

*** NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

NO. 27413

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LIVINGSTON G. MUASAU, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 05-1-0008)

SUMMARY DISPOSITION ORDER

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

The petitioner-appellant Livingston G. Muasau appeals from the June 21, 2005 order of the circuit court of the first circuit, the Honorable Steven S. Alm presiding, denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition.

On appeal, Muasau contends that the circuit court erred in denying his petition inasmuch as: (1) Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny require that the facts upon which his extended-term sentence is based be included in the indictment and proven to the trier of fact beyond a reasonable doubt; and (2) the circuit court, in 1984, failed to enter into the record findings of fact (FOFs) (a) that he was a multiple offender or (b) that an extended-term sentence was necessary for the protection of the public [hereinafter, "the necessity finding"], as required by HRS § 706-662 (Supp. 1981).¹

¹ HRS § 706-662 (Supp. 1981) required that "[t]he finding of the court shall be incorporated in the record."

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Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the order of the circuit court for the following reasons:

In State v. Gomes, 107 Hawai'i 308, 113 P.3d 184 (2005), this court held "that Apprendi does not apply retroactively in this jurisdiction to cases on collateral attack." Id. at 314, 113 P.3d at 190. Muasau fails to advance any arguments as to why this court should reconsider its holding. Therefore, insofar as his extended-term sentence was imposed in 1984 and Apprendi was issued in 2000, his contentions that Apprendi and its progeny rendered his extended-term sentences illegal and required the circuit court to grant his HRPP Rule 40 petition are without merit, and the circuit court correctly denied his petition on that basis.

Muasau alleges that the circuit court in 1984 failed "to follow procedure" by failing to enter FOFs into the record that he was a multiple offender for whom an extended-term sentence was necessary for the protection of the public. Absent application of the Apprendi rule, however, which Gomes instructs does not apply to his case, Muasau fails to allege how the circuit court's omission was to his "substantial detriment," State v. Rivera, 106 Hawai'i 146, 154-55, 102 P.3d 1044, 1052-53 (2004).

Muasau does not contest the fact that, in 1984, he was sentenced concurrently for multiple felonies, rendering him subject to HRS § 706-662(4), and does not contest on appeal the

circuit court's June 21, 2005 FOF to that effect. Moreover, insofar as the prosecution's motion for the extended-term sentence was based on the assertion that the sentence was necessary for the protection of the public, the sentencing court made the necessity finding, at least implicitly, when, at the close of the January 5, 1984 hearing, it granted the motion. Indeed, in issuing its written order, which followed the earlier, oral granting of the motion, the circuit court referenced both the motion and the contents of the hearing.

Muasau, in raising the sentencing court's failure to enter the relevant FOFs in its written order, essentially alleges a violation of his rights to procedural due process. However, "the appellate courts of this jurisdiction have, in other settings, applied procedural due process protection only where an individual's rights are substantially affected." In re Doe, 99 Hawai'i 522, 534 n.18, 57 P.3d 447, 459 n.18 (2002) (citing In re Doe, 91 Hawai'i 147, 150, 981 P.2d 704, 707 (App. 1998), rev'd on other grounds, 90 Hawai'i 246, 978 P.2d 684 (1999); In re Doe, 62 Haw. 70, 74, 610 P.2d 509, 512 (1980); Stafford v. Dickison, 46 Haw. 52, 64, 374 P.2d 665, 672 (1962)). Indeed, HRPP Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Muasau fails to articulate how the omission of the express multiple felony or necessity findings in the 1984 sentencing court's written order affected his substantial rights. The record reflects that, on January 5, 1984, the sentencing court (1) provided both parties a full hearing on the motion for

extended-term sentencing, (2) provided Muasau the opportunity to present witnesses and to testify himself, and (3) orally granted the motion at the conclusion of the hearing based upon the evidence and testimony elicited. The record further reflects that Muasau's attorney at the time approved the written order as to form, raising no objections to the lack of express FOFs in the order. Muasau does not allege, and offers no evidence, that the circuit court's failure to include the express FOFs in its written order denied him notice of the basis of his sentence, nor does he allege that the sentence imposed would have been different but for the omission, and he fails to articulate any justification for waiting more than twenty years to bring the omission to the attention of the court, absent its utility as a bootstrap to secure application of the Apprendi rule to his sentencing.

In light of the foregoing, Muasau fails to meet his burden of establishing abuse of discretion by the sentencing court that was to his "substantial detriment," Rivera, 106 Hawai'i at 154-55, 102 P.3d at 1052-53. State v. Okumura, 78 Hawai'i 383, 399, 894 P.2d 80, 96 (1995) (quoting State v. Faulkner, 1 Haw. App. 651, 654, 624 P.2d 940, 943 (1981)) ("The burden of establishing abuse of discretion is on appellant and a strong showing is required to establish it."), quoted in State v. Cordeiro, 99 Hawai'i 390, 420, 56 P.3d 692, 722 (2002). Accordingly, the circuit court did not err in denying Muasau's petition without a hearing. Hutch v. State, 107 Hawai'i 411, 414, 114 P.3d 917, 920 (2005); HRPP Rule 40(f) (providing that

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"[t]he court may . . . deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition").

Therefore,

IT IS HEREBY ORDERED that the June 21, 2005 order of the circuit court of the first circuit from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, September 24, 2007.

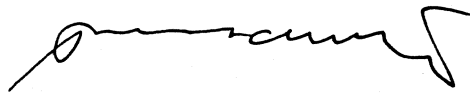


Steven B. Levinson

Puuco Nakayama

Karen E. Duffy, Jr.

I concur in the result.



On the briefs:

Livingston G. Muasau, pro se

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Deputy Attorneys General,
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State of Hawai'i