

NO. 24027

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee

vs.

SAMUEL KAMAE, III, Defendant-Appellant

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APPEAL FROM THE FIFTH CIRCUIT COURT  
(CR. NO. 2338)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Acoba, and Duffy, JJ.)

Defendant-Appellant Samuel Kamae, III (Appellant) appeals from the January 4, 2001 order denying his motion for correction of illegal sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35, entered by the Circuit Court of the Fifth Circuit<sup>1</sup> (the court). The court denied Appellant's motion on the ground that Appellant's Rule 35 motion was untimely.

On appeal, Appellant alleges that: (1) the court erred in dismissing his motion for HRPP Rule 35 relief as untimely; and (2) the court erred in sentencing Appellant as a persistent offender under HRS § 706-662 because, according to Apprendi v. New Jersey, 530 U.S. 466 (2000), the jury, rather than the court, should have determined whether his extended term sentence was "necessary for the protection of the public." HRS § 706-662(1).

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<sup>1</sup> The Honorable George M. Masuoka presided over the matter.

We have carefully reviewed the record and the briefs submitted by the parties and have given due consideration to the arguments advanced and controlling authority. We conclude that the court erred in dismissing the case on jurisdictional grounds, but that Appellant's sentence was legal.

HRPP Rule 35 permits an illegal sentence to be corrected at any time; however, a sentence imposed in an illegal manner must be corrected within ninety days of the final judgment. Appellant contends that the court extended his sentence in violation of the United States and Hawai'i Constitutions because the jury, rather than the judge, should have made the persistent offender determination. This is an "illegal sentence" argument. According to Apprendi, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Read in light of Apprendi, Appellant's argument is not that the jury should have imposed the sentence, but that the facts which would implicate the persistent offender status must be decided by a jury. Hence, the contention is, in effect, that in the absence of jury findings, the judge was not authorized to impose the sentence. In that regard, Appellant's argument is that the sentence was unauthorized and thus illegal, and not simply illegal in the manner in which it was imposed. Therefore, the HRPP Rule 35 motion could be brought at any time and the court

thus erred in dismissing Appellant's HRPP Rule 35 motion on jurisdictional grounds.

Although the court erred as to jurisdiction, Appellant's extended sentence did not violate the rule that "[t]he [United States] Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." Apprendi, 503 U.S. at 466. In State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), this court held that persistent offender status is a determination which "implicates considerations completely extrinsic to the elements of the offense with which the defendant was charged and of which he was convicted" and thus was properly made by the court rather than the jury. Id. at 13, 72 P.3d at 485. Accordingly, Appellant's extended sentence is not illegal. Therefore,

IT IS HEREBY ORDERED that the court's January 4, 2001 order denying Appellant's motion for correction of illegal sentence pursuant to HRPP Rule 35 on jurisdictional grounds is vacated and the case remanded with instructions to the court to enter an order denying the motion. See Norris v. Six Flags Theme Park, Ltd., 102 Hawai'i 203, 207, 74 P.3d 26, 30 (2003) (vacating and remanding because the court should have decided the

jurisdictional question before reaching the merits of the statute of limitations defense).

DATED: Honolulu, Hawai'i, September 30, 2003.

On the briefs:

Samuel Kamae III,  
defendant-appellant,  
pro se.

Tracy Murakami, Deputy  
Prosecuting Attorney,  
for plaintiff-appellee.