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NO. 28133

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 MAY 28 AM 8:00

FILED

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
WALTER WAYNE DE GUAIR, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 92-509)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Walter Wayne De Guair (De Guair), pro se, appeals from the August 7, 2006 Order Denying Defendant Walter De Guair's Motion for Correction of a Clerical Error in a Sentence, Filed on May 8, 2006 (Order Denying Motion to Correct Sentence) filed in the Circuit Court of the Third Circuit (circuit court).[1]

This court previously dismissed De Guair's appeal for lack of jurisdiction. However, in an Order Accepting Application for Writ of Certiorari, Vacating Order Dismissing Appeal and Remanding Appeal to the Intermediate Court of Appeals filed January 25, 2007, the Hawai'i Supreme Court held that this court did have jurisdiction and directed that the appeal be treated as

[1] The Honorable Greg K. Nakamura presided.

an appeal from a Hawai'i Rules of Penal Procedure Rule 40 petition to correct an illegal sentence.

In the underlying criminal case (Cr. No. 92-0509), De Guair was charged with eight counts in an amended complaint filed December 28, 1992. On April 29, 1996, De Guair entered no contest pleas to the following:

Count I, Manslaughter in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 707-702 (1993);

Count II, Attempted Manslaughter in the Second Degree in violation of HRS §§ 705-500(1)(b) and 707-702(2) (1993);

Count IV, Reckless Endangering in the First Degree in violation of HRS § 707-713 (1993); and

Count VIII, Ownership or Possession Prohibited in violation of HRS § 134-7(b) (1993 & Supp. 1995).

The circuit court sentenced De Guair, on July 5, 1996, to imprisonment as follows:

As to Count I, ten years with a mandatory minimum of five years;

As to Count II, ten years with a mandatory minimum of five years;

As to Count IV, five years; and

As to Count VIII, ten years.

The circuit court ordered the sentences on Counts I, II, and VIII to run consecutively with each other, and the

sentence on Count IV to run concurrently with that on Count VIII.

At the end of the sentencing hearing, the circuit court asked defense counsel if there was anything else. The following exchange took place between the circuit court and defense counsel:

> [Defense counsel]: Yes, Your Honor. Pursuant to [HRS §] 706-671, we ask that he be given credit for time served for each of those sentences.
>
> THE COURT: So ordered.

The judgment states: "Defendant to receive credit for time served."

On May 8, 2006, De Guair filed the Rule 36 Motion for Correction of a Clerical Error in a Sentence (Motion to Correct Sentence). The motion was denied without a hearing on August 7, 2006 by the Order Denying Motion to Correct Sentence.

On appeal, De Guair claims that the circuit court erred in denying De Guair's request to conform the written judgment to the sentence imposed at the hearing. De Guair interprets the circuit court's oral comments at his sentencing hearing to mean that he should receive "pre-sentence credit for each of his sentences." De Guair argues that when there is a variation between an oral pronouncement of sentence and the written sentence, the oral pronouncement governs.

The variation alleged by De Guair arises out of De Guair's interpretation of the exchange between his counsel and the circuit court to mean that the court ordered that he should

receive multiple credits for time served so that each consecutive sentence is reduced by the time served. We disagree with that interpretation. The circuit court ordered that credit for time served be granted "pursuant to [HRS §] 706-671." In State v. Tauiliili, 96 Hawai'i 195, 199, 29 P.3d 914, 918 (2001) the Hawai'i Supreme Court held that the purpose of HRS § 706-671 was to equalize the treatment of those defendants that obtained pretrial release and those that did not. In enacting HRS § 706-671, the legislature did not intend to allow "multiple credit for consecutive sentences." Id. ("[W]hen consecutive sentences are imposed, credit for presentence imprisonment is properly granted against only the aggregate of the consecutive sentence terms.").

Tauiliili did not announce a new rule; it simply explained the existing law, which was in effect at all times material to De Guair's case. Thus, we read the circuit court's oral comments at the time of sentencing in light of the supreme court's discussion of HRS § 706-671. When so read, it is clear that the circuit court did not intend to impose the sentence that De Guair now seeks.

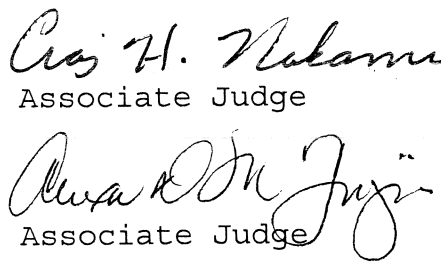
Accordingly, the circuit court did not err in denying the Motion to Correct Sentence. Therefore,

IT IS HEREBY ORDERED that the August 7, 2006 Order Denying Defendant Walter De Guair's Motion for Correction of a Clerical Error in a Sentence, Filed on May 8, 2006 entered in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 28, 2008.

Chief Judge

Associate Judge



Associate Judge

On the briefs:

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Pro Se Defendant-Appellant

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County of Hawaii
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