

**NOT FOR PUBLICATION**

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NO. 25330

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
ROY AIU APAO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(Cr. No. 47431)

MEMORANDUM OPINION

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

This appeal involves another attempt by Defendant-Appellant Roy Aiu Apao (Apao), who was convicted by a jury of murder on December 19, 1975, to correct his "illegal sentence" of life imprisonment without the possibility of parole to a lesser sentence. On September 4, 2002, the Circuit Court of the First Circuit (the circuit court) denied Apao's March 27, 2001 "Motion for Correction of Illegal Sentence Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35[.]" We affirm.

BACKGROUND

A.

On November 21, 1974, Apao was indicted and charged as follows:

On or about the 20th day of July, 1974, in the City and County of Honolulu, State of Hawaii, [Apao] did intentionally or knowingly cause the death of Faafouina Tuaolo, a person known by [Apao] to be a witness in a murder prosecution, by beating the said Faafouina Tuaolo, thereby committing the offense of murder in violation of Section[s] 701 and 606(a)(ii) of the Hawaii Penal Code, Act 9, Session Laws of Hawaii, 1972.

State v. Apao, 59 Haw. 625, 627, 586 P.2d 250, 253 (1978). Under the statutory scheme in effect at the time, murder was a class A felony, punishable, pursuant to Hawaii Revised Statutes (HRS) § 706-606 (Sp. Pamphlet 1975), which stated, in relevant part, as follows:

**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) . . .
  - (ii) A person known by the defendant to be a witness in a murder prosecution[.]

Apao, 59 Haw. at 634, 586 P.2d at 257.

On December 19, 1975, Apao was found guilty as charged, following a jury trial in which evidence was adduced connecting Apao to the murder victim, a witness in an earlier murder prosecution against Apao. On December 24, 1975, the circuit court entered judgment, convicting Apao of murder and sentencing him to life imprisonment without the possibility of parole, pursuant to the enhanced sentencing provision of HRS § 706-606(a)(ii).

On December 26, 1975, Apao filed a notice of appeal to the Hawai'i Supreme Court,<sup>1</sup> which on November 2, 1978, affirmed

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<sup>1/</sup> In his appeal, Defendant-Appellant Roy Aiu Apao contended that the Circuit Court of the First Circuit erred in: (1) denying his motion to dismiss the indictment; (2) denying his motion *in limine*; (3) admitting into evidence prosecution exhibits 4, 5, 6, and 13; (4) denying his motion for mistrial; (5) denying his motion for judgment of acquittal; (6) instructing the jury as to the law of principals and accomplices; and (7) refusing to instruct the jury on the offense of manslaughter.

Apao's conviction. See Apao, supra. In doing so, the supreme court disagreed with Apao that the indictment against him should be dismissed because it charged him with murdering "a person known by [Apao] to be a witness in a murder prosecution[,]" which was not an essential element of the offense of murder. Apao, 59 Haw. at 633, 586 P.2d at 256-57 (internal quotation marks omitted). The supreme court concluded that the indictment properly included the allegation that Apao "knew that the victim was a witness in a prior murder prosecution" because

the better rule is to include in the indictment the allegations, which if proved, would result in application of a statute enhancing the penalty for the crime committed. This will give defendants fair notice of the charges against them. The common law required that "every wrongful act which was to be taken into account in determining the punishment be alleged in the indictment." *State v. Blacker, supra*, 380 P.2d at 791, and it was necessary to allege particular facts in the indictment which created an aggravation of the crime charged. *Id.* at 792.

State v. Apao, 59 Haw. at 636, 586 P.2d at 258 (footnote and internal brackets omitted).

B.

On October 23, 1996, Apao filed his first HRPP Rule 35<sup>2</sup> motion to correct an illegal sentence (first Rule 35

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<sup>2/</sup> At the time, Hawai'i Rules of Penal Procedure (HRPP) Rule 35 provided:

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

(continued...)

motion). Relying on Garringer v. State, 80 Hawai'i 327, 333-34, 909 P.2d 1142, 1148-49 (1996),<sup>3</sup> Apao contended that since the evidence at trial showed that he "did not personally cause the death of another person known as a witness in a murder prosecution[,]" (emphasis in original) his sentence was improperly enhanced to life imprisonment without parole.

That same day, the circuit court, Judge Victoria S. Marks presiding, entered an order summarily denying Apao's first Rule 35 motion. The circuit court ruled that since Apao had not filed his motion within ninety days after the imposition of his sentence or the November 27, 1978 dismissal of his appeal by the Hawai'i Supreme Court, Apao's first Rule 35 motion was untimely.

On November 13, 1996, Apao filed a motion for reconsideration of the circuit court's order denying his first Rule 35 motion, citing the language in the rule that permits the court to correct an illegal sentence "at any time[.]" (Internal quotation marks omitted.) On December 3, 1996, the circuit court summarily denied the motion for reconsideration, determining that there was "no new evidence raised in support of the matter[.]"

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<sup>2/</sup> (...continued)

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.

<sup>3/</sup> In Garringer v. State, 80 Hawai'i 327, 909 P.2d 1142 (1996), the supreme court held that a defendant convicted as an accomplice to a robbery cannot be sentenced to a mandatory minimum term of imprisonment for possession or use of a firearm, based upon a co-defendant's use of a firearm. Id. at 334, 909 P.2d at 1149.

On December 13, 1996, Apao filed an appeal from the circuit court's orders denying his first Rule 35 motion and his motion for reconsideration.

On March 19, 1997, the supreme court issued an order dismissing Apao's appeal. The supreme court concluded that: (1) Apao's December 13, 1996 appeal from the circuit court's October 23, 1996 order denying his first Rule 35 motion was untimely; and (2) it lacked jurisdiction over Apao's appeal from the circuit court's December 3, 1996 order denying Apao's motion for reconsideration because the order was not appealable.

C.

On April 1, 1997, Apao filed another Rule 35 motion (second Rule 35 motion), which was identical in substance and form to his first Rule 35 motion. On July 7, 1997, the circuit court entered an order denying Apao's second Rule 35 motion. In its Findings of Fact and Conclusions of Law explaining its order, the circuit court concluded that the enhanced sentencing provision in HRS § 706-606(a)(ii) was properly applied to Apao, who did not dispute that he knew that the victim he was charged with murdering was a witness in an earlier murder prosecution against Apao. The circuit court also concluded that Garringer was not applicable to Apao's case.

On July 24, 1997, Apao filed a notice of appeal from the circuit court's order denying his second Rule 35 motion.

On November 19, 1998, this court issued a memorandum opinion affirming the circuit court's order. State v. Apao, slip. op. (App. No. 20855, Nov. 19, 1998). We concluded that: (1) the doctrine of *res judicata* barred Apao from relitigating the identical issues presented by his first Rule 35 motion; and (2) even if Apao's second Rule 35 motion was not barred by the doctrine of *res judicata*, the circuit court properly determined that Apao's enhanced sentence to life imprisonment without parole was not illegal because: (a) Garringer did not apply to murder convictions based upon accomplice liability; and (b) Apao, who did not dispute that he knew that the murder victim was a witness in a murder prosecution, was clearly subject to the enhanced sentencing requirement of HRS § 706-606(a)(ii). Slip. op. at 14.

D.

On March 27, 2001, Apao filed the HRPP Rule 35 motion that underlies this appeal, and on July 25, 2001, Apao supplemented this motion (cumulatively, third Rule 35 motion). The thrust of Apao's third Rule 35 motion was that his sentence to life imprisonment without the possibility of parole was infirm because: (1) at the time he was sentenced, murder was a class A felony and the applicable sentence for a class A felony was twenty years' imprisonment, not life imprisonment without the possibility of parole; (2) his enhanced sentence was based on HRS § 706-606(a)(ii), which was repealed by Act 314, 1986 Haw. Sess. L. 593; and (3) the facts germane to the imposition of his

enhanced sentence were neither alleged in the indictment nor found by the jury, as required by Apprendi v. New Jersey, 530 U.S. 466 (2000).

On September 4, 2002, the circuit court, Judge Richard K. Perkins presiding, entered a "Decision and Order Denying [Apao's] Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35[.]"

In summary, the circuit court concluded as follows:

(1) Apao's motion was "barred by the doctrine of res judicata in that the issue of the legality of [Apao's] sentence was adjudicated in connection with the second Rule 35 motion"; (2) in light of this court's November 19, 1998 memorandum opinion affirming the denial of Apao's second Rule 35 motion, Apao's "claim that he should have been sentenced to imprisonment for a term of twenty years rather than life without possibility of parole is without merit"; (3) although Act 314 repealed HRS § 706-606, "the act retained the sentence of life imprisonment without possibility of parole for the intentional or knowing killing of 'a person known by the defendant to be a witness in a criminal prosecution,' which conduct was redesignated by the act as a form of the newly-created offense of murder in the first degree"; (4) Act 314 clearly provided that its amendments did not apply to offenses committed and prosecuted to final judgment before the act's effective date; and (5) Apprendi "does not apply

retroactively to the sentence [Apao] challenges in [his third Rule 35] motion."

This appeal followed.

DISCUSSION

A.

Apao initially argues that the circuit court erred when it concluded that the doctrine of *res judicata* barred his third Rule 35 motion. Relying on State v. Fry,<sup>4</sup> 61 Haw. 226, 602 P.2d 13 (1979), Apao alleges that *res judicata* principles do not apply to HRPP Rule 35 motions since HRPP Rule 35's clear language provides that "[the c]ourt can correct an illegal sentence at any time" and contains no "limitation clauses as to what issues can or cannot be presented[.]" (Internal brackets omitted.) Apao points out, moreover, that the basis for challenging the legality of his sentence in his third HRPP Rule 35 motion differed from the basis of his prior motions.

HRPP Rule 35 was amended, effective July 1, 2003, to impose time limits on motions to correct an illegal sentence and to require motions to correct an illegal sentence more than ninety days after the sentence was imposed to be brought pursuant

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<sup>4/</sup> In State v. Fry, 61 Haw. 226, 602 P.2d 13 (1979), the defendant received suspended sentences for two first-degree robbery convictions. Seven years later, the State of Hawai'i filed an HRPP Rule 35 motion to correct these sentences, on grounds that the trial judge who had suspended the sentences had no authority to do so under the statutes in effect at the time of sentencing. The Hawai'i Supreme Court held that because the sentences did not conform to statute, "they were illegal, and the court had the duty to correct them pursuant to [HRPP] Rule 35." Id. at 229, 602 P.2d at 16. The supreme court also stated: "As [HRPP] Rule 35 provides for the correction of an illegal sentence 'at any time', it is expressly not limited as to the time when a motion to correct may be brought. The court can always reform an illegal sentence." Id. at 230, 602 P.2d at 16.



to HRPP Rule 40. Since the circuit court addressed the merits of Apao's third HRPP Rule 35 motion, notwithstanding its conclusion that the motion was barred by *res judicata*, we find it unnecessary to address the correctness of Apao's interpretation of the former HRPP Rule 35.

B.

Pursuant to Act 314, which was enacted in 1986, the Hawai'i legislature adopted comprehensive amendments to the Hawai'i Penal Code. Apao contends that because Act 314 totally revised HRS § 706-606 as it existed at the time of his sentencing, his enhanced sentence to life imprisonment without the possibility of parole is illegal. We disagree.

Act 314, which became effective on January 1, 1987, amended HRS § 701-101 to expressly provide:

**Applicability to offenses committed before the effective date of amendments.** (1) Except as provided in subsections (2) and (3), amendments made by Act (314), Session Laws of Hawaii 1986, to this Code [does] do not apply to offenses committed before [its] the effective date[.] of Act (314), Session Laws of Hawaii 1986. Prosecutions for offenses committed before the effective date of Act (314), 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 (314), 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 (314), Session Laws of Hawaii 1986, if any of the elements of the offense occurred before that date.

1986 Haw. Sess. L. Act 314, § 1 at 593 (new language underscored, bracketed text deleted, act number added in parentheses).

C.

Apao also argues that the indictment against him failed to adhere to due process principles because it did not, as

required by Apprendi, allege the aggravating circumstances that justified an enhancement of his sentence. Apao claims that the indictment vaguely alleged that he caused the death of Faafouina Tualo "by beating the said Faafouina Tualo," without describing "with certainty and precision" exactly how the beating occurred.

Apao misunderstands Apprendi. In that case, Apprendi, the defendant, was charged with and pled guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of five to ten years, after he fired several shots into the home of an African-American family and made a statement, later retracted, that he did not want the family in his neighborhood because of their race. Apprendi, 530 U.S. at 469-70. The indictment against Apprendi did not refer to New Jersey's hate crime statute, which provided for an "'extended term' of imprisonment if the trial judge [found], by a preponderance of the evidence, that 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id. at 468-69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)) (internal brackets omitted). However, after Apprendi's guilty pleas were accepted, the prosecutor filed a motion for an extended term of imprisonment. Id. at 470. The trial judge thereafter held an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting and concluded that the evidence

supported a finding that "the crime was motivated by racial bias." Id. at 470-71. The trial court then held that the hate crime enhancement applied and sentenced Apprendi to a twelve-year term of imprisonment on one of the counts, which was above the ten-year maximum for the offense charged in that count. Id. at 471.

On appeal, a divided New Jersey Supreme Court affirmed, and Apprendi thereafter petitioned for *certiorari*, which petition was granted by the United States Supreme Court. Id. at 472-74. In reversing, the United States Supreme Court held:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 489 (internal brackets and quotation marks omitted).

In this case, the indictment charged Apao with "intentionally or knowingly caus[ing] the death of Faafouina Tuaolo, a person known by [Apao] to be a witness in a murder prosecution[.]" Apao, 59 Haw. at 627, 586 P.2d at 253. The indictment therefore clearly alleged the fact that subjected Apao to an enhanced sentence for murder, namely, knowledge that Tuaolo was a witness in a murder prosecution, and since Apao was found guilty of murder by a jury, Apao's Apprendi argument is without merit.

CONCLUSION

In light of the foregoing discussion, we affirm the Decision and Order Denying Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 entered by the circuit court on September 4, 2002.

DATED: Honolulu, Hawai'i, March 5, 2004.

On the briefs:

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