

NO. 27242

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant,

vs.

RUSSELL KELA CRUZ, Defendant-Appellee.

EMERSON
CIRCUIT APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-1169)

MEMORANDUM OPINION

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

The plaintiff-appellant State of Hawaii (hereinafter the prosecution) appeals from the April 11, 2005 judgment and sentence of the circuit court of the first circuit, the Honorable Virginia Lea Crandall presiding, convicting the defendant-appellee Russell Kela Cruz of promoting a dangerous drug in the third degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (Supp. 2004), see infra note 1, and unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993) and sentencing him, inter alia, to a five-year term of probation.

On appeal, the prosecution asserts that the circuit court erred in sentencing Cruz to probation under HRS § 712-1243 (Supp. 2004) rather than a mandatory minimum term of imprisonment of thirty days to two-and-a-half years, pursuant to HRS § 712-1243 (Supp. 2002).

For the reasons discussed infra in section III, we hold that the circuit court erred in sentencing Cruz pursuant to the 2004 version of HRS § 712-1243 and, therefore, vacate his sentence and remand for resentencing pursuant to HRS § 712-1243 (Supp. 2002).

I. BACKGROUND

In connection with events occurring on June 9, 2004, Cruz was charged on June 16, 2004 by complaint with promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (Count I), see infra note 1, and with unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (Count II).

During its 2004 session, the legislature amended HRS § 712-1243 through the passage of Act 44, which went into effect on July 1, 2004. See 2004 Haw. Sess. L. Act 44, §§ 7 and 33 at 211, 227. As part of its amendments, the legislature removed the provision from HRS § 712-1243 (Supp. 2002) that required a mandatory minimum sentence of at least thirty days and not more than two-and-a-half years, returning discretion to the sentencing court to impose probation.¹

¹ Effective July 3, 1996, the legislature amended HRS § 712-1243 by adding subsection (3), infra. See 1996 Haw. Sess. L. Act 308, §§ 4 and 7 at 971-72. Effective July 1, 2002, the legislature further amended HRS § 712-1243 by adding the underscored language, infra:

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony.

(3) Notwithstanding any law to the contrary, except for first-time offenders sentenced under [HRS §] 706-622.5, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or

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On January 21, 2005, Cruz filed a motion for a determination by the circuit court that Act 44's amendments applied to the proceedings against him. The prosecution filed a memorandum in opposition, arguing that HRS § 712-1243 (Supp. 2002) -- in effect at the time of the commission of the offense and at the time the prosecution filed its complaint against Cruz -- governed Cruz's proceeding and required that he be sentenced to a mandatory minimum term of imprisonment of thirty days to two-and-a-half years.²

¹(...continued)

distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

See 2002 Haw. Sess. L. Act 161, §§ 8 and 12 at 575. Effective July 1, 2004, the legislature again amended HRS § 712-1243 by striking subsection (3) in its entirety, returning the law to its 1993 form. See 2004 Haw. Sess. L. Act 44, §§ 7 and 33 at 211, 227. The legislature also included a savings clause in Act 44 that read in its entirety: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." See id. § 29 at 227.

² Unlike previous cases before this court concerning Act 44, including State v. Reis, No. 27171 (Haw. August 21, 2007), and State v. Walker, 106 Hawai'i 1, 100 P.3d 595 (2004), the present matter does not involve the question whether the amendments to HRS § 706-622.5 (Supp. 2002) -- provided for in Act 44, section 11 and allowing probation for first-time drug offenders -- are applicable to the defendant. Cruz's eligibility for probation as a first-time drug offender was not at issue in this matter, in light of a 1988 conviction of promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (1985). The present appeal instead focuses on whether the circuit court, in sentencing Cruz, could apply the amendments to HRS § 712-1243 (Supp. 2002) provided for in Act 44, section 7, see supra note 1, which excised subsection (3) and thereby returned discretion to the court to impose a sentence of probation rather than a mandatory minimum term of imprisonment.

It is also worth noting that, regardless of the version of HRS § 712-1243 applicable to Cruz, he could not be sentenced as a repeat offender pursuant to HRS § 706-606.5. The Act 161 version of HRS § 712-1243 sets forth a mandatory minimum term of thirty days to two-and-a-half years,

(continued...)

On January 26, 2005, Cruz pled no contest to both charges. Following arguments by the parties on Cruz's Act 44 motion, the circuit court orally ruled that "[w]ith respect to sentencing, the court adopts the arguments set forth by the defense in its memorandum filed January 21, 2005, and the court finds and concludes that it has the discretion with respect to this case to sentence the defendant to probation." The circuit court then sentenced Cruz to a five-year term of probation, relying on Act 44's amendments to HRS § 712-1243, see supra note 1, to do so.

The prosecution filed a timely notice of appeal on April 20, 2005.

²(...continued)

"notwithstanding any law to the contrary, except for first-time offenders sentenced under [HRS §] 706-622.5," thereby, by its plain language, excluding application of HRS § 706-606.5. See supra note 1. The Act 44 version, by removing subsection (3) from HRS § 712-1243, reinstates the applicability of HRS § 706-606.5 to Cruz's sentencing; but, insofar as he was previously convicted of a class C felony in 1988 -- sixteen years before the present offense -- HRS § 706-606.5(2)(e) (Supp. 1999) exempted Cruz from repeat offender sentencing in 2004 by providing that:

(2) Except as in subsection (3)[pertaining to prior felony convictions resulting in a special term under HRS § 706-667], a person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed during such period as follows:

 (e) Within five years after a prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above.

(Emphasis added.)

II. STANDARDS OF REVIEW

A. Sentencing

"The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed.'" State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (quoting State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000)).

B. Interpretation Of Statutes

"[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) (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. Admin[.] Dir[.] of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (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.

. . . .

Gray, 84 Hawai'i at 148, 931 P.2d at 590 (footnote omitted).

State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-80 (2003) (some internal citations omitted) (some brackets and ellipses added and some in original), quoted in State v. Koch, 107 Hawai'i 215, 220, 112 P.3d 69, 74 (2005). Nonetheless, absent an absurd or unjust result, see State v. Haugen, 104 Hawai'i 71, 77, 85

P.3d 178, 184 (2004), this court is bound to give effect to the plain meaning of unambiguous statutory language and may only resort to the use of legislative history when interpreting an ambiguous statute. State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001). Finally,

we construe penal statutes . . . narrowly, considering them in the light of precedent, legislative history, and common sense. "[W]hatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe [a statute . . .] in a vacuum. Nor can we read it as Baron Parke would read a pleading." State v. Taylor, 49 Haw. 624, 634, 425 P.2d 1014, 1021 (1967). [And], where possible, we will read a penal statute . . . in such a manner as to preserve its constitutionality.

State v. Kamal, 88 Hawai'i 292, 294, 966 P.2d 604, 606 (1998) (some internal quotation marks omitted) (some bracketed material in original) (some paragraph structure altered).

III. DISCUSSION

A. Cruz's Arguments

1. Cruz alleges that the phrases "proceedings that were begun" and "penalties that were incurred" in Act 44, section 29 support the prospective application of Act 44, section 7 to his case.

Cruz argues that the language of Act 44, section 29, see supra note 1, is ambiguous, particularly the phrase "proceedings that were begun." He insists that "proceedings" may refer not only to a criminal prosecution initiated by a charging instrument, but also "'to a mere procedural step that is part of a larger action or special proceeding.'" (Quoting Black's Law Dictionary 629 (5th ed. 1983).) He asserts that the alleged ambiguity of "proceedings" justifies a review of the legislative

history, which, he contends, reflects an intent to provide greater discretion to the lower courts in sentencing decisions. He essentially argues that the circuit court, by implication, correctly concluded: (1) that "proceedings" was ambiguous; (2) that interpreting "proceedings" as including sentencing proceedings comported with the legislature's intent, reflected in Act 44, to return greater discretion to the sentencing court; and (3) that his sentencing proceeding was excluded from Act 44's savings clause, insofar as it was conducted on April 11, 2005, more than nine months after Act 44's effective date, thereby allowing the court to sentence Cruz to probation.

Cruz also asserts that the phrase "penalties that were incurred" unambiguously refers to a sentence imposed upon judgment and that, because his sentence was imposed after July 1, 2004, the circuit court properly applied the amended version of HRS § 712-1243 (Supp. 2004) to his sentence.

2. Cruz argues in the alternative that Act 44 should apply retroactively.

Cruz maintains that even if his sentencing hearing were part of a unitary criminal prosecution initiated prior to July 1, 2004 -- which would require retroactive application of Act 44 for him to benefit from its amendments -- he challenges this court's conclusion in State v. Walker, 106 Hawai'i 1, 9, 100 P.3d 595, 603 (2004) that Act 44 does not apply retroactively, arguing that precedent requires this court to apply ameliorative amendments retroactively regardless of the presence or absence of a savings clause. (Citing Koch; State v. Feliciano, 103 Hawai'i 269, 81 P.3d 1184 (2003); State v. Van den Berg, 101 Hawai'i 187, 65 P.3d

134 (2003); State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988); State v. Von Geldern, 64 Haw. 210, 638 P.2d 319 (1981).) We disagree.

B. The Circuit Court Erred In Applying The Provisions Of Act 44, Section 7 To Cruz's Case.

In Walker, this court concluded that, by the plain language of Act 44, section 29, the legislature did not intend the ameliorative provisions of Act 44 to apply retroactively to proceedings that were begun prior to July 1, 2004. See Walker, 106 Hawai'i at 9, 100 P.3d at 603.

More recently, in State v. Reis, No. 27171 (Haw. August 21, 2007), this court considered, at great length, the question whether the provisions of Act 44 applied to a defendant who committed the charged offense and against whom a prosecution was commenced prior to July 1, 2004. We held that, because of the presence and wording of the specific savings clause contained in Act 44, section 29, the provisions of Act 44 -- including its ameliorative amendments -- were unavailable to such defendants, regardless of whether the application was characterized as retroactive or prospective. Reis, slip op. at 29, 34, 41 (holding (1) "that the term 'proceedings,' as employed in Act 44, section 29, unambiguously means the initiation of a criminal prosecution against a defendant through a charging instrument and subsumes within its scope hearings and other procedural events that arise as a direct result of the initial charging instrument" and (2) "that a defendant incurs, at the moment he or she commits the offense, liability for the criminal penalty in effect at the time of the commission of the offense," and concluding that the

inclusion of the specific savings clause in Act 44 evinced legislative intent that the Act's provisions apply only prospectively). (Emphasis in original.)

We, therefore, reiterate our conclusion that the provisions of Act 44, in their entirety, do not apply to any defendant who committed the charged offense and whose prosecution was commenced prior to July 1, 2004, regardless of the date of the defendant's subsequent conviction or sentence. See Walker, 106 Hawai'i at 9, 100 P.3d at 603; Reis, slip op. at 29, 34, 41.

Accordingly, insofar as Cruz was indicted on June 16, 2004 -- two weeks before the effective date of Act 44's amendments -- the 2002 version of HRS § 712-1243, see supra note 1, applied to his case, and the circuit court therefore erred by sentencing him to probation pursuant to HRS § 712-1243 (Supp. 2004).

IV. CONCLUSION



In light of the foregoing, we vacate the circuit court's April 11, 2005 sentence based upon HRS § 712-1243 (Supp. 2004) and remand for resentencing pursuant to HRS § 712-1243 (Supp. 2002).

DATED: Honolulu, Hawai'i, September 7, 2007.

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