

NO. 27290

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,  
vs.  
JOSELITO YALON, Defendant-Appellant.

APPEAL FROM THE SECOND CIRCUIT COURT  
(FC-CR. NO. 05-1-0092)

FILED  
2006 APR 17 AM 9:34  
E.M. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

SUMMARY DISPOSITION ORDER

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

Defendant/appellant Joselito Yalon appeals from the Family Court of the Second Circuit's May 3, 2005 "Judgment; Guilty Conviction and Sentence; Notice of Entry" and its May 5, 2005 "Findings of Fact and Conclusions of Law Denying Expedited Sentencing."<sup>1</sup> Defendant contends that: (1) the trial court erred in concluding that the presumption in favor of imposing expedited sentencing pursuant to Hawai'i Revised Statutes (HRS) § 706-606.3(10) (Supp. 2005)<sup>2</sup> was rebutted; (2) Findings of Fact

<sup>1</sup> The Honorable Shackley F. Raffetto presided over this matter. The Honorable Reinette W. Cooper presided by special assignment over the waiver of indictment/preliminary hearing, and entry of plea.

<sup>2</sup> HRS § 706-606.3(10) provides:

There shall be a rebuttable presumption in favor of the court imposing a sentence in accordance with this section when a defendant qualifies for the expedited sentencing program, and written notice of "no objection" is issued by the prosecuting authority. The court shall provide written findings of fact setting forth specific reasons justifying imposition of a sentence that is not in accordance with this section.

(FOFs) numbers 1 through 4 are factors that "have already been considered by the legislature because they are present in most, if not all, intra-familial sexual assault and incest cases[,]” and thus, they do not constitute sufficient justification to rebut the presumption of the expedited sentencing program; (3) FOF number 5 is clearly erroneous because "as a matter of course, compliance with voluntary, pre-sentence, sex-offender treatment by and through a polygraph test is never available to anyone being considered for expedited sentencing"; and (4) the Answering Brief of the State of Hawai'i [hereinafter, the prosecution] should be stricken because the prosecution breached the plea agreement.<sup>3</sup>

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to

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<sup>3</sup> Yalon raises six additional issues in his reply brief, to wit, that the trial court, the Honorable Reinette W. Cooper presiding by special assignment, erred when it: (1) refused to bind itself to the parties' plea agreement; (2) refused to schedule Yalon's sentencing proceeding before the same court that accepted his plea; and the trial court, the Honorable Shackley F. Raffetto presiding, erred when it: (1) rejected the option of expedited sentencing before the sentencing proceeding had occurred; (2) relied on the presentence report that had omitted expedited sentencing as one of the sentencing options; (3) initially refused to approve the parties' stipulation that Yalon qualified for the expedited sentencing program; and (4) denied Yalon any meaningful opportunity to respond to the facts relied upon by the court. These assertions are being raised for the first time in Yalon's reply brief, and were not included in the statement of questions on appeal set forth in his opening brief. As such, having found no plain error, these issues are waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded.") and HRAP Rule 28 (b)(7) ("Points not argued may be deemed waived.").

the arguments advocated and the issues raised, we hold as follows:

- (1) The plain meaning of HRS § 706-606.3(10) gives the court discretion to impose a sentence that is not in accordance with the expedited sentencing program notwithstanding the defendant's fulfillment of the requirements of the statute and the prosecution's notice of "no objection." See State v. Solomon, 107 Hawai'i 117, 126, 111 P.3d 12, 21 (2005) ("The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision." (Citations omitted.)); State Farm Mut. Auto. Ins. Co. v. Gepaya, 103 Hawai'i 142, 145, 80 P.3d 321, 324 (2003) ("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." (Quoting Troyer v. Adams, 102 Hawai'i 399, 409, 77 P.3d 83, 93 (2003).));
- (2) The trial court's finding that Yalon's compliance could not be verified is not clearly erroneous, notwithstanding testimony that compliance with

voluntary, pre-sentence, sex-offender treatment by and through a polygraph test is never available to anyone being considered for expedited sentencing. See Taylor-Rice v. State, 91 Hawai'i 60, 69, 979 P.2d 1086, 1095 (1999) (stating that findings of facts shall not be set aside unless clearly erroneous); LeMay v. Leander, 92 Hawai'i 614, 626, 994 P.2d 546, 558 (2000) ("This court has long observed that it is within the province of the trier of fact to weigh the evidence and to assess the credibility of the witnesses, and this court will refrain from interfering in those determinations." (Citation omitted.));

- (3) Given the trial court's consideration of the witnesses at the hearing, the nature and extent of the crime, and the consequences of the crime on the victim, as well as the factors set forth in HRS § 706-606 (1993),<sup>4</sup> the

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<sup>4</sup> HRS § 706-606, titled "Factors to be considered in imposing a sentence," provides:

The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
  - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
  - (b) To afford adequate deterrence to criminal conduct;
  - (c) To protect the public from further crimes of the defendant; and

court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to the substantial detriment of Yalon in concluding that the presumption in favor of expedited sentencing was rebutted. See Solomon, 107 Hawai'i at 126, 111 P.3d at 21 ("[T]o 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."

(Citations and internal quotation marks omitted.);

- (4) The prosecution's Answering Brief need not be stricken inasmuch as the prosecution only agreed that Yalon was eligible for the expedited sentencing program, and that the prosecution had no objection to Yalon being considered for such program. The agreement did not provide that, if the court rejected such agreement, the prosecution had to advocate on Yalon's behalf or remain silent on appeal. Therefore,

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(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) The kinds of sentences available; and

(4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(Emphasis added.).

IT IS HEREBY ORDERED that the trial court's May 3, 2005 judgment and sentence is affirmed.

DATED: Honolulu, Hawai'i, April 17, 2006.

On the briefs:

Hayden Aluli and  
Mimi Desjardins  
for defendant-appellant  
Joselito Yalon

Peter A. Hanano,  
Deputy Prosecuting  
Attorney, County of Maui,  
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Samoa E. Duggan, Jr.