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NO. 27005

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent-Plaintiff-Appellant,

vs.

WAYNE M. CROWELL, Petitioner-Defendant-Appellant.

FILED
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NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 02-1-0323)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, and Nakayama,, JJ. and Acoba, J., concurring and dissenting, with whom Duffy, J., joins)

Petitioner-defendant-appellant, Wayne M. Crowell ("Crowell") timely petitioned this court on May 23, 2007, for a writ of certiorari to review the Intermediate Court of Appeals' ("ICA") February 22, 2007 judgment on appeal, entered pursuant to its January 17, 2007 summary disposition order. Therein, the ICA affirmed the first circuit court's[1] judgment convicting him of promoting a dangerous drug in the second degree ("PDD2") (for knowing distribution of methamphetamine), in violation of Hawai'i Revised Statutes ("HRS") § 712-1242(1)(c) (Supp. 1996),[2] and PDD2

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[1] The Honorable Derrick H.M. Chan presided.

[2] At the time of the charged offenses, HRS § 712-1242(1) provided in relevant part:

> (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:
>
> . . . .
> (b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
> (i) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers
> (ii) One-fourth ounce or more, containing any dangerous drug; or
> (c) Distributes any dangerous drug in any amount.

(for knowing possession of one-eighth ounce or more of methamphetamine), in violation of HRS § 712-1242(1)(b)(i) (Supp. 1996).[3] The ICA also affirmed the trial court's imposition of an extended twenty-year sentence under HRS § 706-662(1) and (4) (Supp. 2001)[4], with a mandatory minimum of three years and four months as a repeat offender.

On June 21, 2007, this court accepted Crowell's application, in which he argued that the ICA gravely erred by holding that: (1) the prior bad acts of the supervising detective John Shaw were irrelevant and therefore, inadmissible; (2) the circuit court did not err in failing to declare a mistrial; (3) there was sufficient evidence to sustain a conviction for knowingly possessing an aggregate weight of one-eighth ounce or more of methamphetamine; and (4) the circuit court lawfully imposed extended terms of imprisonment under HRS § 706-662(1) and (4).

Upon carefully reviewing the record and the briefs

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[3] See footnote 2, supra.

[4] HRS § 706-662 provided in pertinent part:

> A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
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> (1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
>
> . . . .
>
> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
>
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony . . . .

submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) The ICA did not gravely err by affirming the circuit court's exclusion of Crowell's proffered Hawai'i Rules of Evidence ("HRE") Rule 404(b) (Supp. 2005) evidence attempting to prove (a) the supervising detective for the drug sting, John Shaw's ("Detective Shaw") alleged propensity to engage in fraudulent activity, and (b) that prior to Crowell's alleged offenses, Detective Shaw attempted to extort $400 per month from the initial target of the sting, Farley Inovejas, inasmuch as it is irrelevant to Crowell's charges.[5] Any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and therefore, is inadmissible under HRE Rule 404(b);[6]

(2) The ICA did not gravely err in affirming the circuit court's denial of Crowell's motion for mistrial, inasmuch as the State of Hawai'i's ("prosecution") cross-examination of Crowell regarding the integrity of the officers involved in the investigation did not open the door to Crowell's excluded HRE Rule 404(b) evidence. While the prosecution's questioning may have been related to other detectives' motives against Crowell, it was not related to Crowell's excluded evidence regarding Detective Shaw's motives, and therefore, did not prejudice Crowell's right to a fair trial;

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[5] The evidence is not relevant to show Detective Shaw's "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." See HRE Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." (Emphases added.)).

[6] Generally, HRE Rule 404(b) prior bad acts evidence "is admissible when it is 1) relevant and 2) more probative than prejudicial." State v. Robinson, 79 Hawai'i 468, 471, 903 P.2d 1289, 1292 (1995) (citations omitted).

(3) The ICA did not gravely err in affirming Crowell's conviction of PPD2 for knowing possession of an aggregate weight of one-eighth ounce or more of methamphetamine, insofar as there was substantial evidence to support the conviction; and

(4) The ICA gravely erred in affirming the circuit court's imposition of extended twenty-year sentences upon Crowell under HRS § 706-662(1) and (4), in light of this court's recent opinion, State v. Maugaotega, No. 26657 (Haw. Oct. 1, 2007) (holding that the extended sentencing scheme in HRS §§ 706-661 and 706-662 is unconstitutional). Therefore,

IT IS HEREBY ORDERED THAT (1) the ICA's February 22, 2007 judgment, affirming the circuit court's imposition of the extended term sentence, is vacated, and the case is remanded to the circuit court for resentencing, and (2) the judgment is affirmed in all other respects.

DATED: Honolulu, Hawai'i, November 2, 2007.

Taryn R. Tomasa,
Deputy Public Defender,
for petitioner-defendant-
appellant Wayne M. Crowell
on the application