NO. 27271

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

ROWENA NAZARENO TACTAY, Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 04-1-1266)

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

The plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] appeals from the April 8, 2005 judgment of conviction and sentence of the circuit court of the first circuit, the Honorable Michael A. Town presiding, convicting the defendant-appellee Rowena Tactay in Criminal (Cr.) No. 04-1-1266 of promoting a dangerous drug in the third degree (Count I), in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (Supp. 2002),[1] unlawful use of drug paraphernalia (Count II), in

[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[, see infra note 2], if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person

(continued...)

violation of HRS § 329-0043.5(a) (1993), and promoting a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993) (Count III), and sentencing her, inter alia, to a five-year period of probation, pursuant to HRS § 706-622.5 (Supp. 2004).[2]

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[1](...continued)
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.

Although Act 44, section 7 amended HRS § 712-1243, the amendment does not impact the ultimate disposition of Tactay's sentencing, regardless of whether Act 44 applies to her case. If Act 44 does apply, subsection (3) supra would be inapplicable to her sentencing, returning the penalty for a violation of HRS § 712-1243 to a standard class C felony subject to repeat offender sentencing pursuant to HRS § 706-606.5 (Supp. 1999), see infra note 3. If Act 44 does not apply to her case, subsection (3) continues to govern but only dictates the mandatory minimum for a first-time offender: it does not preclude application of HRS § 706-606.5 to the sentencing of a repeat offender such as Tactay.

[2] Effective July 1, 2002, the legislature enacted the predecessor statute to HRS § 706-622.5 (Supp. 2004) in Act 161, § 3, later codified at HRS § 706-622.5 (Supp. 2002), which provided in relevant part:

> **Sentencing for first-time drug offenders** . . . .
> (1) Notwithstanding any penalty or sentencing provision under [HRS ch. 712, pt. IV (concerning offenses related to drugs and intoxicating compounds)], a person convicted for the first time for any offense under [HRS ch. 712, pt. IV] involving possession . . . , not including to distribute or manufacture as defined in [HRS §] 712-1240 [(Supp. 1997)], of any dangerous drug . . . who is non-violent, as determined by the court after reviewing the:
> (a) Criminal history of the defendant;
> (b) Factual circumstances of the offense for which the defendant is being sentenced; and
> (c) Other information deemed relevant by the court;
> shall be sentenced in accordance with [paragraph] (2); provided that the person does not have a conviction for any violent felony for five years immediately prece[]ding the date of the commission of the offense for which the defendant is being sentenced.

(continued...)

On appeal, the prosecution asserts that the circuit court illegally sentenced Tactay to probation, inasmuch as, in light of an undisputed prior conviction, she was a repeat offender and, therefore, should have been sentenced pursuant to HRS § 706-606.5 (Supp. 1999).[3]

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[2](...continued)

(2) A person eligible under [paragraph] (1) shall be sentenced to probation to undergo and complete a drug treatment program. . . .

See 2002 Haw. Sess. L. Act 161, §§ 3 and 12 at 572, 575. Effective July 1, 2004, the legislature amended HRS § 706-622.5 to read:

> **Sentencing for first-time drug offenders** . . . .
>
> (1) Notwithstanding [HRS §] 706-620(3) [(disallowing probation for repeat offenders)], a person convicted for the first time for any offense under [HRS ch. 712, pt. IV] involving possession . . . , not including to distribute or manufacture as defined in [HRS §] 712-1240, of any dangerous drug . . . is eligible to be sentenced to probation under [paragraph] (2) if the person meets the following criteria:
>
> (a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information[.]
>
> . . . .
>
> (2) A person eligible under [paragraph] (1) may be sentenced to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under [HRS §] 706-606.5, the person should not be incarcerated in order to protect the public. . . .

See 2004 Haw. Sess. L. Act 44, §§ 11 and 33 at 214, 227; HRS § 706-622.5(1) and (2) (Supp. 2004). (Emphases added.) Section 29 of Act 44, absent from the codified version found at HRS § 706-622.5, reads as follows: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." See 2004 Haw. Sess. L. Act 44, § 29 at 227.

[3] HRS § 706-606.5 provided in relevant part:

> (1) Notwithstanding [HRS §] 706-669 [(Supp. 1996) (providing for parole hearing and procedure therefor)] and any other law to the contrary, any person convicted of . . . [HRS §] 712-1243 . . . and who has a prior conviction . . . for . . . any of the class C felony offenses enumerated above [including HRS § 708-836, relating to unauthorized control of [a] propelled vehicle,]. . .

(continued...)

For the reasons discussed infra in section III, we hold that the circuit court erred in sentencing Tactay as a first-time drug offender rather than a repeat offender. We therefore vacate the April 8, 2005 sentence and remand for resentencing as a repeat offender, pursuant to HRS § 706-606.5 (Supp. 1999).

I. BACKGROUND

On June 30, 2004, Tactay was charged by complaint in Cr. No. 04-1-1266 with, inter alia, promoting a dangerous drug in the third degree (Count I), in violation of HRS § 712-1243 (Supp. 2002), unlawful use of drug paraphernalia (Count II), in violation of HRS § 329-0043.5(a) (1993), and promotion of a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993), in connection with events that occurred on June 21, 2004. On November 29, 2004, Tactay pled guilty to all three counts.

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[3](...continued)
shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

(a) One prior felony conviction:

. . . .

(iv) Where the instant conviction is for a class C felony offense enumerated above -- one year, eight months;

. . . .

(2) Except as in [paragraph] (3) [(concerning special terms for young adults)], a person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed . . . :

. . . .

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

Effective May 8 and May 25, 2006, the legislature amended HRS § 706-606.5 in respects immaterial to the present matter. See 2006 Haw. Sess. L. Act 80, §§ 1 and 7 at 234-37; id. Act 134, §§ 4 and 7 at 385-86.

On December 20, 2004, the prosecution filed a motion requesting the court to impose a term of imprisonment in Count I based upon Tactay's status as a repeat offender, pursuant to HRS § 706-606.5 (Supp. 1999), see supra note 3. The prosecution's motion was based on Tactay's prior conviction on February 28, 2003, in Cr. No. 01-1-1148, of unauthorized control of a propelled vehicle (UCPV), in violation of HRS § 708-836, and the fact that, had Tactay been sentenced to the maximum term of imprisonment for that offense, her term would not yet have expired at the time of the instant offense.[4]

On April 8, 2005, the circuit court conducted a hearing on the motion for repeat offender sentencing. The circuit court first addressed the question whether the amendments of Act 44, see supra notes 1 and 2, applied:

> The Court: [Defense counsel, w]hat do you say to [the prosecution]'s excellent argument [that] penalties . . . are incurred when you commit the offense, not when they're imposed at a later date?
>
> [Defense]: I say two things, Judge. The use of the word "incurred," as opposed to "imposed," we believe is significant. And I . . . know the case that [the prosecution] cites . . . but I would note that that's a 1901 . . . case . . . .
>
> And I . . . honestly [believe] the legislative intent is so clear, here, Judge . . . .
>
> The Court: I agree. But the language isn't clear.
>
> . . . .
>
> The intent, the spirit is clear, but they . . . put in language which was

[4] Tactay stipulated to the fact of the prior UCPV conviction and to the revocation of probation imposed for that conviction which resulted from her instant conviction. The prosecution requested that any term of imprisonment resulting from the violation of Tactay's probation be served concurrently with its requested term of imprisonment for the instant violations.

indeed unfortunate. And my obligation when I became a judge . . . was not to impose my personal sense of morality and legality . . . it's not about me, it's about the law.

[Defense]: But I think the Court can use the legislative intent. I'll agree with you this is pure sausage making. . . . But I think the Court can, as a principle of law, use that legislative intent to clarify language that is less than clear. And we would note that . . . it does use the word "incurred" rather than "imposed".

. . . .

[Prosecution]: While [defense counsel] is correct that the original quotation on that "incurred" versus "imposed" was from a 1908 case . . . from . . . Kansas, . . . I had cited . . . modern cases as well.

We are talking across all jurisdictions and, most notably, federal jurisdictions. Penalties incurred, there is no ambiguity. This means at the time the act is committed and one incurs the penalty upon themselves[,] makes them subject to the penalty.

As the Court has noted, this is about the rule of law --

The Court: Exactly.

[Prosecution]: -- not the rule of man. If there is no ambiguity in the term, then we do not look to committee reports or anything else unless it's going to be claimed that it is an absurdity not to . . . make Act 44 retrospective.

. . . .

I think even in intent and spirit there was no other reason to put [the savings clause] language there except to make a cutoff point. Did the Legislature intend . . . prospectively for the courts to have discretion? Certainly. However, . . . I would say it would be unconstitutional for them to say the Court can choose to have Act 44 apply in one person's case and Act 161 apply in other person's case. It has to be the same law for everyone in the same circumstances. . . .

. . . .

The only other thing I would add, Your Honor, is [the defense] has brought up a lot of House committee intent, that sort of thing. . . .

. . . .

> Nothing in those House hearings says that there was an intent for discretion retroactively, that the line drawn in the language was meant to be otherwise.
>
> . . . .
>
> The Court: . . . I don't hesitate to follow the law. But in this case I want you to make a record, but I'm going to find it's discretionary. . . . And what convinces me is reading the legislative history, looking at State v. Avilla[, 69 Haw. 509, 750 P.2d 78 (1988)], the word "incurred" has certain legislative meanings but I just don't think that's what they intended . . . .
>
> . . . .
>
> And to me this is clearly a proceeding under []Avilla, the intent of "incur." I don't think [the legislature] w[as] that precise and it's clear to me that the legislative intent was to give discretion, be it "imposed," "incurred." . . . I think there is not clear direction in . . . Act 44 to do otherwise.

The circuit court then accepted Tactay's guilty pleas and entered its judgment of conviction, sentencing Tactay to five-year terms of probation for Counts I and II and for the prior UCPV conviction, based upon its reading of Act 44.[5] The circuit court ordered the sentences to run concurrently.

On May 3, 2005, the prosecution filed a timely notice of appeal of the judgment and sentence.[6]

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[5] The circuit court sentenced Tactay to 250 days of incarceration on Count III with credit for time already served.

[6] The prosecution's notice of appeal reads in relevant part:

> [n]otice is hereby given that the [prosecution] . . . , pursuant to . . . HRS [§] 641-13(6) (1993 . . .), and Hawai'i Rules of Appellate Procedure, Rule 3, appeals . . . from the Judgment, Order of Sentence of Probation, and Notice of Entry filed herein on April 8, 2005 . . . . The [prosecution] intends to contest the propriety of the Judgment, Order of Sentence of Probation, and Entry, filed on April 8, 2005.

(Some paragraph structure altered.)

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. Conclusions Of Law (COLs)

> "'A COL is not binding upon an appellate court and is freely reviewable for its correctness.'" AIG Hawaii Ins. Co. v. Estate of Caraang, 74 Haw. 620, 628, 851 P.2d 321, 326 (1993) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 119, 839 P.2d 10, 28 (1992)). This court ordinarily reviews COLs under the right/wrong standard. In re Estate of Holt, 75 Haw. 224, 232, 857 P.2d 1355, 1359 (1993). Thus, "'[a] COL that is supported by the trial court's [findings of fact] and that reflects an application of the correct rule of law will not be overturned.'" Estate of Caraang, 74 Haw. at 628-29, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29). "However, a COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case." Id. at 629, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29) (internal quotation marks omitted).
>
> State v. Furutani, 76 Hawai'i 172, [180], 873 P.2d 51, [59] (1994).

Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 453, 99 P.3d 96, 104 (2004). (Some brackets and internal citations omitted.) (Some bracketed material altered.)

C. Interpretation Of Statutes

The 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).

> 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.
> >
> > 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 [v. Admin. Dir. of the Court], 84 Hawai'i [138,] 148, 931 P.2d [580,] 590 [(1997)] (footnote omitted).

State v. Koch, 107 Hawai'i 215, 220, 112 P.3d 69, 74 (2005) (quoting State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-80 (2003)). Nevertheless, 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; we 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).

III. DISCUSSION

A. The Parties' Arguments

1. The prosecution contends that the term "proceedings" in Act 44, section 29 plainly means the initiation of a prosecution.

The prosecution notes that this court, in State v. Walker, 106 Hawai'i 1, 10, 100 P.3d 595, 604 (2004), concluded that Act 44 does not apply retroactively and argues, therefore, that "the relevant issue is when the 'proceedings' in this case began." It maintains that precedent supports the conclusion that "proceedings" begin with the initiation of the prosecution through the issuance of a charging instrument. (Citing 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); Avilla; Holiday v. United States, 683 A.2d 61 (D.C. 1996).)

2. Tactay argues that both procedural and precedential barriers exist to granting the prosecution relief.

a. Procedural barriers

Tactay asserts that the prosecution failed to appeal the circuit court's resentencing of Tactay in Cr. No. 01-1-1148 (the 2003 UCPV conviction) to probation, which "renders that judgment final and unappealable which in turn precludes the relief [the prosecution] seeks in this appeal as to C[r]. N[o].

04-1-1266," because HRS § 706-629 (1993)[7] "prohibit[s] [the] simultaneous dispositions of probation and imprisonment."

b. Retroactive and prospective application of Act 44's amendments

i. Prospective application

Tactay argues that the language of Act 44, section 29, see supra note 2, is ambiguous, particularly the phrase "proceedings that were begun." She 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).) She asserts that the alleged ambiguity of "proceedings" justifies a review of the legislative history, which, she contends, reflects an intent to provide greater discretion to the lower courts in sentencing decisions. She 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 her sentencing proceeding was excluded from Act 44's savings clause, insofar as it was

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[7] HRS § 706-629 provides in relevant part:

(1) When the disposition of a defendant involves more than one crime:
(a) The court shall not impose a sentence of probation and a sentence of imprisonment except as authorized by section 706-624(2)(a)[concerning imprisonment as a condition of probation.]

conducted on April 8, 2005, more than nine months after Act 44's effective date, thereby allowing the court to sentence her to probation.

Tactay also asserts that the phrase "penalties that were incurred" unambiguously refers to a sentence imposed upon judgment and that, because her sentence was imposed after July 1, 2004, the circuit court therefore properly applied Act 44's amendments in sentencing her to probation.

ii. Retroactive application

Tactay urges, in the alternative, that even if her sentencing hearing were part of a unitary criminal prosecution initiated prior to July 1, 2004 -- which would require retroactive application of Act 44 for her to benefit from its amendments -- she challenges this court's conclusion in Walker, 106 Hawai'i at 10, 100 P.3d at 604, that Act 44 does not apply retroactively, asserting that precedent requires this court to apply ameliorative amendments retroactively regardless of the presence or absence of a savings clause. (Citing Koch; Feliciano; Van den Berg; Avilla; State v. Von Geldern, 64 Haw. 210, 638 P.2d 319 (1981).)

B. The Circuit Court Erred In Concluding That HRS § 706-622.5 (Supp. 2004) Applied To Tactay's Case.

In State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003), this court analyzed the plain language of HRS § 706-606.5 (Supp. 1999), regarding sentencing for repeat offenders, and HRS § 706-622.5 (Supp. 2002), allowing probation for first-time drug offenders, and held that "in all cases in which HRS § 706-606.5

is applicable, including those in which a defendant would otherwise be eligible for probation under HRS § 706-622.5, the circuit courts must sentence defendants pursuant to the provisions of HRS § 706-606.5." 103 Hawai'i at 234, 81 P.3d at 414.

The legislature then enacted Act 44 in response to Smith, amending HRS § 706-622.5 to include language expressly allowing for probation for first-time drug offenders, even those found by the court to be repeat offenders. See HRS § 706-622.5 (Supp. 2004), supra note 2.

In Walker, we reiterated the holding of Smith and concluded that, "consistent with Act 44, . . . §§ 29 and 33, HRS § 706-606.5 trumps HRS § 706-622.5 with respect to all cases involving 'rights and duties that matured, penalties that were incurred, and proceedings that were begun, before [the] effective date of [Act 44],' i.e., July 1, 2004." 106 Hawai'i at 10, 100 P.3d at 604 (brackets in original).

In State v. Reis, No. 27171 (Haw. Aug. 21, 2007), we held "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 concluded that the inclusion of the specific savings clause in Act 44, section 29

evinced legislative intent that the Act's provisions apply only prospectively. Reis, slip op. at 29, 34, 41 (emphasis omitted).

Therefore, we 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, as required by Walker and Reis, insofar as the prosecution against Tactay began on June 30, 2004, with the filing of the complaint, the circuit court was obligated by the language of Act 44, section 29 to exclude Act 44's amendments from its consideration and, instead, to apply the 2002 version of HRS § 706-622.5 to her case. It therefore erred in sentencing her according to the 2004 version of HRS § 706-622.5 enacted by Act 44. Aplaca, 96 Hawai'i at 22, 25 P.3d at 797.

Moreover, in line with Smith, 103 Hawai'i at 234, 81 P.3d at 414, and Walker, 106 Hawai'i at 10, 100 P.3d at 604, and insofar as Tactay conceded her status as a repeat offender under HRS § 706-606.5 (Supp. 1999) by conceding the existence of an applicable prior conviction of unauthorized control of a propelled vehicle, the circuit court could not sentence her to probation pursuant to HRS § 706-622.5 (Supp. 2002), the first-time drug offender statute in effect at the time of the commission of her offenses. Rather, the circuit court was

required by Smith to apply HRS § 706-606.5 (Supp. 1999) to sentence her to a mandatory minimum sentence of one year and eight months.

C. The Prosecution's Alleged Failure To Appeal The Sentence In Cr. No. 01-1-1148 Does Not Bar Remand For Resentencing.

Upon remand, the circuit court, in applying HRS § 706-606.5 (Supp. 1999) in Cr. No. 04-1-1266, will be obligated to sentence Tactay to an indeterminate five-year term of imprisonment with a mandatory minimum of twenty months, see supra note 3. Although the prosecution's notice of appeal, see supra note 6, refers to the whole judgment, which includes all three sentences for probation running concurrently, the prosecution nevertheless concedes "it did not appeal the sentence of probation ordered in Cr. No. 01-1-1148," and, in its opening brief's statement of the points of error on appeal, it only challenges the sentence of probation for Count I. Insofar as the only count for which the circuit court arguably had no discretion under HRS § 706-606.5 to impose probation rather than imprisonment was Count I, this procedural posture by the prosecution on appeal is not surprising.

Tactay argues, essentially, that a defendant in her procedural position -- under three concurrent sentences of probation, with one sentence overturned on appeal and requiring a term of imprisonment -- has somehow obtained a "get-out-of-jail-free" card and has become immune from imprisonment. We need not address the absurdity of the logical outcome of such an argument, however, because HRS § 706-629 does not prevent, on remand, the

imposition of the mandatory minimum term as required by HRS § 706-606.5 (Supp. 1999). The probation imposed for Tactay's violation of probation in Cr. No. 01-1-1148, as well as for Count II, are still subject to correction as illegal sentences by motion of the prosecution, pursuant to Hawai'i Rules of Penal Procedure Rule 35(a) ("The court may correct an illegal sentence at any time . . . ."). Upon such a motion, the circuit court has broad discretion to ensure that the imposition of a term of imprisonment in Cr. No. 04-1-1266, sentencing for Count II, and any punishment resulting from the revocation of Tactay's probation in Cr. No. 01-1-1148 all comport with the requirements of HRS § 706-629.

IV. CONCLUSION

In light of the foregoing, we vacate the April 8, 2005 sentence of the circuit court and remand for resentencing, with HRS § 706-606.5 (Supp. 1999) being applied to Count I.

DATED: Honolulu, Hawai'i, September 24, 2007.

On the briefs:

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