

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NOS. 27749 AND 27750

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ARTHUR SAMOA GUTUTALA, Defendant-Appellant

K. HANAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NOS. 05-1-1378 and 05-1-1921)

SUMMARY DISPOSITION ORDER

(By: Foley and Nakamura, JJ.; and
Watanabe, Presiding Judge, dissenting)

In this consolidated appeal, Defendant-Appellant Arthur Samoa Gututala (Gututala) appeals from the Judgments of Conviction and Sentence entered by the Circuit Court of the First Circuit^{1/} (circuit court) on December 14, 2005 in Cr. No. 05-1-1378 and in Cr. No. 05-1-1921. On appeal, Gututala raises the following points of error:

(1) The circuit court's "extended sentences under [Hawaii Revised Statutes (HRS)] § 706-662(1) [(Supp. 2005)] must be reversed because they were imposed absent any evidence of Gututala's convictions for two felonies committed at different times when he was eighteen years of age or older."

(2) The circuit court's "extended sentences under HRS § 706-662(1) must be reversed because they were imposed in violation of Gututala's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as explicated in Apprendi v. New Jersey[, 530 U.S. 466, 120 S. Ct. 2348 (2000)] and its progeny."

(3) The circuit court "erred in refusing to entertain Gututala's Motions to Reconsider based on its erroneous conclusion that the pendency of the instant appeal deprived it of jurisdiction to consider them."

^{1/} The Honorable Dexter D. Del Rosario presided.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that the circuit court did not commit plain error by imposing extended terms of imprisonment and denying Gututala's motions to reconsider his sentences because Gututala was a persistent offender. HRS § 706-662(1); State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003); State v. Carvalho, 101 Hawai'i 97, 63 P.3d 405 (App. 2002).

Gututala did not contest or challenge the record before the circuit court that he had been convicted of two felonies at different times when he was eighteen years of age or older, nor did Gututala contend he was not represented by counsel on his prior convictions. State v. Watson, 71 Haw. 258, 787 P.2d 691 (1990). Furthermore, on appeal, Gututala does not contend that he had not been convicted of two felonies at different times when he was eighteen years of age or older or that he was not represented by counsel in this prior convictions. Hawai'i Rules of Penal Procedure Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (internal quotation marks and citation omitted).

The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks and citation omitted).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the

adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

Id. (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

Therefore,

The Judgments of Conviction and Sentence entered by the Circuit Court of the First Circuit on December 14, 2005 in Cr. No. 05-1-1378 and in Cr. No. 05-1-1921 are affirmed.

DATED: Honolulu, Hawai'i, July 13, 2007.

On the briefs:

Phyllis J. Hironaka,
Deputy Public Defender,
for Defendant-Appellant.

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge