

NOT FOR PUBLICATION

NO. 24766

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

CHARLES J. K. TAI, also known as Pico, Defendant-Appellant, v.
STATE OF HAWAI'I, Plaintiff-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 86-0439)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Charles J. K. Tai, also known as Pico (Tai), appeals from the November 14, 2001 "Order Denying Motion for Correction of Illegal Sentence Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35" (Denial Order) entered by Judge Karl K. Sakamoto.

In his opening brief, Tai contends that (1) the court erred when it entered the Denial Order in disregard of Hawaii Revised Statutes (HRS) § 706-659 (1985); (2) the court erred when it did not appoint counsel to assist Tai with his "Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35" (HRPP Rule 35 Motion); (3) "the Circuit Court in adjudicating [Tai's] claim did so under bias and prejudice, . . . and subject[ed] [Tai] to selective enforcement of [the] laws"; and (4) Tai "was subjected to a violation of his right to be afforded counsel on [his] appeal as of right[.]"

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In his reply brief, Tai contends that (5) Tai's sentence under HRS § 706-606 was an enhanced sentence and, "since the sentence enhancements was [(sic)] [not] included in Tai's indictment or complaint, Tai's sentence of life with the possibility of parole should be reduced to the current law on the books today under HRS § 706-659"; and (6) Tai's sentence violates the precedent of State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), which concluded that "the felony underlying an HRS § 134-6(a) offense is, as a matter of law, an included offense of the HRS § 134-6(a) offense." Id. at 3, 950 P.2d at 1203.

We affirm the circuit court's Denial Order.

BACKGROUND

On April 16, 1986, Tai was charged by indictment with Murder, HRS § 707-701 (1985), and Possession of Firearm by a Person Convicted of Certain Crimes, HRS § 134-7(b) (1985)¹. On November 25, 1986, the court accepted Tai's plea of no contest to the firearm charge. On December 4, 1986, a jury found Tai guilty of the murder charge.

On January 12, 1987, the circuit court entered a Judgment sentencing Tai to (1) life imprisonment with the possibility of parole for the murder conviction and (2) ten years' imprisonment

^{1/} Hawaii Revised States § 134-7(b) (1985) states, in relevant part, as follows: "No person who . . . has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, . . . shall own or have in the person's possession or under the person's control any firearm or ammunition therefor."

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for the firearm violation. The firearm sentence and the murder sentence ran consecutively. Tai did not appeal the January 12, 1987 Judgment.

On September 4, 2001, Tai filed his HRPP Rule 35 Motion. In the motion, Tai stated, in relevant part and in his own words, as follows:

1. [Tai's] sentence is illegal because at the time [Tai] was sentenced the statutes' for class **"A"** felonies is **twenty years**, as stated in Hawaii legislative enactments at the time [Tai] was sentenced. See **HPC** § 706-659 (L 1980, c 294 § 1).
2. [Tai's] sentence is illegal because the sentencing judge did not sentence [Tai] to the statutory code that defines different classes of offense. See Title 37, [HRS] (Hawai'i Penal Code) chapter 707-701(1,2). See also Act 9, H.B. No. 20. 1986.

(Emphases in the original.)

On November 14, 2001, prior to a response from Plaintiff-Appellee State of Hawai'i (the State), the court summarily entered the Denial Order. Tai's timely Notice of Appeal followed.

RELEVANT COURT RULES

HRPP Rule 35 (2003) states as follows:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

HRPP Rule 40(a) (2003) states, in relevant part, as follows:

(1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

. . . .

(iii) that the sentence is illegal;

. . . .

(i) *Indigents*. If the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel, the court shall refer the petition to the public defender for representation as in other penal cases; provided that no such referral need be made if the petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner.

STANDARDS OF REVIEW

Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law 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." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (citations and internal quotation marks omitted).

Constitutional Law

We review questions of constitutional law "'by exercising our own independent constitutional judgment based on the facts of the case.'" State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999) (citations omitted). Accordingly, we review questions of constitutional law *de novo* under the "right/wrong" standard. State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998) (citation omitted).

Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court below. State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988); HRPP Rule 52(b). This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

Statutory Interpretation

The Hawai'i Supreme Court has repeatedly stated that a court's

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 where the language of the statute is plain and unambiguous, [a court's] only duty is to give effect to [the statute's] plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995)

(citations, brackets, and internal quotation marks omitted).

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DISCUSSION

1.

When the offenses were committed, when the court accepted Tai's plea of no contest to the HRS § 134-7(b) (1985) possession of firearm charge, and when the jury found Tai guilty of the HRS § 707-701 (1985) murder charge, the following statutes stated, in relevant part, as follows:

§707-701 Murder. (1) . . . [A] person commits the offense of murder if he intentionally or knowingly causes the death of another person.

(2) Murder is a class A felony for which the defendant shall be sentenced to imprisonment as provided in [HRS] section 706-606.

§706-606 Sentence for offense of murder. The court shall sentence a person who has been convicted of murder to an indeterminate term of imprisonment. In such cases the court shall impose the maximum length of imprisonment as follows:

(a) Life imprisonment without possibility of parole in the murder of:

(i) A peace officer while in the performance of his duties, or

(ii) A person known by the defendant to be a witness in a murder prosecution, or

(iii) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this subsection, or

(iv) A person while the defendant was imprisoned.

. . . .

(b) Life imprisonment with possibility of parole in all other cases. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with [HRS] section 706-669.

§706-659 Sentence of imprisonment for class A felony. Notwithstanding . . . any other law to the contrary, a person who has been convicted of a class A felony shall be sentenced to an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation.

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In other words, but for HRS § 706-606, HRS § 706-659 would apply and Tai's maximum sentence for the murder offense would be an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation rather than life imprisonment with possibility of parole.

Effective January 1, 1987, after the offenses were committed, after the court accepted Tai's plea of no contest to the HRS § 134-7(b) (1985) possession of firearm charge, and after the jury found Tai guilty of the HRS § 707-701 (1985) murder charge, but before Tai was sentenced, the following statutes were amended by Act 314, Session Laws of Hawai'i, Regular Session of 1986 (Act 314 or Act), in relevant part, as follows:

SECTION 1. Sections 701-100 to 701-101, Hawaii Revised Statutes, are amended to read as follows:

. . . .

§701-101 Applicability to offenses committed before the effective date of amendments. (1) Except as provided in subsections (2) and (3), amendments made by Act , Session Laws of Hawaii 1986, to this Code [does] do not apply to offenses committed before [its] the effective date[.] of Act , Session Laws of Hawaii 1986. Prosecutions for offenses committed before the effective date of Act , Session Laws of Hawaii 1986, are governed by the prior law, which is continued in effect for that purpose, as if amendments made by Act , Session Laws of Hawaii 1986, to this Code were not in force. For purposes of this section, an offense is committed before the effective date of Act , Session Laws of Hawaii 1986, if any of the elements of the offense occurred before that date.

(2) In any case pending on or commenced after the effective date of amendments made by Act , Session Laws of Hawaii 1986, to this Code, involving an offense committed before that date . . . upon the request of the defendant, and subject to the approval of the court, the provisions of chapter 706 amended by Act , Session Laws of Hawaii 1986, may be applied in particular cases."

. . . .

SECTION 15. [(Repealed HRS § 706-606, governing the sentence for murder, and replaced it with factors to be considered in imposing a sentence.)]

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SECTION 39. Chapter 706, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§ 706-[(656)] Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

(1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without the possibility of parole.

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(2) Persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority.²

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SECTION 49. [(Repealed HRS § 707-701, governing the offense of murder, and replaced it with the offense of murder in the first degree.)]

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SECTION 50. Chapter 707, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§ 707-[(701.5)] Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706- ."

.

SECTION 78. This Act does not affect rights and duties that matured, penalties that were incurred and proceedings that were begun, before its effective date.

SECTION 79. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 80. This Act shall take effect on January 1, 1987.

^{2/} Section 1 of Act 15, Session Laws of Hawaii, Regular Session of 1996, amended HRS § 706-656 by adding language pertaining to repeat offenders. 1996 Haw. Sess. L. Act 15, § 1 at 23.

1986 Haw. Sess. L. Act 314, §§ 1, 15, 39, 49, 50, 78, 79, 80 at 593-629 (footnote omitted; brackets containing parenthetical material added; all other brackets in original).

In other words, Act 314 repealed HRS § 706-606 (1985). The fact that Tai was sentenced on January 12, 1987, and HRS § 706-606 has not been in existence since January 1, 1987, leads Tai to conclude that only HRS § 706-659 (Supp. 2002) applies and thus, a sentence greater than an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation is no longer authorized. In his opening brief, Tai notes that

the [State] wrongfully assumed that [Tai] was challenging his sentence on the day of his sentence, when in fact [Tai] is challenging his sentence today, now, currently as the statutes are presented today. Not something that happened at the time of sentencing. But the issue that happened after the repealing of certain laws in 1986, 1987, that effected the laws today.

Tai further states that he "is attacking his sentence now, today currently in the 21st century. The question that is not before this court is, that [Tai's] sentence was legal at time of his sentence. The dispute is whether [Tai's] sentence is illegal. No answer to the actual question before this court."

Tai's reasoning has the following two fatal faults:

(a) Act 314 expressly does not apply to prosecutions for offenses committed before its January 1, 1987 effective date and (b) if Act 314 applied in this case, it replaced the sentencing mandate in HRS § 706-606 (1985) with a similar mandate in HRS § 706-656.

2.

Tai contends that his rights were prejudicially violated when the court did not sua sponte appoint counsel to represent Tai in pursuance of his HRPP Rule 35 Motion.

HRS § 802-5(a) (1993) states, in relevant part, as follows:

When it shall appear to a judge that a person requesting the appointment of counsel satisfies the requirements of this chapter, the judge shall appoint counsel to represent the person at all stages of the proceedings including appeal, if any. If conflicting interests exist, or if the interests of justice require, the court may appoint private counsel, who shall receive reasonable compensation for necessary expenses[.]

HRS § 802-1 (1993) states, in relevant part, as follows:

Any indigent person who is . . . arrested for, charged with or convicted of an offense or offenses punishable by confinement in jail or prison . . . shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the public defender for any other reason is unable to act, or if the interests of justice require, the court may appoint other counsel.

The appearance of the public defender in all judicial proceedings shall be subject to court approval.

HRS §§ 802-1 and 802-5 pertain to the appointment of counsel in "all stages of the [criminal] proceedings including appeal, if any." HRS § 802-5. HRS §§ 802-1 and 802-5 do not apply in the post-conviction context.

In Briones v. State, the Hawai'i Supreme Court stated that

[n]o constitutional right to an appeal exists. State v. Dannenberg, 74 Haw. 75, 837 P.2d 776, 778 (1992); McKane v. Durston, 153 U.S. 684[, 14 S. Ct. 913, 38 L. Ed. 867] (1894). Hawai'i guarantees by statute the right to an appeal to every criminal defendant who deems himself or herself aggrieved by a district or circuit court judgment. HRS § 641-12 (1985) and § 641-11 (Supp. 1991), respectively. For appeals as of right, a criminal defendant has the right to assistance of counsel pursuant to the Due Process and Equal Protection Clause. U.S. CONST. amend. XIV; HAW. CONST. art. I, § 5;

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Douglas v. California, 372 U.S. 353, [83 S. Ct. 814, 9 L. Ed. 2d 811,] rehearing denied, 373 U.S. 905, [83 S. Ct. 1288, 10 L. Ed. 2d 200] (1963). An appeal as of right is adjudicated in accordance with due process of law only when the appellant has the *effective* assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 396, [105 S. Ct. 830, 836, 83 L. Ed. 2d 821,] rehearing denied, 470 U.S. 1065[, 105 S. Ct. 1783, 84 L. Ed. 2d 841] (1985).

74 Haw. 442, 460, 848 P.2d 966, 975 (1993) (emphasis in original).

In Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d. 539 (1987), the United States Supreme Court considered whether the right to counsel extends to state post-conviction proceedings. In Finley, the majority wrote that

[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, see Johnson v. Avery, 393 U.S. 483 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. Wainwright v. Torna, 455 U.S. 586 (1982); Ross v. Moffitt, 417 U.S. 600 (1974). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. See Boyd v. Dutton, 405 U.S. 1, 7, n.2 (1972) (POWELL, J., dissenting).

481 U.S. at 555, 107 S. Ct. at 1993, 95 L. Ed. 2d. at 545-46.

In Engstrom v. Naauao, 51 Haw. 318, 321, 459 P.2d 376, 378 (1969), the Hawai'i Supreme Court stated, in relevant part,

[t]he constitutional right to assistance of counsel under the sixth amendment of the United States Constitution, [sic] does not apply to habeas corpus proceedings. The petition here is one for post-conviction collateral remedy. Appointment of counsel for an indigent in such proceedings is discretionary with the court. Appointment may be properly made if the petition raises substantial issues which require marshalling of evidence and logical presentation of contentions. No such issue has been raised in the petition in this case.

(Citations omitted.)

The HRPP became the governing rules effective January 1, 1977. As noted above, HRPP Rule 40(i) requires the appointment of

counsel for the defendant who files a motion under HRPP Rule 40 "[i]f the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel" unless "the petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner." See Dan, 76 Hawai'i at 433, 879 P.2d at 538 (denial of petitioner's request for a court-appointed attorney to assist him with his HRPP Rule 40 petition because petitioner failed (a) to establish his indigency consistent with the procedure prescribed in HRS §§ 802-1 through 802-4 and (b) to assert a colorable claim requiring the court to take further action on his petition).

If, notwithstanding HRPP Rule 40(i)'s express authorization of such action and HRPP Rule 35's lack of language authorizing such action, a defendant who filed a motion under HRPP Rule 35 is entitled to the same rights to a court-appointed attorney as are specified in HRPP Rule 40, Tai has not established his right to a court-appointed attorney. Assuming Tai's inability to pay the costs of the proceedings or to afford counsel, Tai's HRPP Rule 35 petition failed to state a colorable claim.

3.

Tai contends that "the Circuit Court in adjudicating [Tai's] claim did so under bias and prejudice, . . . and subject[ed] [Tai] to selective enforcement of [the] laws." In his

words, "face it, realistically speaking, the judge does not want to be responsible for turning a life sentence to a 20 year term. Even if it means violating the law." In light of our conclusion that the court was correct when it denied Tai's HRPP Rule 35 Motion, this point has no merit.

4.

Tai contends that he "was subjected to a violation of his right to be afforded counsel on appeal as of right[.]" This contention will not be considered in this appeal because it was not presented by Tai in the circuit court and it cannot be presented in a HRPP Rule 35 motion.

5.

In his reply brief, Tai contends that his sentence under HRS § 706-606 was an enhanced sentence and, "since the sentence enhancements was [(sic)] [not] included in Tai's indictment or complaint, Tai's sentence of life with the possibility of parole should be reduced to the current law on the books today under HRS § 706-659."

We disagree that Tai's sentence under HRS § 706-606 was an enhanced sentence. HRS § 706-606 specified the sentence for "a person who has been convicted of murder[.]" The precedent cited by Tai, namely State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994), does not pertain to HRS § 706-606. It pertains to HRS § 706-660.1(a), which "is analogous to the 'repeat offender'

statute, HRS § 706-606.5 (1985 and Supp. 1992)[.]" Id. at 530-31, 880 P.2d at 205-06 (footnote omitted).

6.

In his reply brief, Tai contends that his sentence violates the precedent of Jumila, which concluded that "the felony underlying an HRS § 134-6(a) offense is, as a matter of law, an included offense of the HRS § 134-6(a) offense." Id. at 3, 950 P.2d at 1203. Inasmuch as State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002), overruled the precedent of Jumila quoted above, this point of error is without merit.

CONCLUSION

Accordingly, we affirm the circuit court's November 14, 2001 "Order Denying Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35."

DATED: Honolulu, Hawai'i, May 9, 2003.

On the briefs:

Charles J. K. Tai,
Defendant-Appellant, *pro se.*

Chief Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge