

*** NOT FOR PUBLICATION ***

NO. 26379

IN THE SUPREME COURT OF THE STATE OF HAWAII

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E. M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

NATHAN KIMO CHUNG, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 02-1-0590(2))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The defendant-appellant Nathan Kimo Chung appeals from the judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, filed on January 8, 2004, convicting him of and sentencing him for five counts of terroristic threatening in the first degree, in violation of Hawai'i Revised Statutes (HRS) §§ 707-716(1)(a) and (1)(d) (1993), and one count of terroristic threatening in the second degree, in violation of HRS § 707-717(1) (1993). Chung's sole contention on appeal is that the circuit court unconstitutionally sentenced him to a one-year term of imprisonment based upon uncharged misconduct alleged by the prosecution and witnesses at the sentencing hearing as well as information contained in his presentence investigation report.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the judgment and sentence of the circuit court.

*** NOT FOR PUBLICATION ***

"In determining the particular sentence to be imposed, the court must consider a variety of factors [enumerated in HRS § 706-606 [(1993)]] in exercising its discretion in fitting the punishment to the crime 'as well as the needs of the individual defendant and the community.'" State v. Nunes, 72 Hawai'i 521, 524-25, 824 P.2d 837, 839 (1992) (quoting State v. Kumukau, 71 Haw. 218, 225, 787 P.2d 682, 687 (1990)) (footnote omitted) (some brackets added and some in original). "This court has held that a sentencing court 'is not limited to any particular source of information in considering the sentence to be imposed upon a defendant.'" State v. Kahawai, 103 Hawai'i 462, 465, 83 P.3d 725, 728 (2004) (quoting State v. Murphy, 59 Haw. 1, 21, 575 P.2d 448, 461 (1978)). See also HRS § 706-601 (1993 & Supp. 2004); HRS § 706-602 (1993 & Supp. 2004); and HRS § 706-604(3) (1993).

There is no indication in the record that the circuit court erroneously considered any uncharged conduct in imposing Chung's sentence. Contra Nunes, 72 Hawai'i 521, 824 P.2d 837; State v. Vellina, 106 Hawai'i 441, 106 P.3d 364, 373 (2005); and State v. Koch, No. 26296, slip op. at 20 (May 9, 2005). Indeed, the circuit court's sentences were lenient, considering that Chung pled guilty to, inter alia, five counts of first-degree terroristic threatening, class C felonies subject to five-year indeterminate maximum terms of imprisonment. Chung was certainly not entitled to probation without a term of imprisonment, and it was within the circuit court's discretion to sentence Chung to probation, subject to a one-year term of imprisonment as a special condition. See HRS § 706-624(2)(a) (1993). Moreover,

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defense counsel conceded at sentencing that "[w]e expect some level of jail to be imposed," and Chung's signed no contest plea stated that the prosecution "may seek up to one year in jail." As such, the circuit court's sentence did not exceed the "bounds of reason," State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000) (citation omitted), and Chung's "substantial rights," State v. Kamana'o, 103 Hawai'i 315, 319-20, 82 P.3d 401, 405-06 (2003) (citation omitted), were not affected. Therefore,

IT IS HEREBY ORDERED that the judgment and sentence of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, May 27, 2005.

On the briefs:

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for the plaintiff-appellee
State of Hawai'i

Brian J. De Lima,
for the defendant-appellant
Nathan Kimo Chung

