

*** NOT FOR PUBLICATION ***

NO. 25647

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

CLIFFORD AKANA, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 01-1-1738)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson and Nakayama, JJ. and
Acoba, J., concurring and dissenting, with whom Duffy, J., joins)

Defendant-appellant Clifford Akana (Akana) appeals from the January 22, 2003 judgment of the circuit court of the first circuit, the Honorable Michael A. Town presiding, convicting Akana of and sentencing him for six counts of sexual assault in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(b) (1993)¹ [hereinafter, "Counts 1, 5, 9, 13, 17, and 21"], eighteen counts of sexual assault in the third degree,

¹ At the time Akana committed the offenses charged in Counts 1, 5, 9, 13, 17, and 21, HRS § 707-730 provided, in relevant part, as follows:

(1) A person commits the offense of sexual assault in the first degree if:

(b) . . . The person knowingly subjects to sexual penetration another person who is less than fourteen years old; provided this paragraph shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.

In 2001, the legislature amended HRS § 707-730 by adding a subsection (c). 2001 Haw. Sess. L., Second Special Session, Act 1, § 1 at 941. Because the charged offenses occurred in 2000, the amended version of HRS § 707-730 is not implicated in the present matter.

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in violation of HRS § 707-732(1)(b)(1993)² (Counts 2-4, 6-8, 10-12, 14-16, 18-20, and 22-24), and one count of terroristic threatening in the first degree, in violation of HRS § 707-716(1)(d) (1993)³ (Count 25). On appeal, Akana argues that the circuit court erred in (1) denying his motion to dismiss Counts 1-24 of the indictment, and (2) granting the State of Hawai'i's [hereinafter, "the prosecution"] motion for extended term of imprisonment.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the issues raised and arguments advanced, we initially hold that Akana's unconditional guilty plea precluded him from challenging the manner in which the offenses were charged in the indictment. See State v. Morin, 71 Haw. 159, 785 P.2d 1316 (1990); United States v. Floyd, 108 F.3d 202 (9th Cir. 1997); Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Assuming, arguendo, that Akana did not waive his right to challenge the prosecution's charge of Counts 1-24 and one count of continuous sexual assault of a minor under the age of fourteen years, in

² HRS § 707-732(1)(b) provided that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]" In 2001, the legislature amended HRS § 707-732 by adding a subsection (c). 2001 Haw. Sess. L., Second Special Session, Act 1, § 2 at 941. Because the charged offenses occurred in 2000, the amended version of HRS § 707-732 is not implicated in the present matter.

³ HRS § 707-716(1)(d) provides that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

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violation of HRS § 707-733.5 (Supp. 2003)⁴ (Count 26), the indictment, nevertheless, properly charged Counts 1-24 and 26 in the same proceeding, inasmuch as HRS § 707-733.5(3) permitted Counts 1-24 to be charged in the alternative. See HRS § 707-733.5(3). Moreover, because the circuit court dismissed Count 26, Akana's conviction of and sentence for Counts 1-25 fell outside the purview of HRS § 701-109. See HRS § 701-109. Next, we hold that the circuit court did not abuse its discretion in imposing an extended term sentence, inasmuch as the circuit court determined that Akana qualified as a multiple offender whose extended term sentence was necessary for the protection of the public, see HRS §§ 706-661 and 706-662(4); State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004); State v. Kaua, 102 Hawai'i 1,

⁴ HRS § 707-733.5 provides:

- (1) Any person who:
 - (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
 - (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years,is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.
- (2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.
- (3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.
- (4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

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72 P.3d 473 (2003); State v. Huelsman, 60 Haw. 71, 588 P.2d 394 (1974), overruled in part on other grounds by State v. Tafoya, 91 Hawai'i 261, 272, 982 P.2d 870, 901 (1999).⁵ We further hold that the circuit court did not abuse its discretion by finding that strong mitigating circumstances warranted a lesser mandatory minimum term sentence under HRS § 706-606.5 while also finding that an extended term sentence was necessary for the protection of the public under HRS § 706-662(4), inasmuch as the mitigating factors had no effect on the circuit court's determination that Akana was a multiple offender whose commitment to an extended term was necessary for the protection of the public. Therefore,

IT IS HEREBY ORDERED that the circuit court's January 22, 2003 judgment, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, March 4, 2005.

On the briefs:

Keith S. Shigetomi
for defendant-appellant
Clifford Akana

Bryan K. Sano, Deputy
Prosecuting Attorney,
for plaintiff-appellee

⁵ Akana never challenged his extended term sentence based on the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). As such, we decline to address Akana's appeal in light of Apprendi. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2004) ("Points not argued may be deemed waived."). Rivera, Kaua, and Huelsman are therefore cited solely for their analysis of Hawai'i's extended term sentencing structure for multiple offenders set forth in HRS § 706-662(4).

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CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH DUFFY, J., JOINS

I concur in the order, except with respect to the procedure employed as to the imposition of an extended term sentence as to which I disagree, based on the reasons set forth in the dissenting opinion in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044, (2004).