NO. 27545

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MITCHELL PERALTO, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE FIFTH CIRCUIT COURT
(S.P.P. NO. 04-1-0012)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and Acoba, J., concurring)

The petitioner-appellant Mitchell Peralto appeals from the August 26, 2005 order of the circuit court of the fifth circuit, the Honorable George M. Masuoka presiding, denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition without a hearing.

On appeal, Peralto contends that the circuit court erred in denying his petition because it failed to conclude: (1) that the sentencing court retaliated against him for his successful appeal in State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001), by imposing upon him a harsher sentence at his resentencing, in violation of HRS § 706-609 (1993);[1] (2) that his new sentence violated his constitutional guarantees against cruel and unusual punishment; and (3) that the ten-year mandatory

[1] HRS § 706-609 provides that "[w]hen a conviction or sentence is set aside on direct or collateral attack, the court shall not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence."

minimum term of imprisonment imposed in connection with his second-degree murder conviction was imposed in a manner that violated procedures set forth by this court in State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999).

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 order of the circuit court for the following reasons:

In his original HRPP Rule 40 petition, Peralto made two arguments: (1) that the imposition of the mandatory minimum sentence for murder in the second degree violated Apprendi v. New Jersey, 530 U.S. 466 (2000); and (2) that the imposition of two consecutive life sentences with the possibility of parole was cruel and unusual punishment, in violation of the eighth amendment to the United States Constitution and article I, section 12 of the Hawai'i Constitution.

On appeal, however, Peralto does not cite to or rely upon Apprendi. This is not surprising insofar as this court, subsequent to his petition but prior to his appeal, ruled that Apprendi and its progeny do not implicate mandatory minimum sentencing. See State v. Gonsalves, 108 Hawai'i 289, 296, 119 P.3d 597, 604 (2005) (reasoning that "the judicial factfinding 'that give[s] rise to a mandatory minimum sentence . . . does not expose a defendant to a punishment greater than otherwise legally prescribed'" and, hence, does not violate Apprendi (quoting Harris v. United States, 536 U.S. 545, 565 (2002)) (brackets and ellipsis in Gonsalves)); see also State v. White, 110 Hawai'i 79,

86, 129 P.3d 1107, 1114 (2006) ("'The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from th[e] jur[y] -- and without contradicting Apprendi.'" (Quoting Harris, 536 U.S. at 565.) (Emphasis omitted.)).

Instead, Peralto makes a number of new arguments for the first time on appeal. He has, therefore, waived those arguments, for, as this court has noted,

> [a]s a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases. See State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992) ("Our review of the record reveals that [the defendant] did not raise this argument at trial, and thus it is deemed to have been waived."); State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."); Ass['n] of Apt[.] Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 107, 58 P.3d 608, 618 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.").

State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) (some brackets in original and some added). Specifically, by not raising them below, Peralto waived his arguments: (1) that the prosecution and the court retaliated against him by imposing a harsher sentence, in violation of HRS § 706-609, see supra note 1; and (2) that the sentencing court violated Tafoya in imposing a mandatory minimum sentence for his murder conviction.

Nevertheless, insofar as Peralto's "retaliation" argument could possibly be construed as a variation of his eighth amendment argument and his Tafoya argument could with equal effort be considered an iteration of his Apprendi argument, we address them on their merits.

1. The imposition of two consecutive terms of imprisonment for life with the possibility of parole does not constitute cruel and unusual punishment and does not violate HRS § 706-609.

Peralto argues that under his original sentence of life without the possibility of parole for murder in the second degree he was, pursuant to HRS §§ 706-665 and -657, eligible for commutation of the sentence after twenty years but, following his resentencing to life with the possibility of parole, the Hawai'i Paroling Authority (HPA) set his mandatory minimum term at sixty-five years,[2] resulting, he argues, in a harsher sentence,[3] in violation of HRS § 706-609, see supra note 1, that effectively constitutes a "death penalty" and violates his protections against cruel and unusual punishment.

In State v. Loa, 83 Hawai'i 335, 925 P.2d 1258 (1996), and State v. Iaukea, 56 Haw. 343, 537 P.2d 724 (1975), the defendants committed their crimes in a similarly cruel manner. See Loa, 83 Hawai'i at 339, 926 P.2d at 1262 (wherein the defendant repeatedly sexually assaulted one of the victims while taunting her legally-blind companion, made racial slurs, informed them he meant to kill them, stabbed them, and left them to die);

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[2] Peralto failed to cite to the record for evidence that the HPA has indeed issued a sixty-five year minimum term and we are unable to locate support in the record for that assertion. Nevertheless, insofar as we conclude that the argument is, on the whole, without merit, we take the assertion as true.

[3] Peralto also contends that his subsequent sentence was harsher because the court, in resentencing him, imposed an extended term of life with the possibility of parole for the kidnapping conviction, whereas in the original sentencing he was sentenced to twenty years. This is simply not true: a review of the record reveals that, in fact, the circuit court imposed an extended term of life with the possibility of parole for the kidnapping conviction at both the initial sentencing and the resentencing.

Iaukea, 56 Hawai'i at 346-47, 537 P.2d at 727-28 (wherein the defendant threatened the psychiatric social worker assigned to him with a knife in order to rob and repeatedly to sexually assault her after she had offered to assist him in finding safe lodging for the evening). The sentencing court imposed sentences equally onerous as those received by Peralto. See Loa, 83 Hawai'i at 355, 926 P.2d at 1278 (seven life terms of imprisonment with the possibility of parole and two twenty-year terms of imprisonment, to run consecutively); Iaukea, 56 Haw. at 345, 537 P.2d at 727 (life imprisonment). This court, nevertheless, concluded in both Loa, 83 Hawai'i at 356-57, 925 P.2d at 1279-80, and Iaukea, 56 Haw. at 361, 537 P.2d at 736, that the sentences imposed did not violate the defendants' constitutional protections against cruel and unusual punishment.

In the present matter, in light of the details of Peralto's crimes, it cannot be said that the circuit court erred in concluding that the sentencing court did not violate Peralto's constitutional protections against cruel and unusual punishment in imposing the sentence that it did, insofar as the sentence does not "'shock the conscience of reasonable persons or . . . outrage the moral sense of the community.'" Loa, 83 Hawai'i at 357, 926 P.2d at 1280 (quoting State v. Kumukau, 71 Haw. 218, 227, 787 P.2d 682, 687 (1990)), quoted in State v. Kahapea, 111 Hawai'i 267, 282, 141 P.3d 440, 455 (2006). The circuit court did not, therefore, err in denying Peralto's petition without a hearing on this issue. See Hutch v. State, 107 Hawai'i 411, 414, 114 P.3d 917, 920 (2005).

As for Peralto's argument that his subsequent resentencing violated HRS § 706-609, the commutation of which Peralto speaks is commutation of a term of life without the possibility of parole to a term of life with the possibility of parole -- precisely the sentence he, in fact, received at his resentencing.[4] He essentially argues that his initial sentence gave him hope of a change after twenty years, whereas the current sentence requires him to wait sixty-five years to hope for a change. But the hoped-for change under his initial sentence was the chance to have a minimum sentence set by the HPA, a minimum sentence which he, in fact, received upon imposition of the new sentence. It is clear on this analysis alone that the current sentence is not harsher.

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[4] Peralto was sentenced initially to an extended term of life without the possibility of parole, pursuant to HRS § 706-657 (Supp. 1996), which provides in relevant part:

> The court may sentence a person who has been convicted of murder in the second degree to life imprisonment without possibility of parole under [HRS §] 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity . . . .
>
> . . . .
>
> The provisions pertaining to commutation in [HRS §] 706-656(2), shall apply to persons sentenced pursuant to this section.

HRS § 706-656 (Supp. 1996) in turn provides in relevant part:

> If the court imposes a sentence of life imprisonment without possibility of parole pursuant to [HRS §] 706-657[(see supra)], as part of that sentence, the court shall order the director of public safety and the Hawai[']i paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under [HRS §] 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Emphasis added.

Moreover, the HPA's actions were only a collateral effect of the sentence imposed by the circuit court; the HPA's setting of a minimum term sentence of sixty-five years was wholly independent of the circuit court's resentencing Peralto to a lesser sentence of life with the possibility of parole on the murder charge and does not constitute part of Peralto's sentence. See Keawe v. State, 79 Hawai'i 281, 290, 901 P.2d 481, 490 (1995) ("[I]n light of the language of HRS § 706-609 and the clear distinction between sentencing and paroling, we hold that HRS § 706-609 is inapplicable to cases where a new sentence, which is not more severe than a prior sentence, adversely affects a defendant's parole status," cautioning that "the terms 'parole' and 'sentence' should not be confused with each other" because "[w]hile sentencing is the function of the judiciary, the granting of parole is generally the function of the executive branch of government . . . ."). And, we note, Peralto's resentencing did not threaten to affect adversely his parole status, as was the case in Keawe, 79 Hawai'i at 289, 901 P.2d at 489, but, in fact, moved the date for the issuance of the minimum term before parole became available forward in time by at least twenty years.

We therefore conclude that the circuit court correctly denied Peralto's HRPP Rule 40 petition without a hearing on this issue, Hutch, 107 Hawai'i at 414, 114 P.3d at 920.

2. The circuit court did not improperly impose a mandatory minimum sentence for Peralto's murder conviction.

Peralto's Tafoya argument can be best summarized as arguing (1) that the imposition of a mandatory minimum term of imprisonment is subject to the same constitutional constraints as the imposition of an extended term sentence, (2) that the process through which the mandatory minimum is imposed must comport with Apprendi and its progeny, and (3) that the court, in resentencing him, did not comply with Apprendi.

As noted, approximately six months after the parties briefed the present appeal, this court, in Gonsalves, 108 Hawai'i at 295-97, 119 P.3d at 603-05, concluded that imposition of a mandatory minimum term of imprisonment, pursuant to HRS § 706-606.5, did not implicate Apprendi and its progeny insofar as "Apprendi pronounced a rule regarding the judge-imposed penalties that increase statutory maximum sentences, not mandatory minimum sentences, because the judicial factfinding 'that give[s] rise to a mandatory minimum sentence . . . does not expose a defendant to a punishment greater than otherwise legally prescribed.'" Id. at 296, 119 P.3d at 604 (quoting Harris, 536 U.S. at 565) (brackets, ellipsis, and emphasis in Gonsalves).

Thus, even assuming arguendo that Peralto's Tafoya argument is an iteration of the Apprendi argument raised in his petition and is therefore preserved, the circuit court did not err in denying his petition without a hearing, Hutch, 107 Hawai'i at 414, 114 P.3d at 920.

Therefore,

IT IS HEREBY ORDERED that the August 26, 2005 order of the circuit court of the fifth circuit from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, October 15, 2007.

I concur in the result only.

On the briefs:

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