

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27535

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
NICHOLAS GOMES, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 05-1-0172(2))

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Nicholas Gomes (Gomes) appeals from the Judgment filed on September 15, 2005 in the Circuit Court of the Second Circuit¹ (circuit court). A jury found Gomes guilty of Count I, Unlawful Methamphetamine Trafficking, in violation of Hawaii Revised Statutes (HRS) § 712-1240.6(2) (Supp. 2005); Count II, Promoting a Dangerous Drug in the Second Degree, in violation of HRS § 712-1242(1)(b)(i) (Supp. 2006)²; Count III, Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5 (1993); and Count IV, Promoting a Detrimental Drug in the Third Degree, in violation of HRS § 712-1249(1) (1993). The circuit court sentenced Gomes to twenty years of imprisonment on Count I, five years of imprisonment on Count III, and thirty days of imprisonment on Count IV, all terms to run concurrently.

¹ The Honorable Shackley F. Raffetto presided.

² The jury found Gomes guilty of Count II, Promoting a Dangerous Drug in the Second Degree. At Gomes' sentencing, the State moved to dismiss Count II. The circuit court granted the motion and, on November 16, 2006, filed an Order Granting State's Oral Motion to Dismiss Count Two.

On appeal, Gomes contends:

(1) The circuit court erred in not granting his oral motion for judgment of acquittal because the evidence was insufficient to prove the charge of methamphetamine trafficking. Gomes specifically points to the doctrine of corpus delicti. He argues that the scale, plastic packaging, and the combined weight of the drugs recovered by police were insufficient corroborating evidence to prove the truth of his confession to trafficking.

(2) The circuit court erred in allowing his case to proceed to trial with both trafficking and promoting a dangerous drug charges. Although the Promoting a Dangerous Drug in the Second Degree charge was dismissed by the circuit court following the jury trial, Gomes claims that his due process rights were violated because the jury was charged with determining his guilt or innocence on two different crimes when he should have been charged with only one.

(3) The circuit court erred by omitting two jury instructions. Gomes claims that omission of a merger instruction on the trafficking and promoting a dangerous drug charges was error and was presumptively harmful. He also claims that he was entitled to a unanimity instruction on the question of which items constituted drug paraphernalia. Gomes argues that the failure of the circuit court to give a unanimity instruction raises the issue of whether the jury was unanimous as to which specific item(s) of drug paraphernalia Gomes possessed.

(4) He is entitled to be sentenced under the remedial benefits of HRS § 712-1240.7 (Supp. 2007) (Methamphetamine Trafficking in the First Degree), which was enacted in 2006 and which replaced HRS § 712-1240.6 (the statute under which he was sentenced).

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, as well as the relevant statutory and case law, we resolve Gomes' points of error as follows:

(1) The circuit court did not err in denying Gomes' oral motion for judgment of acquittal. In addition to Gomes' confession that he intended to traffic the methamphetamine found in the car he was in, the State produced evidence that a quantity of methamphetamine in excess of one-half ounce, a digital scale, and empty plastic packets were all under the dominion or control of Gomes. State v. Kalani, 3 Haw. App. 334, 343-44, 649 P.2d 1188, 1195 (1982); see also State v. Hale, 45 Haw. 269, 273-74, 367 P.2d 81, 84-85 (1961). The quantity of methamphetamine, some of which was packaged for sale, the digital scale, and empty plastic bags presented sufficient evidence for the jury to conclude that the corpus delicti of the crime had been proven by "substantial independent evidence" along with Gomes' confession. State v. Yoshida, 44 Haw. 352, 360, 354 P.2d 986, 991 (1960).

(2) The circuit court did not err by proceeding to trial on the trafficking and Promoting a Dangerous Drug in the Second Degree counts, and Gomes' due process rights were not compromised by being tried on both charges. HRS § 701-109(1) (1993) specifically permits prosecution on both offenses.

HRS 701-109(3) provided a remedy at or before trial that allowed Gomes to move for severance of the two charges. Gomes did not object to proceeding on both charges or move for severance of the two methamphetamine charges before or during trial and therefore waived any objection to proceeding on both charges at trial or a claim of failure to sever. State v. Hilongo, 64 Haw. 577, 579, 645 P.2d 314, 316 (1982).

(3) An "erroneous omission of the merger instruction only precludes the entry of judgment of conviction on both counts." State v. Padilla, 114 Hawai'i 507, 509, 164 P.3d 765,

767 (App. 2007). The judgment of conviction entered by the circuit court did not include the methamphetamine promoting charge. No reversible error occurred because only one of the two methamphetamine charges resulted in a judgment of conviction.

Gomes' claim that the jury was not properly instructed on the necessity that they reach a unanimous decision as to which items he had possessed as paraphernalia is without merit. Jury Instruction No. 33 provided, in part:

In order for the prosecution to prove an element, all twelve jurors must unanimously agree that the same act or possession of the same item has been proved beyond a reasonable doubt.

Instruction No. 33 was a sufficient instruction on unanimity and clearly explained the necessity for the jury to unanimously decide the element of possession or use of a particular item in determining whether Gomes was guilty of the paraphernalia charge.

(4) The circuit court sentenced Gomes pursuant to HRS § 712.1240.6(2). The Hawai'i Legislature in Act 230, § 50, 2006 Hawai'i Session Laws, repealed HRS § 712-1240.6, effective June 22, 2006. Act 230 § 51 of the 2006 Hawai'i Session Laws provided that "[t]his Act does not affect . . . penalties that were incurred, and proceedings that were begun, before its effective date." The Legislature then enacted Act 230 § 4 (effective June 22, 2006), which created two new classes of methamphetamine trafficking offenses, codified as HRS §§ 712-1240.7 and 712-1240.8. Because Gomes was arrested, charged, convicted, and sentenced during the time period that HRS § 712-1240.6 was in effect and prior to the enactment of Act 230, his claim is without merit.

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on September 15, 2005 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 2, 2008.

On the briefs:

Matthew S. Kohm
for Defendant-Appellant.

Renee Ishikawa Delizo,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge