

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28466

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

STATE OF HAWAI'I, Plaintiff-Appellee v.
JOHN KOA LORENZO, JR., aka Patrick K. Lorenzo,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-0313)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant John Koa Lorenzo, Jr., also known as Patrick K. Lorenzo, (Lorenzo) appeals from the Judgment of Conviction and Sentence filed on March 1, 2007 in the Circuit Court of the First Circuit.^{1/}

On July 24, 2006, Lorenzo pled no contest to:

- (1) Count I, Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (Supp. 2006);
- (2) Count II, Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993);
- (3) Count III, Promoting a Detrimental Drug in the Third Degree, in violation of HR § 712-1249 (1993); and
- (4) Count IV, Operating a Vehicle Under the Influence of an Intoxicant, in violation of HRS § 291E-61(a)(2) (Supp. 2004).

On September 12, 2006, the State of Hawai'i (State) filed motions to sentence Lorenzo as a persistent offender and a repeat offender. On March 1, 2007, the circuit court sentenced Lorenzo to imprisonment, with credit for time served, as follows:

- (1) Count I, an extended term of 20 years, with a mandatory minimum term, as a repeat offender, of 6 years and 8 months;
- (2) Count II, an extended term of 10 years to be served consecutively with the term for Count I;

¹ The Honorable Karl K. Sakamoto presided.

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- (3) Count III, 30 days; and
- (4) Count IV, 30 days.

The circuit court imposed Lorenzo's extended terms of imprisonment for Counts I and II pursuant to HRS § 706-662(1) after determining that Lorenzo was a "persistent offender whose imprisonment for an extended term is necessary for protection of the public." HRS § 706-662(1) (Supp. 2005).

The circuit court entered the Judgment of Conviction and Sentence on March 1, 2006, and on March 29, 2007, Lorenzo filed a notice of appeal.

On appeal, Lorenzo contends:

1. Under Cunningham v. California, __ U.S. __, 127 S. Ct. 856 (2007), the circuit court erred in granting the State's motion for extended-term sentencing under HRS § 706-662(4),^{2/} because the circuit court's finding that the extended terms were necessary for the protection of the public was not proved beyond a reasonable doubt before a jury;

2. Under the holding in Cunningham, Hawai'i's extended-term sentencing scheme under HRS § 706-662 is clearly unconstitutional; and

3. The circuit court erred in granting the State's motion to sentence Lorenzo as a repeat offender because the State presented insufficient evidence (a) to establish Lorenzo's identity in an alleged prior conviction and (b) to establish that Lorenzo had been represented by counsel for his alleged prior conviction.

After the conclusion of briefing in this case, the Hawai'i Supreme Court concluded that the HRS § 706-662 extended sentencing provision, which had been applied to Lorenzo's sentence in this case, was unconstitutional on its face. State v. Mauqaotega, 115 Hawai'i 432, 168 P.3d 562 (2007). In response to Mauqaotega, the Hawai'i Legislature amended HRS §§ 706-661, 706-

² Lorenzo incorrectly cites Hawaii Revised Statutes (HRS) § 706-662(4). The circuit court imposed Lorenzo's extended terms pursuant to HRS § 706-662(1), as requested by the State.

662, and 706-664 to bring these statutes in conformity with the Hawai'i Supreme Court's holding in Maugaotega (2007 Haw. Sess. L., 2d Spec. Sess., Act 1, § ___ at ___) (Act 1).

After Act 1 became law, the State filed a motion to vacate Lorenzo's extended sentences pursuant to Maugaotega and remand for resentencing pursuant to Act 1. Lorenzo opposed the motion.

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 vacate Lorenzo's extended sentences and remand for resentencing pursuant to Act 1. State v. Cutsinger, No. 28203, 2008 WL 257175 (Hawai'i App. Jan. 30, 2008, as amended). In light of our decision to remand for resentencing, we find it unnecessary to address Lorenzo's claim that the circuit court erred in granting the State's motion to sentence him as a repeat offender.

Therefore, Lorenzo's extended sentences under Counts I and II of the March 1, 2007 Judgment of Conviction and Sentence are vacated, and this case is remanded for resentencing in accordance with 2007 Haw. Sess. L., 2d Spec. Sess, Act 1, § ___ at ___, and State v. Cutsinger, supra.

DATED: Honolulu, Hawai'i, February 21, 2008.

On the briefs:

Walter J. Rodby
for Defendant-Appellant.

Mark J. Bennett, Attorney General,
Girard D. Lau and
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(James M. Anderson, Deputy
Prosecuting Attorney, City and
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for Plaintiff-Appellee.

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Cruz S. Nakamura
Associate Judge