

*** NOT FOR PUBLICATION ***

NO. 26345

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

DOVE JOHNSON, Defendant-Appellant.

HONOLULU
OFFICE OF THE CLERK OF THE SUPREME COURT
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(REPORT/CITATION NOS. H-59874H; H-59875H; G-96546H;
G-96544H; 1756612MH; 1745470MH; 1745468MH; 1756609MH;
1756610MH; 175661MH; 1745469MH; 1753814MH; 1731576MH;
1731577MH; 1731072MH; 1731575MH; 1753817MH; 1758169MH;
1716260MH; 1753813MH; 1758166MH; 1758168MH; 1745471MH)

MEMORANDUM OPINION

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

Defendant-appellant Dove Johnson appeals from the District Court of the Third Circuit's December 16, 2003 judgment, the Honorable Matthew S.K. Pyun presiding, sentencing Johnson to a term of 129 days in jail for nineteen counts of eight different traffic offenses, three counts of contempt and one count of failure to appear. On appeal, Johnson contends that the district court erred in: (1) imposing jail sentences in lieu of fines for six traffic offenses; and (2) ordering consecutive terms of imprisonment for each of her offenses without considering the factors set forth in Hawai'i Revised Statutes (HRS) § 706-606 (1993). For reasons discussed more fully *infra*, we affirm in part and vacate in part, the December 16, 2003 judgment and

remand this case for resentencing with respect to the vacated part of the judgment.

I. BACKGROUND

Briefly stated, in the time period between August 6, 2001 and June 25, 2002, Johnson was charged with nineteen traffic offenses, three counts of contempt of court and one count of failure to appear. On November 4, 2003, Johnson pled no-contest to each offense, and sentencing was scheduled for December 16, 2003.

On December 9, 2003, following an interview with Johnson, a pre-sentence report [hereinafter, report] prepared by Probation Officer Gerald Sukiyaama was filed in the district court. According to the report, Johnson was a single, unemployed, 33-year-old mother of four children who received monthly cash assistance¹ of \$1,006 and food stamps in the amount of \$562. The report provided that Johnson was willing to assume responsibility for her offenses and noted that she was not given any traffic citations in the prior eighteen months. Additionally, the report expressed Johnson's belief that the most expedient way to clear her court obligations was to serve jail sentences in lieu of paying fines and performing community service work.

¹ Although it is unclear from the record, we believe Johnson's "monthly cash assistance" refers to government aid.

During the sentencing hearing on December 16, 2003, Johnson reiterated her desire to serve jail sentences in lieu of fines and community service in the following colloquy:

THE COURT: Alright. Miss Johnson, you have the right to address the Court at this time. Is there anything you would like to say?

THE DEFENDANT: Um, it's just all in the report. I talked to the probation officer. I just want you to know I do have four children at home I have to take care of, and I need my license back. And I think jail time is the fastest way that I'll be able to get my license back to be able to drive and get legal.

Subsequently, the district court imposed the following sentences:

| | Date Charged | HRS | Violation | Sentence (Jail Time in days) |
|----|--------------|---|---|------------------------------|
| 1. | 12/04/00 | § 710-1077 | Criminal Contempt | 5 |
| 2. | 08/06/01 | § 291C-102 § 291-11.5 § 249-7 § 286-102 § 431:10C-104 | Speeding No Child Passenger Restraint No License Plates No Driver's License No No-Fault Insurance | 1 1 1 5 15 |
| 3. | 09/27/01 | § 803-6(e) | Failure to Appear | 5 |
| 4. | 02/07/02 | § 286-102 § 431:10C-104 § 286-47 | No Driver's License No No-Fault Insurance Registration Not In Vehicle | 5 15 1 |
| 5. | 05/09/02 | § 286-25 § 286-102 § 431:10C-104 | No Safety Check No Driver's License No No-Fault Insurance | 1 5 15 |
| 6. | 05/27/02 | § 286-25 § 249-10 § 286-102 § 431:10C-104 | No Safety Check Expired Weight Tax No Driver's License No No-Fault Insurance | 1 1 5 15 |
| 7. | 06/25/02 | § 286-25 § 249-10 § 431:10C-104 § 286-102 | No Safety Check Expired Weight Tax No No-Fault Insurance No Driver's License | 1 1 15 5 |
| 8. | 09/18/02 | § 710-1077 | Criminal Contempt | 5 |
| 9. | 09/24/02 | § 710-1077 | Criminal Contempt | 5 |

Due to Johnson's indigence, the district court waived the fees and assessments relating to the foregoing charges.

At the conclusion of sentencing, Johnson requested that the court adhere to the pre-sentence report, which recommended that the sentences for certain offenses run concurrently with others. The court rejected Johnson's request and ordered that her sentences be served consecutively. Judgment was entered on January 14, 2004 and this timely appeal followed.

II. STANDARDS OF REVIEW

A. Statutory Interpretation

"The interpretation of a statute . . . is a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (citations and single quotation marks omitted)).

The standard of review for statutory construction is well established. 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. Moreover, where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

State v. Ramela, 77 Hawai'i 394, 395, 885 P.2d 1135, 1136 (1994) (citations, quotation marks and brackets omitted).

B. Sentencing

The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed. In other words,

while a sentence may be authorized by a constitutionally valid statute, its imposition may be reviewed for plain and manifest abuse of discretion.

Admittedly, the determination of the existence of clear abuse is a matter which is not free from difficulty[,] and each case in which abuse is claimed must be adjudged according to its own peculiar circumstances. Generally, to constitute an abuse[,] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of

law or practice to the substantial detriment of a party litigant.

State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995) (citations and quotation marks omitted) (brackets in original).

III. DISCUSSION

A. Imposing Jail Sentences in Lieu of Fines

Johnson contends that the district court erred in imposing jail sentences in lieu of fines for nine of her nineteen traffic offenses because the sentences were unauthorized by statute and, therefore, illegal.² It is well-settled that, "[a]lthough the sentencing court is given broad discretion in sentencing defendants, the sentence imposed must be authorized by statute." State v. March, 94 Hawai'i 250, 254, 11 P.3d 1094, 1098 (2000) (citations omitted); see also State v. Kahalewai, 71 Haw. 624, 626, 801 P.2d 558, 560 (1990) (clarifying that an illegal sentence is one that the court is not authorized to impose). Accordingly, "a court may only pronounce a sentence 'which the law hath annexed to the crime[,] and 'a sentence which does not conform to statutory sentencing provisions, either in the character or the extent of the punishment imposed, is void." State v. Sequeira, 93 Hawai'i 34, 36, 995 P.2d 335, 337 (App. 2000) (brackets in original) (citations omitted).

² We note that Johnson does not challenge the legality of her jail sentences for the remaining offenses. But see discussion in section III.B., infra.

In the instant case, the district court imposed nine one-day sentences on Johnson for six different traffic offenses pursuant to statutes that did not provide for jail terms. Initially, Johnson was sentenced to one day in jail for violating HRS § 249-7 (1993), no license plates, and one day in jail for each of her two counts of violating HRS § 249-10 (Supp. 1998), expired weight tax. The sentencing statute for the foregoing offenses provides in pertinent part that "any person who violates any of the provisions of [HRS §§ 249-1 through -13] shall be fined not more than \$500." HRS § 249-11 (Supp. 1994). Inasmuch as HRS § 249-11 does not provide for sentences of jail time, Johnson's jail sentences for violating HRS §§ 249-7 and -10 are illegal.

The district court also sentenced Johnson to one day in jail for violating: (1) HRS § 286-25 (1993),³ no safety check (three counts); (2) HRS § 291-11.5 (Supp. 2002),⁴ no child

³ HRS § 286-25 provides: "Whoever operates, permits the operation of, causes to be operated, or parks any vehicle on a public highway without a current official certificate of inspection, issued under section 286-26, shall be fined not more than \$100."

⁴ HRS § 291-11.5(e) provides in relevant part:

Violation of this section shall be considered an offense as defined under section 701-107(5) and shall subject the violator to the following penalties:

- (1) For a first conviction, the person shall:
 - (A) Be fined not more than \$100;
 - (B) Be required by the court to attend a child passenger restraint safety class conducted by the division of driver education; provided that:
 - (i) The class may include video conferences as determined by the administrator of the division of driver education as an alternative

(continued...)

passenger restraint; (3) HRS § 291C-102 (Supp. 2002),⁵ speeding; and (4) HRS § 286-47 (Supp. 1998),⁶ registration not in vehicle. Inasmuch as the sentencing provisions for the foregoing offenses do not authorize jail time, Johnson's jail sentences for such offenses are illegal. Accordingly, we hold that the district court erred in imposing jail sentences in lieu of fines for the foregoing six offenses.

B. Consecutive Sentencing

As previously noted, see supra note 2, Johnson does not challenge the legality of the jail sentences imposed for the

⁴(...continued)

- method of education; and
- (ii) The class shall not exceed four hours;
- (C) Pay a \$50 driver education assessment as provided in section 286G-3; and
- (D) Pay a \$10 surcharge to be deposited into the neurotrauma special fund[.]

⁵ The penalties for violations of HRS § 291C-102 are governed by HRS §§ 291C-161(b) and (e) (Supp. 1999), which provide in pertinent part:

(b) . . . every person who violates any provision of this chapter for which another penalty is not provided shall be fined:

- (1) Not more than \$200 for a first conviction thereof;
- (2) Not more than \$300 for conviction of a second offense committed within one year after the date of the first offense; and
- (3) Not more than \$500 for conviction of a third or subsequent offense committed within one year after the date of the first offense

(e) . . . The court may require a person who violates any of the provisions of this chapter to attend a course of instruction in driver retraining as deemed appropriate by the court, in addition to any other penalties imposed.

⁶ HRS § 286-61 (1993) governs penalties for violations of HRS § 286-47 and states in pertinent part: "Any person who violates sections . . . 286-44.5 to 286-56.5 . . . shall be fined not less than \$5 nor more than \$1000[.]"

remaining offenses.⁷ She contends, however, that the district court erred in imposing consecutive terms of imprisonment without considering the factors set forth in HRS § 706-606 as required by HRS § 706-668.5 (1993).⁸

HRS § 706-606 provides:

The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
 - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and

⁷ We note that the statutes governing sentencing for Johnson's remaining offenses authorize the sentencing court to impose jail time. See (1) HRS § 710-1077 (1993) (generally, criminal contempt punishable as misdemeanor with jail time not to exceed one year or as petty misdemeanor with jail time not to exceed thirty days pursuant to HRS § 706-663 (1993)); (2) HRS § 286-102 (Supp. 2002) (no driver's license punishable by not more than thirty days in jail for first offense and not more than one year for two or more prior convictions in preceding five-year period pursuant to HRS 286-126 (Supp. 2003)); (3) HRS § 803-6(e) (Supp. 2002) (failure to appear punishable by not more than 30 days in jail); and (4) HRS § 431:10C-104 (Supp. 1997) (no no-fault insurance punishable by not more than 30 days in jail for multiple convictions within a five-year period from any prior offense pursuant to HRS § 431:10C-117(a) (5) (Supp. 2002)).

We also note that Johnson's traffic record indicates that she was convicted of three prior violations of HRS § 431:10C-104 (no no-fault insurance), the last occurring on August 8, 2000. As such, Johnson's five violations of HRS § 431:10C-104 qualify as multiple convictions within a five-year period.

⁸ HRS § 706-668.5 provides in pertinent part:

- (1) . . . Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. . . .
- (2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

- (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(Emphases added).

In addressing consecutive sentencing, this court has previously held that "discretionary consecutive prison sentences, pursuant to HRS § 706-668.5, may properly be imposed only if the penal objectives sought to be achieved include retribution (i.e., "just deserts") and deterrence." Gaylord, 78 Hawai'i at 150, 890 P.2d at 1190. However, a court is not required to orally recite its findings on the record for each of the factors set forth in HRS § 706-606. State v. Sinagoga, 81 Hawai'i 421, 428, 918 P.2d 228, 235 (App. 1996). In fact:

[A]bsent clear evidence to the contrary, it is presumed that a sentencing court, following the receipt of a pre-sentence report under HRS § 706-601 [(Supp. 1997)⁹] and a mandated sentencing hearing under HRS § 706-604 [(1993)¹⁰], will have considered all the factors in HRS § 706-606 before imposing concurrent or consecutive terms of imprisonment under HRS § 706-668.5.

Id.

⁹ HRS § 706-601 provides in pertinent part:

- (1) Except as provided in subsections 3 and 4, the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where:
- (a) The defendant has been convicted of a felony; or
 - (b) The defendant is less than twenty-two years of age and has been convicted of a crime.
- (2) The court may order a pre-sentence diagnosis in any other case.

(Emphasis added).

¹⁰ HRS § 706-604(1) provides, "Before imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition."

In the instant case, Johnson fails to affirmatively argue that the district court did not consider the factors provided in HRS § 706-606. She merely states that the "record does not reflect the sentencing court's consideration or acknowledgment of [her] circumstances as contained within the [pre-sentence report]." However, as previously indicated, a court is not required to orally recite its findings on the record for each of the factors set forth in HRS § 706-606. Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235.

In sentencing Johnson, the district court stated:

The Court is not inclined to run things concurrent because it is not fair to people to have one person commit three violations and get sentenced to only one. Whereas other people get sent -- commit one violation, they get sentenced on that one. So it's not fair. I mean, what it is, is rewarding somebody who commits more offenses and I don't think that is fair. So under the circumstances all of these jail terms are [to] run consecutive.

(Emphasis added.) We believe the foregoing statement demonstrates that the district court considered the factors provided in HRS § 706-606, quoted supra, (i.e., specifically those factors previously underscored). In other words, the district court appears to have considered: (1) that the imposition of consecutive sentences was "to provide just punishment for the offense," HRS § 706-606(2)(a); (2) "[t]he kinds of sentences available," HRS § 706-606(3); and (3) "[t]he need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." HRS § 706-606(4). Additionally, the record indicates that the court reviewed the pre-sentence report and, thus, was

aware of "[t]he nature and circumstances of the offense and the history and characteristics of the defendant." HRS § 706-606(1). Accordingly, inasmuch as Johnson fails to demonstrate "clear evidence to the contrary," Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235, this court presumes that the district court considered the relevant statutory factors. We, therefore, hold that the district court did not abuse its discretion in imposing consecutive sentences.

IV. CONCLUSION

Based on the foregoing, we vacate that part of the December 16, 2003 judgment imposing jail terms on Johnson for violating: (1) HRS §§ 249-7 and -10; (2) HRS §§ 286-25 and -47; (3) HRS § 291-11.5; and (4) HRS § 291C-102. We remand this case for resentencing with respect to these aforementioned offenses. In all other respects, the judgment is affirmed.

DATED: Honolulu, Hawai'i, March 28, 2005.

On the briefs:

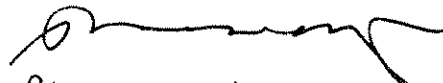
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