

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28309

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'ISTATE OF HAWAI'I, Plaintiff-Appellee, v.
JOHNSTON KAPUA, Defendant-Appellant
and
SOLOMON KAHALEWAI, JR., and CHRISTOPHER HICKS,
DefendantsAPPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-1249)SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Johnston Kapua ("Kapua") appeals from the Judgment entered on November 9, 2006, by the Circuit Court of the First Circuit (circuit court).¹ He challenges the portion of the Judgment that sentenced him to an extended term of imprisonment of twenty years.

Kapua was charged by complaint with attempted second degree murder. The jury found Kapua guilty of the included offense of first degree assault, a violation of Hawaii Revised Statutes (HRS) § 707-710 (1993). Plaintiff-Appellee State of Hawaii (the State) filed a motion for an extended term of imprisonment, pursuant to HRS § 706-662(3) (Supp. 2003),²

¹ The Honorable Karl K. Sakamoto presided.

² At the time of the alleged offense, Hawaii Revised Statutes (HRS) § 706-662(3) (Supp. 2003) provided:

§706-662 Criteria for extended terms of imprisonment. A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:

.

- (3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding
(continued...)

K. HAMAKAHO
CLERK, APPEAL COURT
STATE OF HAWAII

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alleging that Kapua "is a dangerous person whose imprisonment for an extended term is necessary for the protection of the public." Kapua filed a memorandum in opposition to the State's motion. The circuit court granted the State's motion and imposed an extended term of imprisonment of twenty years for Kapua's first degree assault conviction.

Kapua's sole point of error on appeal is that the circuit court erred in granting the State's motion for extended term sentencing. Kapua relies on State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) (hereinafter "Maugaotega II"), in which the Hawai'i Supreme Court held that the version of HRS § 706-662 under which Kapua was sentenced was unconstitutional. Id. at 446-47, 168 P.3d at 576-77. The State concedes that in light of Maugaotega II, it "cannot in good faith argue [Kapua's] extended term of imprisonment was imposed in a manner that passes constitutional muster."

We agree with the State's concession. Kapua's extended term sentence must be vacated because the sentencing court and not the jury made findings of fact that were necessary to impose Kapua's extended term sentence pursuant to HRS § 706-662(3). Maugaotega II, 115 Hawai'i at 446-47, 168 P.3d at 576-77. We vacate Kapua's extended term sentence and remand the case for resentencing.

²(...continued)

unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data in order to establish dangerousness in accord with the Hawaii rules of evidence.

The November 9, 2006, Judgment of the circuit court is vacated, and the case is remanded to the circuit court 1) to vacate Kapua's extended term sentence and 2) for resentencing in accordance with this summary disposition order and applicable law.³

DATED: Honolulu, Hawai'i, April 25, 2008.

On the briefs:

Keith S. Shigetomi
for Defendant-Appellant

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

Manuel

Chief Judge

Craig W. Makamua
Associate Judge

[Signature]
Associate Judge

³ In response to Maugaotega II, the Hawai'i Legislature enacted Act 1 of the 2007 Second Special Session (hereinafter, "Act 1"), 2007 Haw. Sess. L., Second Special Session ----, ----, which took effect on October 31, 2007. In State v. Jess, No. 28483, 2008 WL 837046, at *23-25 (Haw. March 31, 2008), the Hawai'i Supreme Court held that the retroactive application of Act 1 to the defendant Jess's resentencing would not violate the constitutional prohibition against *ex post facto* measures. See also State v. Cutsinger, No. 28203, 2008 WL 257175 (Haw. App. Jan. 30, 2008).