant was convicted.'" Id. at 278, 602 P.2d at 925 (brackets omitted). The supreme court then concluded, as to both defendants Freitas and Karren, that sufficient evidence was adduced to prove their prior convictions and that those convictions were counseled. Id. at 278-79, 602 P.2d at 925-26.

In Freitas's case,

the State called as a witness a clerk of the first circuit court who produced the court records and judgment in Cr. No. 47720, Circuit Court of the First Circuit, showing the conviction of one Joseph Freitas, Jr. of burglary in the first degree on May 28, 1975. Certified copies of both the indictment and the judgment in that case were admitted into evidence. To connect defendant Freitas with the judgment of prior conviction, the probation officer assigned to prepare the presentence report in that case testified and identified defendant Freitas as the Joseph Freitas, Jr. convicted and sentenced for burglary in the first degree in the prior proceeding. The evidence adduced was sufficient to prove the fact of the defendant's prior conviction.

Id. at 278, 602 P.2d at 925-26.

In Karren's case, the State called as a witness a clerk who produced the court records and judgment in a prior case showing the conviction of a Kenneth L. Karren for burglary in the first degree. Also admitted into evidence were a certified copy of the court clerk's minutes of the hearings on Karren's guilty plea and sentencing, as well as "certified copies of the order appointing counsel, the waiver of indictment, the information, the defendant's written plea of guilty, and the judgment itself."

²Hawaii Revised Statutes § 706-666(2) (1976) has not been amended and is identical to the current version of the statute.

Id. at 278-79, 602 P.2d at 926. The probation officer for Karren's prior case also testified and identified the defendant as the same person previously supervised by the officer. Id. at 279, 602 P.2d at 926.

In State v. Afong, 61 Haw. 281, 602 P.2d 927 (1979), a defendant challenged his sentence as a repeat offender. The supreme court, in a *per curiam* opinion, held that a defendant's prior conviction is sufficiently shown when a probation officer testifies and identifies the defendant as an individual who was placed under the officer's supervision pursuant to a previous judgment of conviction. Id. at 283, 602 P.2d at 929. However, the supreme court also held that proof of the defendant's legal representation in the prior case "was less than satisfactory" and reversed and remanded for resentencing. Id. at 283-84, 602 P.2d at 929. The supreme court stated that because "the defendant is being subjected to increased punishment by virtue of his prior conviction[, i]t is essential . . . that evidence upon which the sentencing court is asked to rely to determine the fact of prior conviction and the fact of legal representation or the waiver thereof is properly presented to the court for its consideration." Id. at 284, 602 P.2d at 929. See also State v. Caldeira, 61 Haw. 285, 290, 602 P.2d 930, 933 (1979); State v. Pantoja, 89 Hawai'i 492, 498, 974 P.2d 1082, 1088 (App. 1999).

Here, the State relied on a presentence report prepared by a probation officer to establish Gututala's prior convictions and argue for an extended-imprisonment term. The report was not introduced into evidence at the hearing, and even if it were, it would have been inadmissible. Moreover, the report was completely silent as to whether Gututala had been represented by counsel when those prior convictions were obtained. Kamae and its progeny deem the circuit court's reliance on the presentence report to impose an extended sentence on Gututala improper. The circuit court's reliance on the presentence report also affected

Gututala's substantial rights, thereby amounting to plain error. See State v. Vellina, 106 Hawai'i 441, 450, 106 P.3d 364, 373 (2005) (plain error arose when circuit court's sentence to consecutive terms was based on the exclusive reliance of unproven assertions by the prosecutor that the defendant sold guns to a "drug dealer").

I would vacate Gututala's extended sentences and remand for resentencing.

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