***** NOT FOR PUBLICATION *****

NO. 26688

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

GEORGE BRITTAIN, JR., Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NOS. 03-1-0365(2) and 04-1-0084(2))

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

The defendant-appellant George Brittain, Jr. appeals from the judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, filed on June 10, 2004, convicting him of and sentencing him for the following offenses: (1) in Cr. No. 03-1-0365(2), (a) unauthorized control of a propelled vehicle, in violation of Hawai'i Revised Statutes (HRS) § 708-836 (1993 & Supp. 2003), and (b) theft in the second degree, in violation of HRS § 708-831(1)(b) (1993 & Supp. 2003);[1] and (2) in Cr. No. 04-1-0084(2), (a) possession of a prohibited

[1] We note that Cr. Nos. 03-1-0365(2) and 04-1-0084(2) are unrelated matters but were sentenced together and that the circuit court entered a single judgment of conviction as to both criminal numbers. Brittain's appeal relates solely to the circuit court's imposition of mandatory minimum terms of imprisonment in Cr. No. 04-1-0084(2).

weapon, in violation of HRS § 134-8(a) (1993),[2] and (b) place to keep unloaded firearm, in violation of HRS § 134-6(c) (1993 & Supp. 2003).[3] On appeal, Brittain contends that the circuit

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[2] HRS § 134-8 provides in relevant part:

(a) The manufacture, possession, sale, barter, trade, gift, transfer, or acquisition of any of the following is prohibited: assault pistols, except as provided by section 134-4(e); automatic firearms; rifles with barrel lengths less than sixteen inches; shotguns with barrel lengths less than eighteen inches; cannons; mufflers, silencers, or devices for deadening or muffling the sound of discharged firearms; hand grenades, dynamite, blasting caps, bombs, or bombshells, or other explosives; or any type of ammunition or any projectile component thereof coated with teflon or any other similar coating designed primarily to enhance its capability to penetrate metal or pierce protective armor; and any type of ammunition or any projectile component thereof designed or intended to explode or segment upon impact with its target.

. . . .

(d) Any person violating subsection (a) or (b) shall be guilty of a class C felony and shall be imprisoned for a term of five years without probation. Any person violating subsection (c) shall be guilty of a misdemeanor except when a detachable magazine prohibited under this section is possessed while inserted into a pistol in which case the person shall be guilty of a class C felony.

[3] HRS § 134-6 provides in relevant part:

(c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

. . . .

(e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or

(continued...)

court erred in imposing mandatory minimum terms of imprisonment, pursuant to HRS §§ 706-660.1(3)(d) (1993),[4] in connection with his convictions of possession of a prohibited weapon and place to keep unloaded firearm in Cr. No. 04-1-0084(2), as evidenced by (1) the plain language of HRS § 706-660.1, (2) the statute's legislative history, (3) an in pari materia reading of HRS §§ 706-660.1 and HRS §§ 134-6 and 134-8, and (4) the "rule of lenity."[5]

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[3](...continued)
possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

[4] HRS § 706-660.1 provides in relevant part:

Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.

. . . .

(3) A person convicted of a felony, where the person had a semiautomatic firearm or automatic firearm in the person's possession or used or threatened its use while engaged in the commission of the felony, whether the semiautomatic firearm or automatic firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

. . . .

(d) For a class C felony -- five years.

[5] This court has recognized that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." State v. Sakamoto, 101 Hawai'i 409, 413 n.3, 70 P.3d 635, 639 n.3 (2003) (internal citations and quotation signals omitted). This "policy of lenity means that the [c]ourt will not interpret a [state] criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended." Id. (internal citations and quotation signals omitted) (some brackets added and some in original).

State v. Haugen, 104 Hawai'i 71, 75 n.6, 85 P.3d 178, 182 n.6 (2004).

For the reasons discussed infra, we hold that the circuit court erred in sentencing Brittain to mandatory minimum terms of imprisonment, pursuant to HRS § 706-660.1(3)(d), in connection with his convictions in Cr. No. 04-1-0084(2).

I. BACKGROUND

On July 21, 2003, a Maui grand jury returned an indictment against Brittain charging him with the following offenses in Cr. No. 03-1-0365(2): (1) unauthorized control of a propelled vehicle (Count I), in violation of HRS § 708-836; and (2) theft in the second degree (Count II), in violation of HRS § 708-831(1)(b).

On February 17, 2004, a Maui grand jury returned an indictment against Brittain charging him with the following offenses in Cr. No. 04-1-0084(2): (1) possession of a prohibited weapon (Count I), in violation of HRS § 134-8(a), see supra note 2, and (2) place to keep unloaded firearm (Count II), in violation of HRS § 134-6(c), see supra note 3. The indictment against Brittain in Cr. No. 04-1-0084(2) read in relevant part as follows:

> COUNT ONE: 03-15998
> That on or about the 19th day of February, 2003, in the County of Maui, State of Hawaii, GEORGE H. BRITTAIN, JR., did intentionally or knowingly possess an object which was a prohibited weapon, which he believed, knew, or recklessly disregarded the substantial and unjustifiable risk that the object was a prohibited weapon, to wit, a Remington 16 gauge semi-automatic shotgun with a barrel length of less than eighteen inches, thereby committing the offense of Possession of a Prohibited Weapon or Device in violation of Section 134-8(a) of the Hawaii Revised Statutes.
>
> COUNT TWO: 03-15999
> That on or about the 19th day of February, 2003, in the County of Maui, State of Hawaii, GEORGE H. BRITTAIN,

> JR., did intentionally or knowingly carry on his person or have in his possession, an object which was an unloaded firearm, which he believed, knew, or recklessly disregarded the substantial and unjustifiable risk that the object was an unloaded firearm, to wit, a Remington 16 gauge semi-automatic shotgun, without it being within an enclosed contained, and he believed, knew, or recklessly disregarded the substantial and unjustifiable risk that the unloaded firearm was in a place other than his place of business, residence, or sojourn, thereby committing the offense of Place to Keep Unloaded Firearm in violation of Section 134-6(c) of the Hawaii Revised Statutes.

On April 8, 2004, Brittain entered a plea of no contest to the two charges against him in Cr. No. 04-1-0084(2).

On May 4, 2004, Brittain entered a plea of no contest to the two charges against him in Cr. No. 03-1-0365(2).

On June 1, 2004, the State of Hawai‘i [hereinafter, "the prosecution"] filed a motion for imposition of mandatory minimum terms of imprisonment in Cr. No. 04-1-0084(2). The prosecution sought a mandatory minimum term of imprisonment of five years as to both Counts I and II, pursuant to HRS § 706-660.1(3)(d), see supra note 4.

On June 10, 2004, the circuit court conducted a hearing on the prosecution's motion for mandatory minimum terms of imprisonment and sentencing. The prosecution maintained that the circuit court was "mandated by law to impose a mandatory minimum period of incarceration without the possibility of parole for [Brittain's] use of a semi-automatic shotgun." Defense counsel for Brittain argued "that the mandatory minimum of one year is adequate and sends the right signal." The circuit court granted the prosecution's motion for mandatory minimum terms of imprisonment, orally ruling as follows:

> As far as [the imposition of] mandatory minimum [terms is] concerned under [HRS] Section 706-[660.1(3)], there

> isn't any real dispute that this was a semi-automatic firearm. The statute clearly provides that it doesn't matter whether it's operable or not. So I'll impose a five[-]year mandatory minimum under the statute in [Cr. No.] 04-1-0084(2).

The circuit court sentenced Brittain to the following: (1) an indeterminate five-year maximum term of imprisonment in connection with both Counts I and II in Cr. No. 03-1-0365(2); and (2) an indeterminate five-year maximum term of imprisonment, subject to a five-year mandatory minimum term, in connection with both Counts I and II in Cr. No. 04-1-0084(2). The circuit court ordered all counts to run concurrently.

On June 9, 2004, Brittain timely filed a notice of appeal ex officio at the circuit court of the first circuit.

II. STANDARDS OF REVIEW

A. Sentencing

> [A] sentencing judge generally has broad discretion in imposing a sentence. State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995); State v. Valera, 74 Haw. 424, 435, 848 P.2d 376, 381 . . . (1993). The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184; State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d 682, 687-88 (1990); State v. Murray[,] 63 Haw. 12, 25, 621 P.2d 334, 342-43 (1980); State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 16 (1979).
>
> Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995). "[F]actors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions." Fry, 61 Haw. at 231, 602 P.2d at 17. And, "'[g]enerally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Keawe, 79 Hawai'i at 284, 901 P.2d at 484 (quoting Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184 (quoting Kumukau, 71 Haw. at 227-28, 787 P.2d at 688)).

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000)

(brackets and ellipsis points in original).

B. Questions Of Constitutional Law

> "We answer questions of constitutional law 'by exercising our own independent judgment based on the facts of the case,'" and, thus, questions of constitutional law are reviewed on appeal "under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations omitted).

State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001).

C. Statutory Interpretation

> "[T]he interpretation of a statute . . . is a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); State v. Nakata, 76 Hawai'i 360, 365, 878 P.2d 699, 704 (1994). . . .

Gray v. Administrative Director of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). See also State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai'i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2)(1993). "Laws in pari materia, or upon the

> same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Rauch, 94 Hawai'i at 322-23, 13 P.3d at 331-32 (quoting State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai'i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai'i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai'i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998))))))).

III. DISCUSSION

Brittain argues that the circuit court did not have the legal authority to impose mandatory minimum terms of imprisonment in connection with Counts I and II in Cr. No. 04-1-0084(2), given the plain and unambiguous language of HRS § 706-660.1 and when read in pari materia with HRS §§ 134-6(c) and 134-8(a). Brittain maintains that his conduct could not trigger mandatory minimum terms of imprisonment "because HRS § 706-660.1 is not applicable where the defendant was convicted only of possessory firearm offenses." We agree with Brittain.

We have observed that "'[i]t is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." Haugen, 104 Hawai'i at 75, 85 P.3d at 182 (citations

omitted).

HRS § 706-660.1 is entitled "[s]entence of imprisonment for use of a firearm, semi-automatic firearm, or automatic firearm in a felony." (Emphasis added.) See supra note 4. For the circuit court to have imposed a legitimate mandatory minimum term of imprisonment, Brittain must have (1) been convicted of a felony (2) where he had a firearm or a semi-automatic firearm (a) in his possession (b) or used (c) or threatened its use while engaged in the commission of the felony. Nevertheless, Brittain was convicted of possession of a prohibited weapon and place to keep an unloaded firearm in Cr. No. 04-1-0084(2), the felonious conduct being the possession of the firearm itself and the failure to keep it in an approved "enclosed" container.

Accordingly, Brittain did not possess, use, or threaten the use of a firearm while engaged in the commission of the felonies of possession of a prohibited weapon and place to keep an unloaded firearm. Brittain's possession of the firearm was the entire felonious conduct with respect to both offenses; in other words, there was no underlying felony that Brittain committed while possessing or using a firearm. As such, Brittain's conduct falls outside of the ambit of HRS § 706-660.1. Thus, by virtue of the plain language of HRS § 706-660.1, Brittain's possession of a semi-automatic firearm and failure to transport it in an approved container did not automatically subject him to the enhancement of a mandatory minimum term of imprisonment.

This court's recent decision in State v. Vellina, 106 Hawai'i 441, 106 P.3d 364 (2005), is dispositive of the present matter. In Vellina, we held that the circuit court erred in sentencing Vellina to mandatory minimum terms of imprisonment pursuant to HRS §§ 706-660.1(1)(c) and (3)(c) in connection with two counts of first-degree theft of a firearm, inasmuch as the entire felonious conduct with respect to each count was the theft of the firearm and Vellina had not used a firearm in the commission of the felonies.

> In State v. Ambrosio, 72 Haw. 496, 824 P.2d 107 (1992), this court held that the defendant could be sentenced to a mandatory minimum term of imprisonment, pursuant to HRS § 706-660.1(a)(2) (1985), in connection with a kidnapping conviction, but could not also be sentenced to a mandatory minimum term with respect to a charge of use of a firearm during the commission of a felony.
>
> HRS § 706-660.1(a)(2) provided:
>
> > A person convicted of a felony, where the person had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
> > . . . .
> > (2) For a class A felony -- up to ten years[.]
>
> This court stated:
>
> > The language of the above statute is clear and unambiguous. The enhanced sentencing applies to the conviction for the felony in which the firearm was used. In this case, it was the kidnapping.
> >
> > The legislature has chosen to make the use of a firearm in the commission of a felony the basis for enhanced sentencing for that felony, and it has also chosen to make such use a separate felony, but it clearly has not chosen to impose two mandatory minimum sentences for one use of a gun.

> Accordingly, the judge below properly applied the statute when sentencing appellant for kidnapping. The judge below improperly applied the statute when sentencing appellant for the felony of using a firearm in the commission of the kidnapping.

Ambrosio, 72 Haw. at 497, 824 P.2d at 108.

Vellina, 106 Hawai'i at 448, 106 P.3d at 371.

Moreover, the Intermediate Court of Appeals (ICA) recently held in State v. Coelho, 2005 WL 980613 (April 28, 2005), that the court erred in imposing a mandatory minimum term of imprisonment on a defendant who was convicted of being a felon in possession of a firearm pursuant to HRS § 134-7(b).

> Coelho was convicted of being a felon in possession of a firearm; the felonious conduct was the possession of the firearm itself. There was no underlying felony that Coelho committed while possessing or using a firearm. Convicting Coelho of being a felon in possession of a firearm pursuant to HRS § 134-7(b) and sentencing him to a mandatory minimum term of imprisonment pursuant to HRS § 706-660.1(3)(c) essentially punished Coelho twice for a single possession of a firearm.

Coelho, 2005 WL 980613.

"Analogously, the legislature has specifically chosen to make the use of a firearm in the commission of a felony the basis for enhanced sentencing in connection with that felony, and it has also chosen to make" the possession of a prohibited weapon and the unauthorized place to keep a firearm separate felonies, "but it has not chosen to impose a mandatory minimum prison term for" either the possession of that firearm or the failure to keep it in an authorized container. Vellina, 106 Hawai'i at 448, 106 P.3d at 371 (emphases in original).

Furthermore, we can conceptualize no scenario in which a defendant may be subject to a mandatory minimum term of

imprisonment under HRS § 706-660.1(3)(d) for use of a firearm in the possession of a firearm. By contrast, we stated in Vellina that there could be no imposition of a mandatory minimum prison term for the mere theft of a firearm "unless a different firearm is used in the commission of the theft." 106 Hawai'i at 448, 106 P.3d at 371 (emphasis added). Therefore, the circuit court's reasoning that there wasn't "any real dispute that [Brittain used] a semi-automatic firearm" and that "[t]he statute clearly provides that it doesn't matter whether it's operable or not" is irrelevant to whether the circuit court's imposition of mandatory minimum terms was appropriate in Cr. No. 04-1-0084(2).

In essence, convicting Brittain of possession of a prohibited weapon, pursuant to HRS § 134-8(a), and sentencing him to mandatory minimum terms of imprisonment, pursuant to HRS § 706-660.1(3)(d), punished him twice for the possession of the same firearm. Likewise, convicting Brittain of failure to keep the unloaded firearm in an approved container, pursuant to HRS § 134-6(c), and sentencing him to mandatory minimum terms of imprisonment, pursuant to HRS § 706-660.1(3)(d), punished him twice for the possession of the same firearm.

Accordingly, we hold that the circuit court erred in sentencing Brittain to a mandatory minimum term of imprisonment pursuant to HRS §§ 706-660.1(3)(d) in connection with Counts I and II in Cr. No. 04-1-0084(2).

IV. CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's judgment of conviction and sentence and remand

for further proceedings.

DATED: Honolulu, Hawai'i, July 5, 2005.

On the briefs:

Peter A. Hanano,
Deputy Prosecuting Attorney,
for the plaintiff-appellee
State of Hawai'i

James S. Tabe,
Deputy Public Defender,
for the defendant-appellant
George Brittain, Jr.