

**Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000153  
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NO. CAAP-15-0000153

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
MORELI PAULO TALAMOA, also known as MORELI PAULO,  
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 13-1-0738)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Moreli Paulo Talamoa, also known as Moreli Paulo (Talamoa) appeals from the Judgment of Conviction and Sentence (Judgment), filed on February 18, 2015 in the Circuit Court of the First Circuit (circuit court).<sup>1</sup> Judgment was entered against Talamoa for Robbery in the Second degree in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (2014), a class B felony.<sup>2</sup> Talamoa was sentenced to ten (10) years imprisonment, and pursuant to the circuit court's grant of

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<sup>1</sup> The Honorable Dexter D. Del Rosario presided.

<sup>2</sup> HRS § 708-841(1)(a) provides:

**§708-841 Robbery in the second degree.** (1) A person commits the offense of robbery in the second degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

(a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

Plaintiff-Appellee State of Hawai'i's (State) Motion for Sentencing of Repeat Offender, Talamoa must serve a "reduced mandatory minimum: three (3) years and four (4) months as a repeat offender" under HRS § 706-606.5(1)(a)(iii) (2014).<sup>3</sup>

Talamoa contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence under HRS § 706-606.5 because: (1) article I, §§ 5 and 10 of the Hawai'i Constitution require the Complaint to have stated that Talamoa was subject to mandatory minimum sentencing as a repeat offender under HRS § 706-606.5; (2) the Sixth and Fourteenth Amendments of the United States Constitution require the question of Talamoa's qualification as a repeat offender to have been submitted to a jury and proven beyond a reasonable doubt; and (3) article I, §§ 5, 10, and 14 of the Hawai'i Constitution require the question of Talamoa's qualification as a repeat offender to have been submitted to the jury and proven beyond a reasonable doubt.

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 raised by the parties, as well as the relevant statutory and case law, and because the Hawai'i Supreme Court's recent decision in State v. Auld, 136 Hawai'i 244, 361 P.3d 471 (2015) has only prospective effect and therefore does not apply to this case, we resolve Talamoa's points of error as follows and affirm.

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<sup>3</sup> HRS § 706-606.5(1)(a)(iii) provides in pertinent part:

**§706-606.5 Sentencing of repeat offenders.** (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies[,] . . . and who has a prior conviction or prior convictions for the following felonies . . . [,] shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

(a) One prior felony conviction:

(iii) Where the instant conviction is for a class B felony--three years, four months[.]

The arguments that Talamoa raises in this case were addressed by this court in State v. Auld, No. CAAP-13-0002894, 2015 WL 356286 (Haw. App. Jan. 27, 2015). In Auld, we affirmed the defendant's mandatory minimum sentence under HRS § 706-606.5 as a repeat offender, concluding that under materially similar circumstances as this case, the defendant's constitutional rights to a trial by jury and due process were not violated. In particular, we held that: under the federal and state case law at that time, a prior conviction for purposes of mandatory minimum sentencing did not need to be proven to a jury beyond a reasonable doubt; and the defendant's due process rights were not violated where his prior convictions were not included in the charging document.

The Hawai'i Supreme Court accepted an application for certiorari in Auld, overruled prior precedent, and expressly noted that "we announce new rules in this case." Auld, 136 Hawai'i at 255, 361 P.3d at 482. The Hawai'i Supreme Court held that "under article I, sections 5 and 10 of the Hawai'i Constitution, the State must allege the predicate prior conviction(s) in a charging instrument in order to sentence the defendant to a mandatory minimum sentence as a repeat offender under HRS § 706-606.5." Id. at 257, 361 P.3d at 484. The Hawai'i Supreme Court further held that "as a matter of state law," the ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000) which provides an exception for the "fact of [a] prior conviction"<sup>4</sup> "does not apply to repeat offender sentencing under HRS § 706-606.5, and [thus] a jury is required to find that the defendant's prior conviction(s) have been proved beyond a reasonable doubt to trigger the imposition of a mandatory minimum sentence under that statute." Id.

The Hawai'i Supreme Court considered the application of

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<sup>4</sup> In Apprendi, the United States Supreme Court held that "[o]ther 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." 530 U.S. at 490 (emphasis added).

its rulings in Auld, concluding that "[a]s these new rules result from the express overruling of prior appellate precedent holding that the Apprendi rule did not apply to mandatory minimum sentencing and that notice of repeat offender sentencing did not need to be given in a charging instrument, they are given prospective effect only." Id. (emphasis added). Therefore, the Hawai'i Supreme Court affirmed this court's judgment on appeal in Auld, which had affirmed the defendant's conviction and sentence in the circuit court.

In Auld, the Hawai'i Supreme Court also addressed what it means to prospectively apply a new rule. The Hawai'i Supreme Court stated that a purely prospective effect of a new rule "means that the rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." Id. at 255, 361 P.3d at 482. By contrast, a limited or pipeline retroactive effect means that "the rule applies to the parties in the decision and all cases that are on direct review or not yet final as of the date of the decision[.]" Id. at 256-57, 361 P.3d at 482-83.

As even Talamoa recognizes in his reply brief, which was filed soon after the Hawai'i Supreme Court's opinion was issued in Auld, "the Auld court held that its holdings would apply 'prospectively only,' which would deny Talamoa relief."<sup>5</sup> The Hawai'i Supreme Court published Auld on November 24, 2015. The Judgment in this case was filed on February 18, 2015. Thus, because Talamoa was convicted and sentenced before the Auld opinion was issued, Auld's prospective rule changes do not apply to Talamoa. Therefore, for purposes of this case, we consider this court's ruling in Auld, CAAP-13-0002894, under the existing case law at that time, which was affirmed by the Hawai'i Supreme

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<sup>5</sup> We will not address Talamoa's contention that the Hawai'i Supreme Court's "prospective-only" ruling must be reconsidered and/or clarified, as we are bound by the Hawai'i Supreme Court's express ruling on the issue.

Court.

**1. Due Process**

Talamoa contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence because the Complaint failed to include HRS § 706-606.5 as subjecting Talamoa to sentencing as a repeat offender, thus violating Talamoa's due process rights under article I, §§ 5 and 10 of the Hawai'i Constitution. Talamoa cites to State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008) for the proposition that "a charging instrument, be it an indictment, complaint, or information, must include all 'allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed.'" Id. at 398, 184 P.3d at 150 (citation omitted).

In Auld, No. CAAP-13-0002894, relying on the case law at that time, we noted that the Hawai'i Supreme Court in Jess "cited favorably to the federal standard that prior convictions are an exception to the mandate to include sentence enhancements in the charging instrument." Id. at \*2 (citing Jess 117 Hawai'i at 397-98, 184 P.3d at 149-50). In addition, we noted that in State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979), the Hawai'i Supreme Court expressly stated that "[w]hile due process does not require that notice be given prior to the trial of the underlying offense, it does require that a defendant to be sentenced under HRS § 706-606.5 be given reasonable notice and afforded the opportunity to be heard." Auld, No. CAAP-13-0002894, 2015 WL 356286, at \*2 (brackets omitted) (quoting Freitas 61 Haw. at 277, 602 P.2d at 925). This court concluded that because the defendant, Auld, filed an opposition to the State's motion for imposition of the mandatory minimum sentence, was represented by counsel who presented argument at the hearing on the State's motion, did not object to the circuit court receiving into evidence the sealed and certified judgments from Auld's two prior felony convictions, and did not object to judicial notice of the records in both prior convictions, Auld's due process rights were not violated. Auld, No. CAAP-13-0002894, 2015 WL 356286, at \*2.

With regard to whether Talamoa was given reasonable notice and afforded the opportunity to be heard, similar to Auld, Talamoa filed an opposition to the State's Motion for Sentencing of Repeat Offender, was represented by counsel who presented argument at the hearing on the State's motion, and did not object to the circuit court receiving into evidence Talamoa's one prior felony conviction. Thus, similar to our reasoning in Auld, No. CAAP-13-0002894, 2015 WL 356286, Talamoa's due process rights were not violated in this case.

## **2. Trial by jury**

Talamoa contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence under HRS § 706-606.5, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, as well as article I, §§ 5, 10, and 14 of the Hawai'i Constitution, because the question of Talamoa's qualification as a repeat offender should have been submitted to a jury and proven beyond a reasonable doubt.

This court in Auld, No. CAAP-13-0002894, rejected the same argument under the existing case law at the time. As in Auld, Talamoa relies on the United States Supreme Court decision in Alleyne v. United States, — U.S. — , 133 S. Ct. 2151 (2013) for the proposition that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Auld, No. CAAP-13-0002894, 2015 WL 356286, at \*2 (quoting Alleyne, — U.S. at —, 133 S. Ct. at 2155). However, we noted that the United States Supreme Court in Alleyne expressly noted that it did not disturb its prior case law that held that a prior conviction is not an element of a crime and does not have to be proven to a jury beyond a reasonable doubt. Auld, No. CAAP-13-0002894, 2015 WL 356286, at \*2 (citing Alleyne, — U.S. at —, 133 S. Ct. at 2160 n.1). We further noted that the Hawai'i Supreme Court "has expressly recognized an exception for prior convictions from the requirement that a sentence enhancement must be proven beyond a reasonable doubt to the trier of fact." Auld, No. CAAP-13-0002894, 2015 WL 356286, at \*2 (citing State v.

Maugaotega, 115 Hawai'i 432, 446-47 & n. 15, 168 P.3d 562, 576-77 & n. 15 (2007)).

Based on our decision in Auld, No. CAAP-13-0002894, 2015 WL 356286, under the law applicable at that time and as applicable to this case, Talamoa's arguments in this appeal must fail.

Therefore,

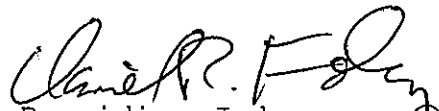
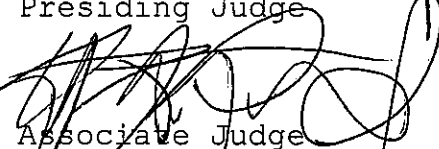
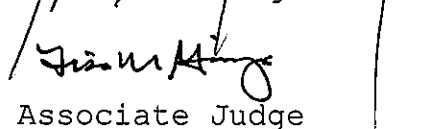
IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence filed on February 18, 2015 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 17, 2016.

On the briefs:

Phyllis J. Hironaka,  
Deputy Public Defender,  
for Defendant-Appellant.

Donn Fudo,  
Deputy Prosecuting Attorney,  
for Plaintiff-Appellee.

  
Presiding Judge  
  
Associate Judge  
  
Associate Judge