***** FOR PUBLICATION *****

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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No. 23135
STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JUSTIN VAN DEN BERG, Defendant-Appellant.
(CR. NO. 91-0306(3))

No. 22931
STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

GARY G. KARAGIANES, Defendant-Appellant.
(CR. NO. 92-0304(2))

NO. 23135 & 22931

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NOS. 91-0306(3) & 92-0340(2))

MARCH 17, 2003

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ., AND CIRCUIT JUDGE HIRAI, ASSIGNED BY REASON OF VACANCY; ACOBA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY MOON, C.J.

Inasmuch as the legal issues presented by appeal Nos. 23135 and 22931 are identical, we consolidate these appeals for purposes of disposition. In appeal No. 23135, defendant-

appellant Justin Van den Berg appeals from: (1) the December 30, 1999 order granting plaintiff-appellee State of Hawaii's (the prosecution) motion to reconsider the reversal of Van den Berg's firearms conviction, which effectively reinstated the firearms conviction; and (2) the February 17, 2000 order denying Van den Berg's request that the mandatory minimum sentence on his second degree murder conviction, imposed in conjunction with the separate sentence on his firearms conviction, be vacated on double jeopardy grounds because the mandatory minimum sentence was predicated upon the single use of a firearm. Both orders were entered by the Honorable Joseph Cardoza.

In appeal No. 22931, defendant-appellant Gary Karagianes similarly appeals from the September 29, 1999 order denying his motion to (1) reverse his firearms conviction and (2) vacate the mandatory minimum sentence on his second degree murder conviction on double jeopardy grounds. The September 29, 1999 order was entered by the Honorable Shackley Raffetto.

For the reasons set forth below, we reverse the firearms convictions of both Van den Berg and Karagianas [hereinafter, collectively, Appellants].

I. BACKGROUND

A. Van den Berg

On November 14, 1996, the Intermediate Court of Appeals affirmed Van den Berg's convictions of: (1) murder in the second

degree; (2) possession or use of a firearm in the commission of a felony, in violation of Hawai'i Revised Statutes (HRS) § 134-6(a) (1990)[1] [hereinafter, the HRS § 134-6(a) or firearms conviction]; and (3) carrying a pistol or revolver without a license. State v. Van den Berg, No. 17304 (Haw. Ct. App. Nov. 18, 1996) (mem.). As a result, Van den Berg continued to serve his sentences of: (1) life imprisonment, with the possibility of parole, for second degree murder, with a mandatory minimum term of fifteen years, imposed pursuant to HRS § 706-660.1 (1990);[2] (2) twenty years for the firearms conviction, with a mandatory minimum term of ten years; and (3) ten years for the carrying without a license conviction.

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[1] HRS § 134-6(a) states in relevant part:

> **Possession or use of firearm in the commission of a felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly possess or intentionally use or threaten to use a firearm while engaged in the commission of a felony, whether the firearm was loaded or not, and whether operable or not.

[2] HRS § 706-660.1 was amended in 1990 and states in relevant part:

> (a) A person convicted of a felony, where the person had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
>
> (1) For murder in the second degree and attempted murder in the second degree - up to fifteen years;
> (2) For a class A felony - up to ten years;
> (3) For a class B felony - up to five years; and
> (4) For a class C felony - up to three years.

On August 16, 1999, the circuit court granted Van den Berg's "Motion to Correct Illegal Sentence" (First Motion to Correct) and reversed his firearms conviction, pursuant to State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998). Thereafter, the prosecution filed a motion for reconsideration of the reversal of the Van den Berg's firearms conviction. After several hearings, the circuit court, on December 30, 1999, granted the prosecution's motion and denied Van den Berg's First Motion to Correct, effectively reinstating his firearms conviction.

On November 26, 1999, Van den Berg filed another "Motion to Correct Illegal Sentence," arguing that double jeopardy principles prohibited the imposition of: (1) a mandatory minimum term of imprisonment on the firearms conviction; and (2) a mandatory minimum term of imprisonment on the second degree murder conviction in conjunction with a separate sentence for the firearms conviction when the mandatory minimum sentence was predicated upon the same use of a firearm upon which the firearms conviction was based. On February 17, 2000, the circuit court agreed, in part, and vacated the mandatory minimum term of imprisonment for the firearms conviction; however, the court affirmed the mandatory minimum sentence for the second degree murder conviction and the separate sentence for the firearms conviction. Van den Berg timely appealed.

B. Karagianes

On January 12, 1996, this court affirmed the convictions of Karagianes for murder in the second degree and possession or use of firearm in the commission of a felony [hereainfter, the HRS § 134-6(a) or firearms conviction]. State v. Karagianes, No. 17612 (Haw. Jan. 12, 1996) (mem.). As a result, Karagianes continued to serve his sentences of: (1) life imprisonment, with the possibility of parole, for second degree murder, with a mandatory minimum term of fifteen years, imposed pursuant to HRS § 706-660.1; and (2) ten years of imprisonment for the firearms conviction.

Like Van den Berg, Karagianes, on May 11, 1999, moved to have his firearms conviction reversed pursuant to Jumila and, on June 8, 1999, moved to vacate the fifteen-year mandatory minimum sentence imposed on the second degree murder conviction based on double jeopardy grounds. Both motions were consolidated for hearing, and, on September 29, 1999, the circuit court denied both motions. Karagianes timely appealed.

II. STANDARDS OF REVIEW

A. Statutory Interpretation

"The question whether a defendant can be convicted of both carrying or use of firearm in the commission of a separate felony and the separate felony is a question of statutory

interpretation. We interpret statutes de novo." State v. Brantley, 99 Hawai'i 463, 464, 56 P.3d 1252, 1253 (2002) (citing State v. Cornelio, 84 Hawai'i 476, 483, 935 P.2d 1021, 1028 (1997) (citations omitted)).

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists . . . .
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. Gray [v. Administrative Director of the Court, 84 Hawai'i 138, 148, 931 P.2d 580 (1997) (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).
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> State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) . . . (some brackets omitted and ellipses points added and some in original).

Brantley, 99 Hawai'i at 464-65, 56 P.3d at 1253-54 (quoting State v. Rauch, 94 Hawai'i 315, 322-23, 13 P.3d 324, 331-32 (2000)).

B. Retroactivity

> The Constitution neither prohibits nor requires retrospective effect. . . . Free to apply decisions with or without retroactivity, the Court's task is to exercise its discretion, weighing the merits and demerits of retroactive application of the particular rule. . . . In making [those] determination[s], the [United States Supreme] court (sic) has given consideration to three factors: (a) the purpose to be served by the newly announced rule, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

State v. Ikezawa, 75 Haw. 210, 220, 857 P.2d 593, 598 (1993) (quoting State v. Santiago, 53 Haw. 254, 268-69, 492 P.2d 657, 665-66 (1971) (citations omitted) (some ellipses points added and some in original) (internal brackets and notations in original)).

III. DISCUSSION

A. The Firearms/HRS § 134-6(a) Convictions

Appellants contend that the circuit court erred by failing to apply Jumila pursuant to the doctrine of stare decisis and refusing to reverse their convictions and sentences for violating HRS § 134-6(a).

In Jumila, this court stated that the underlying felony to HRS § 134-6(a), i.e. murder in the second degree, will always be established by proof of the same or less than all the facts required to establish the commission of the HRS § 134-6(a) offense, and, therefore, the underlying felony was an included offense of HRS § 134-6(a). Jumila, 87 Hawai‘i at 3, 950 P.2d at

1203. Under HRS § 701-109 (1993),[3] a defendant may not be convicted of more than one offense if one of those offenses is included within another. We concluded that, although the legislature could create an exception to the statutory prohibition set forth in HRS § 701-109, the legislature had not clearly done so when it enacted HRS § 134-6(a). See id. at 5, 950 P.2d at 1205. We further stated that

> [w]e have found no indications in the language of HRS § 134-6(a) or the legislative history preceding its original enactment in 1990 to suggest[] that the legislature intended that an individual could be convicted of both an HRS § 134-6(a) offense and its underlying felony or that the legislature otherwise intended to create an exception to HRS § 701-109. . . .

Id. (emphasis added). Therefore, "[i]n light of the attenuated legislative history in this regard," we held that a defendant could not be convicted of both the HRS § 134-6(a) offense and the

[3] The section of the 1993 version of HRS § 701-109 is virtually identical to the 1985 version that was applicable in Appellants' cases and provides in relevant part:

> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
> (a) One offense is included in the other, as defined in subsection (4) of this section[.]

Subsection (4) provides in relevant part:

> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]

separate, underlying felony and reversed the defendant's HRS § 134-6(a) conviction. Id.

The aforementioned holding in Jumila was subsequently overruled by this court in Brantley, based upon our recognition that the language of HRS § 134-6(a) at issue in both Jumila and Brantley was the language that existed as a result of the 1993 amendments to the statute.[4] Brantley, 99 Hawai'i at 469, 56 P.3d at 1258. The amendments and legislative history leading up to the 1993 version of HRS § 134-6(a) (1993 Statute), under which the defendant in Jumila was charged, set forth substantive changes that belied the holding in Jumila. Therefore, we

[4] HRS § 134-6(a)(1993) states in relevant part (brackets indicate material deleted from the 1990 version and underscoring indicate material added by the 1993 amendment):

> **[Possession] Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly [possess] carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not[.]; provided that a person shall not be prosecuted under this subsection where the separate felony is:
>
> > (1) A felony offense otherwise defined by this chapter;
> > (2) The felony offense of reckless endangering in the first degree under section 707-713;
> > (3) The felony offense of terroristic threatening in the first degree under section 707-716(a), 707-716(b), and 707-716(d); or
> > (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under 708-821 and the firearm is the instrument or means by which the property damage is caused.

1993 Haw. Sess. L. Act 239, § 1 at 418.

concluded in Brantley that, when considering "the language of [HRS § 134-6(a)] and the legislative understanding embedded in the 1993 amendments that conviction of both offenses was permitted, we are convinced that the legislature intended to permit convictions of both HRS § 134-6(a) and the separate felony at the time of Brantley's conviction." Id.

Additionally, Section 2 of Act 239, which amended HRS § 134-6(a) in 1993, expressly stated that the amendments to the act were not to "affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." 1993 Haw. Sess. L. Act 239 § 2, 419 (emphasis added). The 1993 amendments to HRS § 134-6(a) became effective on June 18, 1993. Id.

In the present case, the record indicates that Appellants' respective proceedings were "begun" before June 18, 1993: (1) Van den Berg was indicted on October 25, 1991, his trials were conducted in 1992 and 1993, and he was convicted on May 5, 1993; and (2) Karagianes was charged on July 8, 1992, his trials were held in 1992 and 1993, and he was convicted on September 15, 1993. Because the proceedings involving Appellants began prior to the effective date of Act 239, the 1993 Statute did not apply to Appellants. Consequently, neither Brantley nor Jumila, which interpreted the 1993 Statute, is dispositive of the present case. Notwithstanding the above, the core legal analysis

in both Brantley and Jumila is still good law and applicable to the discussion in this case.

This court has not previously interpreted the scope of the original 1990 version of HRS § 134-6(a) [hereinafter, the 1990 Statute). See State v. Ganal, 81 Hawai'i 358, 371, 917 P.2d 370, 383 (1996) (noting that, at the time of the opinion, this court had never interpreted the scope of the original version of HRS § 134-6(a)). We recognize, however, that, in 1992, this court did state that

> [t]he legislature has chosen to make the use of a firearm in the commission of a felony the basis for enhanced sentencing for that felony, and it has also chosen to make such use a separate felony, but it clearly has not chosen to impose two mandatory minimum sentences for one use of a gun.

State v. Ambrosio, 72 Hawai'i 496, 497-98, 824 P.2d 107, 108, reconsideration denied, 72 Hawai'i 616, 829 P.2d 859 (1992). Thus, although the 1990 Statute was applicable in Ambrosio, we also recognize that the court in that case made no inquiry into or analysis of the statutory language or legislative intent of HRS § 134-6(a), but, instead, examined the statutory language of HRS § 706-660.1. Consequently, Ambrosio does not stand for the proposition that, in 1990, the legislature clearly intended for a defendant to be convicted of both HRS § 134-6(a) and the underlying felony.

As previously noted, the original 1990 version of HRS 134-6(a) states:

> **Possession or use of firearm in the commission of a felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly possess or intentionally use or threaten to use a firearm while engaged in the commission of a felony, whether the firearm was loaded or not, and whether operable or not.

1990 Haw. Sess. L. Act 195, § 2 at 422 (codified at HRS § 134-6(a) (1990). Act 195 also specified that "[a]ny person violating this section by possession, using or threatening to use a firearm while engaged in the commission of a felony shall be guilty of a class A felony." Id. (codified at HRS § 134-6(d) (1990)). The plain language of the 1990 Statute requires the actual commission of an underlying felony, all the elements of which the prosecution must prove in order to convict a defendant of violating HRS § 134-6(a). Because the underlying felony to HRS § 134-6(a) is always established by proof of the same or less than all the facts required to establish the HRS § 134-6(a) offense, the underlying felony is, as a matter of law, an included offense of the HRS 134-6(a) offense. See HRS § 701-109(4)(a). Therefore, because HRS § 701-109 prohibits the imposition of separate sentences for both an offense and an offense included therein, unless there is clear legislative intent to create an exception to the statutory prohibition, a defendant may not be sentenced for both the HRS § 134-6(a) offense and the underlying felony. The language of the 1990 Statute does not indicate that the legislature intended to create an exception to HRS § 701-109. In Brantley, we observed that the

substantive changes to the language of the 1993 Statute created an ambiguity in HRS § 134-6(a) with respect to whether the legislature intended to abrogate the general prohibition in HRS § 701-109 against convictions of both HRS § 134-6(a) and the underlying, separate felony. We, therefore, turned to the legislative history for guidance and concluded that the legislature did intend to permit dual convictions. In contrast, the language of the 1990 Statute does not suggest any ambiguity.

In the absence of a clear legislative intent to create an exception to the statutory prohibition in HRS § 701-109, we abide by the plain language of HRS § 134-6(a) and HRS § 701-109, which, as discussed above, prohibits separate sentences for both an offense and an offense included therein. We, therefore, hold that the original 1990 enactment of HRS § 134-6(a) prohibited the conviction of a defendant for both an HRS § 134-6(a) offense and its underlying felony.

Based on the foregoing, we reverse Appellants' convictions of and sentences for the HRS § 134-6(a) offense.

B. HRS § 706-660.1

In light of our reversal of their respective convictions and sentences on the HRS § 134-6(a) charge, we need not address Appellants' arguments that double jeopardy principles bar the imposition of sentences on both the HRS § 134-6(a) conviction and the mandatory minimum term of imprisonment on the

second degree murder conviction, pursuant to HRS § 706-660.1 based on the single use of a firearm.

On the briefs:

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