

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28020

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
ROBERT G.K. BRANCO, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 05-1-0863)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Robert G.K. Branco (Branco) appeals from the June 23, 2006 Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit (circuit court)¹ finding him guilty of committing the offense of Unauthorized Entry into Motor Vehicle, in violation of Hawaii Revised Statutes (HRS) § 708-836.5 (Supp. 2005), and sentencing him to five years of incarceration to be served consecutive to a sentence for a prior conviction.

The charge stems from an incident on March 28, 2005 involving a truck belonging to Michael Gunderson (Gunderson). A man later identified as Branco was observed inside the truck while it was parked on Ke Nui Road near Ehukai Beach. When Branco was arrested nearby, he was found in possession of a chisel and a punch awl, which a police officer testified are tools that are commonly used to break automobile locks and windows.

¹ The Honorable Michael A. Town presided.

Branco raises the following points of error on appeal:

1. During Motions in Limine, the defense timely objected to the introduction of uncharged crimes. The court overruled the defense's objection. The trial court erred in refusing to exclude in the first instance uncharged crimes. The defense objected to the introduction of any mention of drug related activity by co-accomplice Chirale Rivera who would testify that Branco and she were smoking ice as the State never charged Branco with possession of crystal methamphetamine. The defense also objected to the introduction of the uncharged terroristic threatening such as "alleged threats made to witnesses while the defendant's in an agitated state." The defense objected to the introduction of such evidence as irrelevant and even if relevant was more prejudicial than probative and should have been excluded. The court ruled that the evidence was admissible. Because of the drug and threat evidence, Appellant was deprived of the right to a fair and impartial trial.

2. The trial court erred in sentencing Branco to consecutive terms. Prior to the imposition of sentencing, Branco objected to the State's repeated efforts to paint him in a bad light by continuous reminders to the court of uncharged misconduct. The state also complained about the costs of Branco's jury trial and the costs of State foster care for children he failed to support.

The Court sentenced Branco to consecutive terms. There was mention of the documents the court relied upon but no facts mentioned justifying consecutive terms other than the parole violation. The documents the court relied upon were judicial notice of the records and files and the pre-sentence report.

After a careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the relevant law, we resolve Branco's points of error as follows:

(1) The circuit court did not err in admitting evidence of Branco's use of crystal methamphetamine (ice) on the day of the offense. A woman who was with Branco that day, Chirale Rivera, testified that she and Branco had been smoking ice throughout the day but had run out by the time they arrived at the beach. In these circumstances, Branco's ice use was relevant to establish a motive for him to break into Gunderson's truck, i.e., to get money to buy more ice. Hawai'i Rules of Evidence (HRE) Rule 404(b) (evidence of other crimes, wrongs, or

acts may be admissible to prove motive). Moreover, because Branco testified in his own defense at trial, it was also relevant to his ability to accurately perceive the events of that day. See State v. Sabog, 108 Hawai'i 102, 109, 117 P.3d 834, 841 (App. 2005).

We also conclude that the circuit court did not abuse its discretion in finding that the probative value of this evidence was not substantially outweighed by its prejudicial effect, HRE Rule 403, particularly since Branco was not on trial for an ice offense. See State v. Cordeiro, 99 Hawai'i 390, 416, 56 P.3d 692, 718 (2002). The circuit court reached its conclusion after engaging in a colloquy with counsel regarding the probative value and prejudicial effect of the evidence. State v. Arakawa, 101 Hawai'i 26, 35, 61 P.3d 537, 546 (App. 2002) (family court adequately weighed the probative value of evidence against its prejudicial effect when it admitted the evidence after engaging in an extended colloquy with counsel). Finally, the circuit court alleviated any prejudice by giving limiting instructions to the jury. Cordeiro, 99 Hawai'i at 416, 56 P.3d at 718.

Furthermore, we conclude that the circuit court did not err in admitting evidence of threats made by Branco to Gunderson when Gunderson went to Ke Nui Road and encountered Branco while Branco was under arrest. This evidence was relevant to show Branco's awareness of guilt. Arakawa, 101 Hawai'i at 33, 61 P.3d at 544 ("the fact that [the defendant] made threats against

potential testifying witnesses rendered it more probable that he had 'consciousness of guilt' with respect to the alleged abuse") (citations omitted); State v. Smith, 91 Hawai'i 450, 459, 984 P.2d 1276, 1285 (App. 1999) ("It is well-established that evidence of threats or intimidation is admissible under [HRE] Rule 404(b) to show a defendant's consciousness of guilt.") (citation omitted). Moreover, we conclude that the circuit court, which engaged in a colloquy with counsel about the evidence, did not abuse its discretion in determining that its probative value was not substantially outweighed by its prejudicial effect. HRE Rule 403; see Arakawa, 101 Hawai'i at 35, 61 P.3d at 546.

(2) The circuit court did not err in sentencing Branco to a consecutive sentence. Branco was on parole for burglary at the time he committed the instant offense. His parole had been revoked and he was serving his sentence for the burglary when the circuit court sentenced him here. HRS § 706-668.5 (1993) provides:

Multiple sentence of imprisonment. (1) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.

(2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

The circuit court here expressly stated that it was aware of the requirement to consider the HRS § 706-606 factors in determining whether to impose a consecutive or concurrent

sentence. It noted that it had considered the presentence report and the record of the case, and concluded that a consecutive sentence was warranted particularly in view of the short time which had elapsed between Branco's release on parole and his commission of the instant offense. We conclude that the circuit court did not abuse its broad discretion in imposing a consecutive sentence in these circumstances. State v. Tauiliili, 96 Hawai'i 195, 199, 29 P.3d 914, 918 (2001) ("Absent clear evidence to the contrary, it is presumed that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606 (1993).") (citation omitted).

Branco suggests that the circuit court considered impermissible factors raised by the State at the sentencing hearing, including uncharged conduct and the costs to the State of Branco having exercised his right to go to trial. However, the circuit court did not indicate that it was relying on any of those factors in imposing sentence. Indeed, it expressly indicated that it was not relying on uncharged conduct in imposing sentence. With regard to Branco's exercise of his right to a jury trial, Branco contends that it was error for the circuit court to sentence him to consecutive sentences "when the record showed that a plea bargain . . . would have resulted in a five year concurrent term rather than a five year consecutive term." In support of this assertion, Branco relies on a portion of the State's argument at sentencing, in which the deputy

prosecuting attorney said to the court, "If he pleads, you were willing at that time to give him concurrent, you know, if he pleads, give him concurrent."

Branco does not cite to any other portion of the record which relates to plea discussions, and we have found no references other than the deputy prosecuting attorney's comments. Assuming arguendo that the circuit court did express a sentencing inclination in connection with plea discussions in this case, there is nothing in the record to indicate that the circuit court took Branco's decision to go to trial into account when it imposed a consecutive sentence after trial.² Rather, the court, in imposing sentence, referred to its consideration of the presentence report and noted its concern with Branco having committed this offense so soon after being released on parole. In these circumstances, we conclude that the circuit court did not base its decision on Branco's exercise of his right to a jury trial, or any other impermissible factors. See People v. Rabb, 316 N.W.2d 446, 448 (Mich. Ct. App. 1982) (in assessing the trial court's comments at sentencing, the court of appeals notes "[t]he remarks do not show that the trial court considered defendant's failure to plead guilty in giving defendant a greater sentence than that offered during plea negotiations. The trial court obviously was considering all of the background information provided in the presentence investigation report.").

² Nor is there anything to indicate that the circuit court threatened Branco with a harsher sentence if he failed to plead guilty. See State v. Mata, 71 Haw. 319, 326, 789 P.2d 1122, 1126 (1990) ("Very obviously the threat, express or implied, of a more severe sentencing, in the event of a guilty verdict, if a jury trial is demanded, would be coercive, and would violate a defendant's constitutional rights.").

Therefore,

IT IS HEREBY ORDERED that June 23, 2006 Judgment of Conviction and Sentence entered in the Circuit Court of the First Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, January 22, 2008.

On the briefs:

Shawn A. Luiz,
for Defendant-Appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge