IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

LISA ANN PALI, Petitioner/Defendant-Appellant.

NO. SCWC-11-0000451

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. CAAP-11-0000452; CR. NO. 05-1-0366(2)))

MAY 21, 2013

CONCURRING AND DISSENTING OPINION BY RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

The majority concludes that a defendant has "complied with other terms and conditions of probation" as required for expungement of a drug conviction under Hawaiʻi Revised Statutes (HRS) § 706-622.5(4) when the defendant has completed his or her probationary term and has been discharged from probation. Majority opinion at 1-3. I respectfully dissent from that

holding.[1] In my view, whether a defendant has "complied with other terms and conditions of probation" under HRS § 706-622.5(4) is not satisfied by the completion of a probationary term or a discharge from probation, but rather requires a separate evaluation of the defendant's compliance with the actual terms and conditions of probation. Here, defendant Lisa Ann Pali committed multiple crimes during her probationary term in violation of a condition of her probation. Accordingly, she did not satisfy the requirement under HRS § 706-622.5(4) that she had "complied with other terms and conditions." Therefore, I would hold that the circuit court properly denied Pali's motion for expungement.

It is well-established that the "fundamental starting point for statutory interpretation is the language of the statute itself." State v. Wheeler, 121 Hawaiʻi 383, 390, 219 P.3d 1170, 1177 (2009) (quoting Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & Cnty. of Honolulu, 114 Hawaiʻi 184, 193, 159 P.3d 143, 152 (2007)). "[W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." Id. Moreover, "implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to

[1] I concur in the majority's conclusions that there was no due process violation and that the circuit court had jurisdiction, but on other grounds, discussed infra.

be obtained primarily from the language contained in the statute itself." Id.

At issue in this case is how the court determines that a defendant has "complied with other terms and conditions of probation" as required for expungement of a record of conviction pursuant to HRS § 706-622.5(4). HRS § 706-622.5(4) (Supp. 2004) provides:

> The court, upon written application from a person sentenced under this part, shall issue a court order to expunge the record of conviction for that particular offense; provided that a person has successfully completed the substance abuse treatment program and complied with other terms and conditions of probation. A person sentenced to probation under this section shall be eligible for one time only for expungement under this subsection.

(Emphasis added).

The statute clearly states that expungement of a defendant's record of conviction requires the defendant to satisfy two conditions: (1) that the defendant successfully complete a substance abuse treatment program, and (2) that the defendant comply with other terms and conditions of probation. The phrase "complied with other terms and conditions of probation" is unambiguous; thus, we must "give effect to its plain and obvious meaning." Wheeler, 121 Hawaiʻi at 390, 219 P.3d at 1177 (citation omitted). Moreover, because the language is unambiguous, this court need not and should not look beyond this language for a different meaning. See State v. Richie, 88 Hawaiʻi 19, 30, 960 P.2d 1227, 1238 (1998) ("'It is a cardinal

rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning.'" (quoting Alvarez v. Liberty House, Inc., 85 Hawaiʻi 275, 278, 942 P.2d 539, 542 (1997))).

The "plain and obvious meaning" of this phrase is that a defendant must have abided by the specific terms and conditions imposed as part of his or her probation sentence. In other words, a defendant has not "complied" if he or she has violated a condition or term of his or her probation. In my view, this requirement is distinct from a defendant simply completing his or her period of probation or being discharged from probation.

Respectfully, the majority's decision to import the requirements related to revocation of probation and discharge from probation into the expungement provision is contrary to the plain language of HRS § 706-622.5(4). HRS § 706-622.5(4) does not expressly allow for expungement where a defendant has been discharged from probation or completed his or her term of probation, nor does it make any reference to HRS § 706-630 (regarding discharge from probation) or HRS § 706-625 (regarding revocation of probation).

Had the legislature intended for a defendant's drug conviction record to be expunged when - in addition to completing substance abuse treatment - the defendant completed his or her

term of probation or was discharged from probation, the legislature could have included such language in the statute. Instead, the legislature expressly required that the defendant "complied with other terms and conditions of probation." HRS § 706-622.5(4).

Accordingly, I respectfully disagree with the majority's conclusion that the requirement that a defendant "complied with other terms and conditions of probation" is met when the defendant is discharged from and completes a probation term, regardless of whether the defendant in fact conformed to and abided by his or her probationary terms and conditions.

Based on the foregoing, I would hold that the circuit court did not err in denying Pali's motion for expungement. Here, Pali filed a motion for expungement, and the State asserted that she did not comply with a mandatory condition of probation; that is, that she "must not commit another federal or state crime during the term of probation[.]" The State, through a declaration of counsel, cited Pali's five criminal convictions for offenses she committed while on probation.[2] Pali never denied the State's assertion regarding her criminal convictions during her probation. Indeed, in her Memo in Support of Motion for an

[2] The deputy prosecuting attorney stated that Pali was convicted of: (1) Theft in the Fourth Degree for an offense that occurred on August 9, 2006, (2) Operating a Vehicle Under the Influence of an Intoxicant (OUI) for an offense that occurred on October 6, 2006, (3) Criminal Contempt of Court for an offense that occurred on March 7, 2007, (4) Driving Without a License for an offense that occurred on March 28, 2008, and (5) Driving Without a License for an offense that occurred on November 10, 2009.

Order of Expungement, Pali acknowledged two of her criminal convictions:

> Further, per her Probation Officer, Ms. Pali has in fact complied with the "other terms and conditions" of her probation. This despite Ms. Pali's conviction for Theft 4 (where she was considered an accomplice to her daughter because they came into the store together), her OUI (based on a relapse after finishing IOP at Malama in 2006) when she was starting Family Court Drug Court after the OUI as well as participating in The Shelter's Relapse Prevention program after the OUI, and because she was getting Dual Diagnosis treatment based on Mental Health and Drug addiction issues, Ms. Patricio still believes Ms. Pali has successfully complied with the other terms and conditions of her probation and thus discharged her from Probation, with her supervisor's approval.
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> As the law under HRS [§] 706-622.5 speaks to complying with "other terms and conditions" of probation and as in her probation officer's opinion and recommendation that Ms. Pali has complied with the other terms and conditions to her satisfaction, Ms. Pali's felony convictions should be expunged at this time.

(Emphasis added).

Although, according to Pali, her probation officer determined that she complied with the other terms and conditions of her probation "to [the probation officer's] satisfaction," Pali clearly failed to comply with the term prohibiting her from committing another crime while on probation.[3] In fact, Pali violated this term of her probation multiple times. Given the type and number of offenses committed by Pali while on probation, it cannot be said that these violations were trivial or technical

[3] As stated in note 2, supra, the State asserted that Pali was convicted of Operating a Vehicle Under the Influence of an Intoxicant. Such an offense also appears to violate condition J of the Special Terms and Conditions of Pali's probation, which stated that she "must not possess, use, or consume any alcohol, unprescribed or illegal drug nor possess any drug-related paraphernalia."

in nature. Rather, Pali materially violated the terms of her probation.

Moreover, Pali's certificate of discharge does not lead to a legal or factual conclusion that she complied with the terms and conditions of probation. As the Intermediate Court of Appeals (ICA) noted, the certificate merely stated that Pali, "having completed the period of probation on December 28, 2010, . . . shall be relieved of any obligations imposed by the order of the court and shall have satisfied the disposition of the court[.]" (Emphasis added). The certificate notes only that Pali "completed" her "period of probation"; it does not state that she complied with the terms and conditions of her probation. Indeed, HRS § 706-630, which provides for the discharge of a defendant from probation, neither requires nor makes any reference to compliance with probationary terms or conditions. Rather, the plain language of HRS § 706-630 only provides that the defendant is relieved of any court obligations and is deemed to have satisfied the disposition of the court "[u]pon the termination of the period of the probation or the earlier discharge of the defendant[.]"[4] As is apparent from this case,

[4] HRS § 706-630 (Supp. 1998) reads in full:

> Upon the termination of the period of the probation or the earlier discharge of the defendant, the defendant shall be relieved of any obligations imposed by the order of the court and shall have satisfied the disposition of the court, except as to any action under this chapter to collect unpaid fines,

(continued...)

HRS § 706-630 allows for a defendant to be discharged from probation and deemed to have "satisfied the disposition of the court" even if he or she has repeatedly violated – in other words, failed to comply with – the terms and conditions of probation.[5]

For these reasons, I respectfully disagree with the majority's assertion that determinations of non-compliance in an HRS § 706-622.5(4) expungement hearing after discharge would conflict with HRS § 706-630 and a certificate of discharge. See majority opinion at 19-22, 26. A denial of an expungement request because of non-compliance does not in any way disturb or undo the effects of discharge; here, the circuit court's denial neither subjected Pali to any further court obligations nor deemed her term of probation incomplete.[6] Indeed, expungement

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[4](...continued)
restitution, attorney's fees, costs, or interest.

The foregoing language indicates that a defendant discharged from probation would no longer be subject to obligations previously imposed by the court, and that the court may not impose on the defendant any additional obligations, except with respect to actions to collect, inter alia, unpaid fines. The statute does not provide that the terms and conditions of probation are deemed to have been complied with.

[5] Under the majority's reasoning, any failure by the State or a probation officer to raise the violations in a revocation hearing renders such violations inconsequential in a separate HRS § 706-622.5(4) expungement proceeding wherein the court must determine, inter alia, whether the defendant complied with his or her probationary terms and conditions. Respectfully, I believe such an interpretation is contrary to the plain language of HRS § 706-622.5(4) and is not supported by HRS §§ 706-625 and 706-630.

[6] Moreover, the circuit court's denial does not conflict with any prior "judicial determination[,]" see majority opinion at 21-22, as the record does not reflect any express prior judicial ruling, regarding Pali's discharge or otherwise, that Pali complied with the terms and conditions of probation.

(continued...)

under HRS § 706-622.5(4) is a benefit that is additional to and separate from the discharge from probation;[7] accordingly, an independent determination that the defendant met all of the statutory requirements for expungement would not be inconsistent with prior probation proceedings.[8]

I would therefore hold that Pali did not comply with other terms and conditions of her probation and thus did not satisfy all of the requirements for expungement of a record of

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[6](...continued)

the probation administrator, not a judge, signed Pali's certificate of discharge. Thus, it would appear that the circuit court's denial of expungement did not constitute a "reexamination" or "redetermination" of compliance.

[7] Additionally, expungement would appear to serve a different purpose than revocation of probation. The revocation process punishes a defendant by revoking probation if the defendant "has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony." HRS § 706-625(3). Expungement under HRS § 706-622.5(4), on the other hand, provides additional benefits to defendants who have completed a substance abuse treatment program and complied with all other terms and conditions of probation.

[8] For similar reasons, I would also hold that Pali's due process and jurisdiction arguments are without merit. Pali's due process rights were not violated because the circuit court did not modify Pali's sentence, Pali's position is unchanged from before the filing of her expungement motion, and the circuit court afforded Pali – and Pali accepted – the opportunity to respond to the State's opposition to her motion. Moreover, Pali's reliance on probation revocation requirements is unavailing because the expungement procedure is separate from revocation, and HRS § 706-622.5(4) does not contain any reference to revocation.

Pali's argument that the circuit court lacked jurisdiction is also without merit. Pali argues that because Pali's violations were not previously raised in a revocation or modification motion, the circuit court's denial of her expungement motion, based on her previous violations, "constituted an illegal modification of sentence for which the circuit court had no jurisdiction." However, as stated above, the circuit court's denial of expungement in no way modified any terms of probation or revoked Pali's probation; rather, the expungement procedure requires the distinct determination that the defendant has, inter alia, "complied with other terms and conditions of probation." HRS § 706-622.5. Moreover, Pali's reliance on State v. Asuncion, 120 Hawaiʻi 312, 205 P.3d 577 (2009), is misplaced because, as the majority notes, the facts in Asuncion are distinguishable from the instant case. Majority opinion at 26 n.17.

conviction under HRS § 706-622.5(4). Accordingly, I would affirm the judgment of the ICA, which affirmed the Circuit Court of the Second Circuit's May 11, 2011 "Order Denying Defendant's Motion for an Order of Expungement Pursuant to HRS § 706-622.5(4)."

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama