IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ERWIN E. FAGARAGAN, Petitioner/Petitioner-Appellant,

vs.

STATE OF HAWAIʻI, Respondent/Respondent-Appellee.

SCWC-11-0000592

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000592; SPP NO. 11-1-0005(1)
(CR. NOS. 04-1-0595(1) AND 05-1-0090(1)))

FEBRUARY 14, 2014

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

This case requires us to consider whether the Hawaiʻi Paroling Authority (HPA) erred in determining the minimum prison terms to be served by defendant Erwin Fagaragan. Fagaragan was convicted of multiple crimes in connection with two separate incidents. The HPA subsequently set minimum prison terms in both

cases in a consolidated hearing. However, it later redetermined the minimum terms in one of those cases after a count in that case was reversed on appeal by the Intermediate Court of Appeals (ICA); when the HPA did so, it re-imposed the same minimum terms on the remaining counts.

In my view, the HPA did not act arbitrarily or capriciously in establishing Fagaragan's minimum terms. While in some circumstances the reversal of a count on appeal could change the HPA's assessment of the culpability of the defendant, that was not the case here. The reason is simple: the count that was reversed on appeal involved exactly the same underlying criminal conduct as one of the remaining counts of conviction. State v. Fagaragan, 115 Hawaiʻi 364, 370, 167 P.3d 739, 745 (App. 2007). Indeed, that was explicitly the reason why that count was reversed, and the remaining count involving the same underlying conduct was allowed to stand. Thus, nothing material had changed about Fagaragan's culpability, and it was reasonable for the HPA to impose the same minimum terms. Accordingly, I respectfully dissent.

I. FACTUAL BACKGROUND

One of the cases at issue here arose when Fagaragan was stopped by police after they observed him driving a stolen car. He was found to be in possession of more than 33 grams of methamphetamine packaged in packets, scales, glass pipes, empty

packets, and $1,474 in cash. After a jury trial, he was convicted of several offenses in Criminal No. 04-1-0595(1), for which he was sentenced as follows: Promoting a Dangerous Drug in the First Degree (20 years), Unauthorized Control of a Propelled Vehicle (5 years), Prohibited Acts Related to Drug Paraphernalia (5 years), and Promoting a Detrimental Drug in the Third Degree (30 days).

The other case arose when Fagaragan was stopped by police and arrested on an outstanding warrant. Fagaragan, 115 Hawaiʻi at 365, 167 P.3d at 740. Police found $8,649 in cash in Fagaragan's pockets. Id. The car he was driving was searched and a bag was recovered that contained approximately 5.46 ounces of methamphetamine in 34 packets, a pipe, and a digital scale. Id. He was charged in Criminal No. 05-1-0090(1) with three offenses: (1) Promoting a Dangerous Drug in the First Degree, in violation of Hawaiʻi Revised Statutes (HRS) § 712-1241(1)(a)(i)[1] (Count One); (2) Attempted Promoting a Dangerous Drug in the First Degree, in violation of HRS §§ 705-500 and 712-

[1] HRS § 712-1241(1)(a)(i) (Supp. 2003) states in relevant part:

> A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
>
> (a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
>
> (i) One ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

1241(1)(b)(ii)(A)[2] (Count Two); and (3) Prohibited Acts Related to Drug Paraphernalia (Count 3). Id. A jury found Fagaragan guilty on all counts, and he was sentenced to twenty year terms on both Counts One and Two, and five years on Count Three, to run concurrently. Id.

The HPA consolidated the two cases for purposes of setting minimum terms of imprisonment. After a hearing, the HPA issued an order that identified Fagaragan's "Level of Punishment" as Level III, and the "Significant factors identified in determining level of punishment" as "Nature of Offense." The order set the following minimum terms:

Crime Number	Count	Offense	Maximum	Minimum
04-1-595(1)	I	UCPV	5 years	5 years
04-1-595(1)	II	PDD-1	20 years	20 years
04-1-595(1)	IV	Paraphernalia	5 years	5 years
05-1-0090(1)	I	PDD-1	20 years	20 years
05-1-0090(1)	II	Att. PDD-1	20 years	20 years
05-1-0090(1)	III	Paraphernalia	5 years	5 years

Subsequently, the ICA decided Fagargan's appeal of the

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[2] HRS § 712-1241(1)(b)(ii)(A) (Supp. 2003) states in relevant part:

> A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
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> (b) Distributes:
>
> (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
>
> (A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

second case. Id. The ICA reversed Fagaragan's conviction of Attempted Promoting a Dangerous Drug in the First Degree, because it was based on the exact same conduct as the Promoting a Dangerous Drug in the First Degree charge for which he also was convicted. Id. at 366, 167 P.3d at 741. Specifically, the ICA found that "the legislature did not intend to authorize the imposition of multiple punishments for both possession and attempted distribution under HRS § 712-1241, where the convictions are based on a defendant's possession of the same amount of drugs at the same moment in time." Id. at 369, 167 P.3d at 744.

In reaching that conclusion, the ICA relied on both the language and the legislative history of the statute. With regard to the former, the ICA noted that:

> [T]he provisions relating to possession and distribution of methamphetamine are set forth in separate clauses within the same statute. Put differently, there is a single offense (Promoting a Dangerous Drug in the First Degree), which can be violated either by possessing a certain quantity of methamphetamine or by distributing a lesser quantity of methamphetamine. HRS § 712-1241(1)(a) and (b). The same maximum penalty applies whether a conviction is based on possession or distribution. HRS § 712-1241(2).

Id. at 369, 167 P.3d at 744 (footnote omitted).

With regard to the legislative history, the ICA quoted the following statement from the Judicial Council of Hawaii in explaining its proposed 1970 draft of the Hawaii Penal Code:

> It is the purpose of the Code to hit hardest at the illegal trafficker in narcotics, dangerous drugs,

> marijuana concentrates, or marijuana. The scheme devised for so doing is to arrange the sanctions relating to each substance, either for possession or dispensing, on the basis of the amounts involved. Such amounts are meant to reflect, i.e., provide an indicia of, the position of the defendant in the illegal drug, marijuana concentrate, or marijuana traffic. Large amounts indicate the defendant is a main source of supply, sometimes called an "importer," "dealer," or "wholesaler." Middle amounts indicate that he is an intermediary between the main source and the consumer; sometimes the intermediary is called a "pusher," "carrier," or "retailer." Finally, the smallest amounts indicate the defendant's main involvement in the traffic is that of a user or consumer of drugs or substances. In keeping with the purpose of the Code, the greater the amounts involved the more severe the sanctions. Also, it will be noted that the offenses of dispensing a given substance are classed or graded one degree above the possession of the same amount. Thus, for example, in secs. 1241 and 1242, the possession of "wholesale" amounts of a narcotic drug is a class A felony; however, the defendant who dispenses "retail" amounts of narcotics will receive the same sanction, whereas possession of that amount is a class B felony.

Id. at 370, 167 P.3d at 745 (emphasis added) (quoting Judicial Council of Hawaii, Hawaii Penal Code (Proposed Draft) at 346-47 (1970)).[3]

The ICA summarized its analysis as follows:

> Consequently, it appears that the legislature intended that the possession of one ounce or more of methamphetamine, in situations such as the one now before us, would serve as a proxy for the intent to distribute under HRS § 712-1241. Put another way, the legislative history suggests that the legislature intended that possession and attempted distribution based on the possession at one moment in time of the same methamphetamine be punished as a single offense.

Id. at 370, 167 P.3d at 745.

After the ICA's decision was issued, the HPA held a

[3] The 1972 legislature adopted section 1241 as proposed by the Judicial Council, with some amendments that are not relevant here. Compare Judicial Council of Hawaii, Hawaii Penal Code (Proposed Draft) at 342 (1970) with 1972 Haw. Sess. L. Act 9, § 1241(1) at 134.

hearing to reset Fagaragan's minimum terms in that case. It subsequently issued an order that again identified his "Level of Punishment" as Level III, and the "Significant factors identified in determining level of punishment" as "Nature of Offense." The order re-set the same minimum terms as the original order, i.e., 20 years for Promoting a Dangerous Drug in the First Degree and 5 years for Possession of Drug Paraphernalia.

II. DISCUSSION

The majority contends that the HPA erred in determining that Fagaragan met the criteria for a Level III level of punishment.[4] Majority opinion at 34-49.

The HPA is required to set minimum terms in accordance with its Guidelines for Establishing Minimum Terms of Imprisonment (1989) (hereinafter "HPA Guidelines"). HRS § 706-669(8) (1993 & Supp. 1996). The minimum sentences for particular offenses fall within ranges that are determined based on (1) the maximum sentence for the offense, and (2) whether the offender's level of punishment is classified as Level I, II, or III. HPA

[4] The majority opinion also concludes that Fagaragan did not waive the issues that are addressed here, because there is a factual dispute about when he received notice of the HPA's decision re-setting his minimum terms. Majority opinion at 33. I will assume arguendo that the majority's analysis on that point is correct, but respectfully note that it does not follow, as the majority suggests, that the appropriate disposition would be to have the circuit court remand this matter to the HPA for purposes of resetting the minimum terms. Majority opinion at 47-48. Rather, it would appear that the case should be remanded to the circuit court to resolve the factual dispute regarding notice prior to addressing the merits of Fagaragan's petition. In any event, as set forth below, I do not believe that any remand is necessary since the HPA did not err in re-setting Fagaragan's minimum terms.

Guidelines at 2. The Guidelines set forth a number of criteria for each of the three levels. Id. at 3-7. In explaining the criteria, the Guidelines note that "[i]t should be emphasized that two of the primary criteria discussed under the three levels of punishment, Nature of Offense and Degree of Injury/Loss to Person or Property, are comparative and require awareness and knowledge by the Authority members of offense circumstances and past Authority decisions." Id. at 3 (emphasis added).

The first criteria for Level III is Nature of Offense, and provides in relevant part as follows:

> a. The offense was against a person(s) and the offender displayed a callous and/or cruel disregard for the safety and welfare of others; or
> b. The offense involved the manufacture, importation, distribution, or cultivation of substantial quantities of drugs. . . .
> c. The offense was committed against the elderly, a handicapped person, or a minor, and the conviction was for murder, attempted murder, sexual assault, robbery, assault, or kidnapping[.]

Id. at 5.

As noted by the majority, subsection (b) indicates that "[t]he offense" includes "distribution," but not possession, of "substantial quantities of drugs."[5] Majority opinion at 37. The majority suggests that because the ICA reversed Fagaragan's attempted distribution conviction, he no longer satisfies the

[5] Fagaragan was convicted of possessing 5.46 ounces of methamphetamine, which is more than five times the minimum required for conviction under the statute. See HRS § 712-1241(1)(a)(i).

criteria for Level III punishment because he was not convicted of distributing drugs. Majority opinion at 37. There are several reasons why that argument must fail.

First, as noted above, although the attempted distribution count was reversed, the count that was based on possession of more than an ounce of methamphetamine remained intact. The two counts involved exactly the same conduct; therefore, Fagaragan's culpability remained exactly the same.

Second, as noted by the ICA, the legislature intended that possession of more than an ounce of methamphetamine "would serve as a proxy for the intent to distribute under HRS § 712-1241." Fagaragan, 115 Hawaiʻi at 370, 167 P.3d at 745. As noted by the Judicial Council in its 1970 report, "[l]arge amounts indicate that the defendant is a main source of supply, sometimes called an 'importer,' 'dealer,' or 'wholesaler.'" Judicial Council of Hawaii, Hawaii Penal Code (Proposed Draft) at 346. The statute was accordingly structured to punish a defendant who, like Fagaragan, possesses "'wholesale' amounts of a narcotic drug" the same as a defendant who "dispenses 'retail' amounts of narcotics": both of them are guilty of the same offense, Promoting a Dangerous Drug in the First Degree, with the same maximum sentence. Id. at 346-47; HRS §§ 706-659, 712-1241(2). Thus, the fact that Fagaragan's conviction on the attempted distribution count was reversed was immaterial.

Third, the HPA's guidelines allow the Authority to determine Nature of Offense based on the actual conduct of the defendant in committing the offense. This is reflected in several different ways in the Guidelines. Most notably, the criteria at issue here -- that "[t]he offense involved the . . . distribution . . . of substantial quantities of drugs" -- by its very terms provides that it is sufficient if the offense "involved" distribution. HPA Guidelines at 5. It does not require that the defendant be convicted of an offense that has distribution as an element.

It is noteworthy that the drafters of the Guidelines knew how to distinguish between an offense and a conviction. Indeed, in the very next criteria after the one at issue here, the Guidelines recognize that distinction by providing that "[t]he offense was committed against the elderly, a handicapped person, or a minor, and the conviction was for murder, attempted murder, sexual assault, robbery, assault, or kidnapping[.]" HPA Guidelines at 5 (emphases added).

It also is significant that the preamble to the Guidelines' discussion of the Criteria provides that determining the Nature of Offense "require[s] an awareness and knowledge by the Authority members of offense circumstances." Id. at 3 (emphasis added). If, as the majority suggests, the analysis is driven solely by the elements of the counts of conviction, then

"awareness and knowledge . . . of offense circumstances" should be of little or no relevance. Moreover, contrary to the suggestion of the majority, majority opinion at 44-46, this provision gives notice to offenders that they could be held accountable for distribution even if they were not convicted of an offense that includes distribution as an element.

III. CONCLUSION

The ICA's decision reversing Fagaragan's conviction for Attempted Promoting a Dangerous Drug in the First Degree in Criminal No. 05-1-0090(1) had no effect whatsoever on Fagaragan's culpability. That is because of the unique circumstances of the case, i.e., he was convicted and sentenced in two separate counts for exactly the same conduct. Although one of those counts was reversed, the other was not. As a result, when the HPA reset his minimum term in 05-1-0090(1), they were faced with exactly the same person as before: he had done exactly the same things, and he therefore had exactly the same level of culpability. Thus, it was not arbitrary and capricious for the HPA to establish the same minimum terms on the remaining counts. Nor is there any way that Fagaragan's minimum sentences in Criminal No. 04-1-0595(1) could have been affected. Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paul A. Nakayama