

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26989

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ANTHONY KALANI AKAU, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-2289)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Anthony Kalani Akau (Akau) appeals from the Judgment entered in the Circuit Court of the First Circuit^{1/} (circuit court) on October 15, 2004.

On October 21, 2003, the State of Hawaii (the State) indicted Akau for three counts of Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242 (1993 & Supp. 2002) in Cr. No. 03-1-2289 (hereafter referred to as "the distribution case"). Following Akau's guilty plea, the circuit court sentenced him to ten years of imprisonment, with a mandatory minimum of six months, and ordered him to pay \$500 for a drug demand reduction assessment.

The charges against Akau in the distribution case stemmed from allegations that on three separate dates Akau sold crystal methamphetamine to two different undercover police officers. Akau was not immediately arrested for these offenses because the undercover officers were not ready to "surface." However, based on Akau's conduct in distributing the drugs, the police obtained a search warrant for Akau's person and personal effects. The execution of the search warrant led to the recovery of methamphetamine and drug paraphernalia from Akau's person, and, in Cr. No. 02-1-2644, Akau was subsequently charged with,

^{1/} The Honorable Michael A. Town presided.

convicted of, and sentenced for Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (1993 and Supp. 2002), and Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993) (hereinafter referred to as the possession case).

On appeal, Akau argues that the offenses in the distribution and possession cases should have been charged together in one complaint or indictment. Specifically, he contends the circuit court (1) abused its discretion by denying his Motion to Dismiss Counts I-III (Motion to Dismiss) and wrongly entered Conclusions of Law (COL) 3, 6, 7, 8, and 9 in its Order Denying Defendant's Motion to Dismiss Counts I-III; and (2) abused its discretion by denying his Motion for Act 161 Sentencing Eligibility (Sentencing Motion) and wrongly entered COLs 3, 4, and 5 in its Order Denying Defendant's Motion for Act 161 Sentencing Eligibility. Akau requests that we overrule the circuit court's denial of his Motion to Dismiss. Alternatively, he requests that we vacate the circuit court's sentence and remand for the court to sentence him as a first-time offender pursuant to the Act 161 version of HRS § 706-622.5 (Supp. 2002) (see, 2002 Haw. Sess. L. Act 161, § 3 at 572).

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, we conclude that Akau's contentions are without merit.

(1) Akau argues that because the offenses charged in the distribution case took place before the execution of the search warrant and were in fact the predicate for the search warrant, the distribution and possession^{2/} cases were part of the "same episode" and therefore, pursuant to HRS §§ 701-111(1)(b)

^{2/} On December 5, 2002, in Cr. No. 02-1-2644, the State charged Akau with Promoting a Dangerous Drug in the Third Degree and Unlawful Use of Drug Paraphernalia, to which Akau pled no contest. The circuit court sentenced Akau to, inter alia, a term of five years of probation and one year of incarceration pursuant to Hawaii Revised Statutes § 706-622.5 (Supp. 2003).

(1993) and 701-109(2) (1993), the charges against him in the distribution case should have been dismissed.

HRS § 701-109(2) reflects a policy that all charges that arise from one episode be consolidated in one trial so a defendant need not face the expense and uncertainties of multiple trials based on essentially the same episode. Commentary on HRS § 701-109.

Akau's case is similar to State v. Servantes, 72 Haw. 35, 804 P.2d 1347 (1991), because the State's distribution case against Akau provided the State with probable cause to search his person and personal effects. The State's search warrant, in turn, gave rise to the possession case. However, Akau's case is distinguishable from Servantes because the search warrant for Akau was based on three separate buys/sales of crystal methamphetamine from/to him conducted on three separate dates (October 8 and 22 and November 21, 2002) -- all made before the police department executed its search warrant on Akau and his personal effects on November 26, 2002. The dates and circumstances involved in the distribution and possession cases were more disparate than were the dates and circumstances in the two cases involved in Servantes. Hence, we do not agree that the possession and distribution cases were part of the "same episode" and, as such, should have been consolidated into one trial.

Akau's case is more like State v. Kelihelehua, 105 Hawai'i 174, 95 P.3d 605 (2004), in that the criminal offenses were not closely related in time, place, or circumstances.

The Supreme Court of Hawai'i explained in State v. Carroll, 63 Haw. 345, 351, 627 P.2d 776, 780 (1981), that HRS § 701-109(2) was designed to prevent the State from harassing a defendant with successive prosecutions where the State had failed to convict the defendant or was dissatisfied with the punishment previously ordered. However, the State's conviction of Akau in the possession case was successful, as Akau was convicted of Promoting a Dangerous Drug in the Third Degree and Unlawful Use

of Drug Paraphernalia and sentenced to a term of five years of probation and one year of incarceration. There is no evidence in the record on appeal that the State attempted to harass Akau by prosecuting the possession case separately from the distribution one.

The circuit court did not err in denying Akau's Motion to Dismiss.

(2) Akau appears to argue that the circuit court erred in denying his Sentencing Motion because when the court sentenced him as a first-time offender under the Act 161 version of HRS § 706-622.5 in the possession case, he became part of a "special class of offenders" who benefit from Act 161 and, as such, the court should have sentenced him again as a first-time offender in the distribution case.

In the circuit court's June 18, 2004, Order Denying Defendant's Motion for Act 161 Sentence Eligibility, the circuit court made the following relevant COLs:

II. CONCLUSIONS OF LAW

3. Inasmuch as the instant case involves [Akau's] distribution of crystal methamphetamine, HRS Section 706-622.5 does not apply to [Akau].

4. Where distribution of methamphetamine is involved, HRS Section 712-1242(3) (1997 Supp.) mandates a ten-year term of incarceration, with a mandatory term between six (6) months to five (5) years.

5. The legislative history of HRS Section 706-622.5 indicates that [Akau], charged with distributing methamphetamine, was not eligible for probation, and therefore HRS 712-1242(3) required that [Akau] be sentenced to a mandatory indeterminate term of incarceration of ten years with an appropriate mandatory minimum term of incarceration.

HRS § 712-1242(3) (Supp. 2002) provides:

§712-1242 Promoting a dangerous drug in the second degree. *** [sic]

(3) Notwithstanding any law to the contrary, except for first-time offenders sentenced under section 706-622.5, if the commission of the offense of promoting a dangerous drug in the second degree under this section involved the possession or distribution of methamphetamine, or any of its

salts, isomers, and salts of isomers, the person convicted shall be sentenced to an indeterminate term of imprisonment of ten years with a mandatory minimum term of imprisonment, the length of which shall be not less than six months and not greater than five years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

(Emphasis added.)

HRS § 706-622.5 provides in relevant part:

§706-622.5 Sentencing for first-time drug offenders; expungement. (1) Notwithstanding any penalty or sentencing provision under Part IV of chapter 712, a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate . . . shall be sentenced in accordance with subsection (2) [.]

As the State points out, Akau was charged with distributing crystal methamphetamine on three different occasions. Therefore, HRS § 706-622.5 does not apply to him.

Therefore,

The Judgment filed on October 15, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 21, 2007.

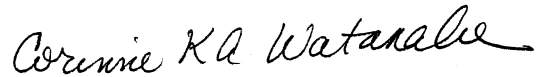
On the briefs:

Christopher R. Evans
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Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge