

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27474

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ANTHONY ANGEL BIRANO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 04-1-0635)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Anthony Angel Birano (Birano) appeals from the Judgment filed on July 27, 2005 in the Circuit Court of the Second Circuit (circuit court).^{1/}

On December 20, 2004, the State of Hawaii (the State) charged Birano via an Indictment with one count of Unlawful Methamphetamine Trafficking (Count One), in violation of Hawaii Revised Statutes (HRS) § 712-1240.6 (Supp. 2005); one count of Promoting a Dangerous Drug in the Second Degree (Count Two), in violation of HRS § 712-1242(1)(b)(i) (Supp. 2005); two counts of Prohibited Acts Related to Drug Paraphernalia (Counts Three and Five), in violation of HRS § 329-43.5(a) (1993); and one count of Commercial Promotion of Marijuana in the Second Degree (Count Four), in violation of HRS § 712-1249.5(1)(a) (1993).

On May 31, 2005, Birano entered a No Contest Plea on Counts One, Three, and Four pursuant to a plea agreement with the

^{1/} The Honorable Shackley F. Raffetto presided.

State. Birano and the State expressly stipulated under paragraph 8 of the agreement that the State was "free to argue for up to 20 years indeterminate prison term on Count One and a mandatory minimum of 6 years, 8 months under HRS [§] 706-606.5," while Birano was "free to argue the applicable mandatory minimum term is five years under HRS [§] 712-1240.6(2)." Upon the State's Motion, the circuit court dismissed Counts Two and Five.

On July 26, 2005, the circuit court sentenced Birano, pursuant to the plea agreement, to the following terms of imprisonment:

Count One: twenty (20) years;
Count Three: five (5) years; and
Count Four: ten (10) years.

All terms were to run concurrently. The circuit court ruled that the repeat offender statute (HRS § 706-606.5(1)(a)(ii) (Supp. 2005)) applied and set Birano's mandatory minimum term of imprisonment at six years and eight months.^{2/} The circuit court entered the Judgment on July 27, 2005. Birano timely appealed on August 26, 2005.

On appeal, Birano argues that (1) the plain and specific language of Hawaii Revised Statutes (HRS) § 712-1240.6 required the circuit court to sentence Birano to a mandatory

^{2/} Birano had a prior felony conviction in 1999 for Burglary in the First Degree (HRS § 708-810 (1993)), a class B felony.

minimum term of imprisonment of five years, and (2) the ambiguity and conflict between HRS § 712-1240.6 and HRS § 706-606.5 (Supp. 2005) must be resolved in favor of Birano.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues as raised by the parties, we conclude that the repeat offender statute, HRS § 706-606.5, applied to Birano, and the circuit court was correct in sentencing Birano to a mandatory minimum of six years and eight months. HRS § 706-606.5(1)(a)(ii); State v. Delmondo, 67 Haw. 531, 533, 696 P.2d 344, 346 (1985); Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999).

Therefore,

The Judgment filed on July 27, 2005 in Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 30, 2006.

On the briefs:

Taryn R. Tomasa
Deputy Public Defender
for Defendant-Appellant.

Artemio C. Baxa
Deputy Prosecuting Attorney,
County of Maui
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge