

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28236

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'ISTATE OF HAWAI'I, Plaintiff-Appellee, v.
ANDREW K. KAMANA'O, Defendant-AppellantNORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 56708)SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Andrew K. Kamana'o (Kamana'o) appeals from the Amended Judgment of Conviction and Sentence filed on October 16, 2006 in the Circuit Court of the First Circuit^{1/} (circuit court). The circuit court resentenced Kamana'o on his convictions for two counts of Rape in the First Degree (Counts VI and IX), in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(a)(i) (1985), and one count of Sodomy in the First Degree (Count XI), in violation of HRS § 707-733(1)(a)(i) (1985), to twenty years of imprisonment for each count, with a mandatory minimum term of imprisonment (mandatory minimum) of five years on each count as a repeat offender. The circuit court ordered that the terms of imprisonment for Counts IX and XI were to run concurrently with each other and consecutively to Count VI, with credit for time served, and all three terms were to run concurrently with any terms of imprisonment imposed in Cr. No. 52291.

On October 13, 1983, a jury found Kamana'o guilty of the above three counts, plus three counts of Burglary in the First Degree, one count of Attempted Sodomy in the Third Degree, one count of Sexual Abuse in the First Degree, and one count of Harassment. The circuit court granted the motions of the State

^{1/} The Honorable Virginia Lea Crandall presided.

of Hawai'i (State) for extended term and repeat offender sentencing and sentenced Kamana'o on January 10, 1984 to the following concurrent sentences: (1) an extended term of life imprisonment with a mandatory minimum of five years on the two convictions for rape and one conviction for sodomy; (2) an indeterminate term of ten years with a mandatory minimum of five years for the burglary convictions; (3) an indeterminate term of five years with a mandatory minimum of three years for the attempted sodomy and first degree sexual abuse convictions; and (4) thirty days for the Harassment conviction. The circuit court filed a Judgment on January 10, 1984 and an Amended Judgment on February 7, 1984. It denied Kamana'o's motion for reconsideration of his sentences. Kamana'o appealed; however, he did not raise any points of error with respect to sentencing. In appeal No. 9699, the Hawai'i Supreme Court affirmed his convictions and sentences.

On September 15, 2000, Kamana'o filed a Motion for Correction of Illegal Sentence Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35, arguing that, pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the State failed to charge the extended term sentencing in the indictment and the court's sentencing him to an extended term was illegal. The circuit court denied the motion on August 14, 2002. Kamana'o appealed. On December 3, 2003, in appeal No. 25271, the Hawai'i Supreme Court vacated the judgment and the order denying Kamana'o's motion to correct his sentence and remanded for resentencing. The supreme court held that "because a sentencing court is prohibited from imposing an enhanced sentence as a function of a defendant's refusal to admit guilt, the circuit court plainly erred in denying Kamana'o's Rule 35 motion." State v. Kamana'o, 103 Hawai'i 315, 324, 82 P.3d 401, 410 (2003).

On remand, the circuit court held a resentencing hearing. It ruled that an extended term of imprisonment was necessary for the protection of the public with respect to

Kamana'o's convictions for two counts of Rape in the First Degree and one count of Sodomy in the First Degree. The circuit court sentenced Kamana'o to an extended term of life imprisonment with the possibility of parole as a multiple offender for the rape and sodomy convictions; ten years of imprisonment for each of the burglary convictions; five years of imprisonment for the attempted sodomy and first degree sexual abuse convictions; and thirty days for the Harassment conviction. It ordered that all sentences were to run concurrently with each other and with any other sentences and that Kamana'o receive credit for time served. The circuit court entered its Judgment on April 27, 2004.

Kamana'o appealed. On June 20, 2005, this court affirmed the April 27, 2004 Judgment.

On October 27, 2005, Kamana'o petitioned the United States District Court for the District of Hawai'i (District Court) for habeas corpus relief. On June 22, 2006, the District Court granted Kamana'o's petition, holding that "Hawaii's extended sentencing law for multiple offenders, Haw. Rev. Stat. § 706-622(4), violates Apprendi" and ordering the circuit court to resentence Kamana'o "in a manner consistent with this order."

On October 5, 2006, the circuit court, in accordance with the District Court's ruling, denied the motion to sentence Kamana'o to an extended term of imprisonment and resentenced him to imprisonment as follows: (1) 20 years on Count VI, with a mandatory minimum of five years as a repeat offender; (2) 20 years on Count IX, with a mandatory minimum of five years as a repeat offender; and (3) 20 years on Count XI, with a mandatory minimum of five years as a repeat offender. The circuit court ordered that the sentences for Counts IX and XI were to be served concurrently with each other and consecutively to the sentence for Count VI and Kamana'o was to receive credit for time served. It entered its Amended Judgment of Conviction and Sentence on October 16, 2006.

On October 18, 2006, Kamana'o filed a Motion to Correct Illegal Sentence (Motion to Correct Sentence), arguing that the circuit court should eliminate the consecutive term from his sentence.

On October 25, 2006, Kamana'o filed a notice of appeal from the Amended Judgment of Conviction and Sentence.

At the November 22, 2006 hearing on the Motion to Correct Sentence, the circuit court denied Kamana'o's motion. It filed its Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Correct Illegal Sentence (Order) on December 18, 2006.

On appeal, Kamana'o contends:

(1) The circuit court erred in its Findings of Fact (FOF) 1, 2, and 6 and wrongly entered its Conclusions of Law (COL) 3, 4, and 5 in its Order because the court was statutorily barred from imposing a consecutive term and the cases adopted by the court as authority to circumvent the prohibition against consecutive maximum terms were inapposite.

(2) Judicial construction of the applicable repeat offender statute to permit consecutive term sentencing of Kamana'o violated federal due process and ex post facto protections.

(3) The circuit court's resentencing of Kamana'o to a consecutive term of imprisonment was inconsistent with the District Court's order of resentencing.

(4) State courts are bound by the lower federal courts' interpretation of Apprendi relative to Hawai'i's extended term statute.

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 hold:

(1) The circuit court was not statutorily barred from imposing consecutive terms. Consecutive terms were authorized by HRS § 706-606.5(1) and (3), as amended in 1981.

(2) Imposition of consecutive sentences was pursuant to HRS § 706-606.5(1) and (3) and was not in violation of federal due process or ex post facto. HRS § 706-606.5(1) and (3) provided adequate notice. See State v. Vinge, 81 Hawai'i 309, 321, 916 P.2d 1210, 1222 (1996).

(3) The consecutive terms were not inconsistent with the District Court's order or Appendi. State v. Kahapea, 111 Hawai'i 267, 141 P.3d 440 (2006).

Therefore,

The Amended Judgment of Conviction and Sentence filed on October 16, 2006 in the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

Mary Ann Barnard
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge