

NOS. 22911, 22912, AND 22913

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
GEORGE EDWARD WHITE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 95-0638, 95-1438, AND 95-1883)

MEMORANDUM OPINION

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

Defendant-Appellant George Edward White (White) appeals each of the circuit court's July 16, 1999 Order of Resentencing[;] Revocation of Probation entered in Criminal No. 95-0638 (No. 22911), Criminal No. 95-1438 (No. 22912), and Criminal No. 95-1883 (No. 22913). On December 6, 1999, these three appeals were consolidated under No. 22911 for briefing. We affirm.

In the three cases, the relevant events occurred chronologically as follows:

Criminal No. 95-0638

March 29, 1995	Indictment charged White with Promoting a Dangerous Drug in the Second Degree, Hawai'i Revised Statutes (HRS) § 712-1242(1)(c), a class B felony, on November 8, 1994.
June 29, 1995	White pled no contest.

Criminal No. 95-1438

July 18, 1995 Indictment charged White with Promoting a Dangerous Drug in the Second Degree, HRS § 712-1242(1)(c), a class B felony, on December 28, 1994.

November 24, 1995 White pled guilty.

Criminal No. 95-1883

September 14, 1995 Indictment charged White with Promoting a Dangerous Drug in the Third Degree, HRS § 712-1243, a class C felony, on February 6, 1995.

November 24, 1995 White pled guilty.

Criminal Nos. 95-0638, 95-1438, and 95-1883

November 24, 1995 In each case, the court found White guilty and sentenced him to probation for five years. Special conditions of probation were imposed. One of the conditions was a jail term of 229 days with credit for time served since April 7, 1995. Another of the conditions was that White was prohibited from being in the area "bordered by River Street, Vineyard Boulevard, Nimitz Highway, and Bethel Street."

May 31, 1996 In each case, Plaintiff-Appellee State of Hawai'i (the State) filed a Motion for Revocation of Probation, Resentencing, and Issuance of Bench Warrant. The grounds were that White violated the special conditions of probation by failing (a) to make any contact with the probation officer since March 21, 1996, (b) to notify the probation officer of his current address, (c) to notify the probation officer of his being arrested on March 11, 1996 for drug related offenses, and (d) to not be in the prohibited area.

August 22, 1996 In each case, the court entered an Order of Resentencing/Revocation of Probation, resentencing White to another five-year term of probation. Special conditions of

probation were imposed. One of the conditions was a jail term of three months with credit for time served back to June 5, 1996.

- February 21, 1997 In each case, the State filed a Motion for Revocation of Probation, Resentencing and Issuance of Bench Warrant. The grounds were that he violated the special conditions of probation by failing (a) to report to the Adult Probation Division since October 15, 1996, and (b) to notify the probation officer of his arrest on January 11, 1997, for the offense of Assault in the Third Degree at Kakauliki Street and Nimitz Highway.
- July 25, 1997 In each case, the court entered its Order Denying Motion for Revocation of Probation, Resentencing and Issuance of Bench Warrant Filed 2/21/97.
- June 4, 1997 In each case, the State filed a Motion for Revocation of Probation, Resentencing and Issuance of Bench Warrant. The grounds were that White violated the special conditions of his probation by failing (a) to report to his probation officer and (b) to report the changes in his address, causing his whereabouts to be unknown.
- November 19, 1998 In each case, the court entered its Order of Resentencing; Revocation of Probation, resentencing White to another five-year term of probation nunc pro tunc to August 15, 1996. Special conditions of probation were imposed, but no jail term.
- April 22, 1999 In each case, the State filed a Motion for Revocation of Probation, Resentencing and Issuance of Bench Warrant. The grounds were that White violated the special conditions of probation by failing (a) to report to his probation officer since November 20, 1998, (b) to notify his probation officer of changes in his address, (c) to inform his probation officer of his arrest on December 2, 1998 for the offense of Promoting a Dangerous Drug in the Third Degree at

35 North Hotel Street, which is located within the prohibited area.

July 15, 1999

At the hearing, White stipulated to the violations and "ask[ed] the Court to consider placing him back on probation, if the Court is so inclined, to put a special term of incarceration because of his failure to report in." The court orally found that White's "violations are substantial and flagrant" and "that [White] has inexcusably failed to comply with the substantial requirements imposed as a condition of his probation[.]"

July 16, 1999

In each case, the court entered an Order of Resentencing[;] Revocation of Probation. The order states the court's finding "that [White] has inexcusably failed to comply with a substantial requirement of the Judgment setting forth the terms and conditions of probation." In Criminal Nos. 95-0638 and 95-1438, the court sentenced White to incarceration for ten years. In Criminal No. 95-1883, the court resentenced White to incarceration for five years. The court ordered all terms of incarceration to be served concurrently.

August 9, 1999

In each case, White filed a Motion for Reconsideration of Resentencing.

September 16, 1999

At the hearing on White's August 9, 1999 motion for reconsideration, White's request for the motion be heard by a different judge was denied. White then personally stated to the court:

Yes, sir. I mean I kind of think this is a little bit too harsh. I mean you got people coming within the walls of this courthouse, they doing a whole lot more serious crimes than what I'm doing. Take for instance a few cases that's been heard against children. And I mean I'm just appalled that these people can just walk away with a little bit of time that they're serving.

Me, I'm out working and trying to make a living. You know what I mean? I mean I just think it's a little bit too extreme.

The court orally denied White's motion.

October 8, 1999 In each case, White's counsel filed a notice of appeal from the July 16, 1999 Order of Resentencing[;] Revocation of Probation.

POINT ON APPEAL

White contends that the circuit court abused its discretion when it entered its July 16, 1999 Order of Resentencing[;] Revocation of Probation, resentencing him to incarceration for concurrent terms of ten, ten, and five years.

RELEVANT STATUTES

HRS § 706-660 (1993) states that the following is the "maximum length of imprisonment" for the following crimes:

- (1) For a class B felony - 10 years.
- (2) For a class C felony - 5 years.

HRS § 706-625 (Supp. 1999) states, in relevant part, as follows:

(3) The court shall revoke probation if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony. The court may revoke . . . probation if the defendant has been convicted of another crime other than a felony.

(4) The court may modify the requirements imposed on the defendant or impose further requirements, if it finds that such action will assist the defendant in leading a law-abiding life.

(5) When the court revokes probation, it may impose on the defendant any sentence that might have been imposed originally for the crime of which the defendant was convicted.

HRS § 706-624(2) (a) (1993) authorizes, as a further condition of probation, an order requiring the defendant to "[s]erve a term of imprisonment not exceeding one year in felony cases[.]"

DISCUSSION

This case involves HRS §§ 706-625(3) and (5). It does not involve HRS § 706-625(4) because probation was revoked and the court sentenced White to the maximum prison term.

When the circuit court exercised its authority pursuant to HRS § 706-625(5), White sought a sentence of probation and a special term of incarceration on the ground that "[he's employed at least as a fisherman. . . . So . . . he has a different lifestyle, it is true, and that lifestyle is being out on a boat and I guess, you know, being that lifestyle, it's not always consistent with other citizens who have a regular schedule and are willing to report in -- or take that responsibility."

In this appeal, White's argument is as follows:

In the instant case, [White], a commercial fisherman, stipulated to the violation contained in the Motion for Revocation Of Probation, Resentencing And Issuance Of Bench Warrant. The violations [White] stipulated to were that he failed to report to his probation officer and he was found in the geographical restriction imposed by his probation terms.

In the previous motions to revoke his probation, the other courts¹ resentenced [White] to probation on two (2) occasions, one nunc pro tunc, and the other court denied the motion. The primary basis for the previous motions were [White's] failure to report to his probation officer.

¹ It was not other courts. It was the same court and different judges.

The Court abused [its] discretion in resentencing [White] to terms of imprisonment and should have resentenced [White] to probation with a special term of imprisonment not exceeding one year. State v. Gambelia, 69 Haw.[424,] at p. 426[744 P.2d 1208, 1209 (1987)].

It appears that White misunderstands the meaning of probation. Probation is a

[s]entence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration. It is not a matter of right, but rather an act of grace and clemency available only to those defendants found eligible by the court. It implies that defendant has a chance to prove himself and its purpose is reform and rehabilitation. For this purpose the defendant must agree to specified standards of conduct and the public authority operating through the court impliedly promises that if he makes good, his probation will continue; however, his violation of such standards subjects his liberty to revocation.

Black's Law Dictionary 1202 (6th ed. 1990) (citations omitted).

White contends that the consequence of the third revocation of his probation should have been the same as the consequence of the first and second revocations of his probation. We disagree. In our view, the fact that three prior periods of probation and two prior short terms of incarceration did not motivate White to comply with the express special conditions of his probations clearly established that a sentence harsher than probation was no less than within the discretion of the court to impose pursuant to HRS § 706-625(5).

CONCLUSION

Accordingly, in each of the three appeals, we affirm the circuit court's July 16, 1999 Order of Resentencing[;] Revocation of Probation.

DATED: Honolulu, Hawai'i, November 27, 2000.

On the briefs:

Randal I. Shintani
for Defendant-Appellant. Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu, Associate Judge
for Plaintiff-Appellee.

Associate Judge