

*** NOT FOR PUBLICATION ***

NO. 27027

IN THE SUPREME COURT OF THE STATE OF HAWAII

2006 MAY -3 AM 9:09
NORMA T. YARBA
CLERK, APPELLATE COURTS
STATE OF HAWAII

FILED

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

DONAVAN JOHNSON, aka Chris David Johnson and Tunji Oluwole,
Defendant-Appellant,

and

WARREN CANADA, aka James Louis, and PAUL FRENCH, aka Chris Meyers
and Phil Crowson, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 03-1-2007)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ., and Duffy, J.,
dissenting separately in which Acoba, J., joins)

The defendant-appellant Donovan Johnson appeals from
the November 29, 2004 judgment of the circuit court of the first
circuit, the Honorable Derrick H. M. Chan presiding.

On appeal, Johnson contends that the circuit court
erred in sentencing him to extended terms of imprisonment
inasmuch as: (1) the plaintiff-appellee State of Hawai'i did not
demonstrate that Johnson was a "persistent offender" under
Hawai'i Revised Statutes (HRS) § 706-662(1); and (2) "the
Hawai[']i and Federal Constitutions require that the maximum
sentence a judge may impose may be based solely on the facts
reflected in the jury verdict or admitted by the defendant."

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

*** NOT FOR PUBLICATION ***

circuit court's judgment for the following reasons:

(1) The circuit court's sentencing Johnson to a mandatory minimum term as a "multiple offender," see HRS § 706-662(4), was based upon his simultaneous and multiple convictions by the jury. Accordingly, the circuit court did not violate Johnson's constitutional right to a trial by jury. See generally State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004).

(2) Johnson's simultaneous convictions for six felonies met the threshold for extended sentencing, which requires that "the convicted defendant satisf[y] one or more of the following criteria," which include paragraph (4) (a) ("The defendant is being sentenced for two or more felonies"). See HRS § 706-662 (emphasis added). Regardless of how the circuit court labeled Johnson's prior (or simultaneous) bad acts in its oral ruling -- whether as "multiple," "persistent," or both -- Johnson's six felonies were proven before a jury and consequently triggered the circuit court's statutory discretion pursuant to HRS § 702-662 to impose extended terms of imprisonment. Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, May 3, 2006.

On the briefs:

Naomi Hirayasu,
for the defendant-appellant
Donavan Johnson

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
for the plaintiff-appellee
State of Hawai'i



