

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the result reached by the majority. I write separately because my reason for affirming the circuit court's decision to modify the probation of Defendant-Appellant Jayvan Curioso (Curioso) to make the payment of restitution a condition of probation differs from the grounds relied upon by the majority. I join in the majority's analysis in rejecting Curioso's claim that the circuit court failed to consider Curioso's ability to pay in requiring him to pay \$50 per month in restitution.

My basis for affirming the circuit court's decision to modify Curioso's probation to make payment of restitution a condition of probation is as follows. When the circuit court granted Curioso's motion to defer acceptance of his guilty pleas in 2007, it ordered him to pay restitution in the amount of \$3,366.06, jointly and severally with his two co-defendants, as a condition of the deferral, and it also made the payment of restitution a free-standing order that would remain in effect beyond the deferral period. However, when the circuit court set aside the deferral, due to violations by Curioso, and sentenced Curioso to probation on September 1, 2011, it did not make Curioso's payment of restitution a condition of probation.

Nevertheless, the circuit court's imposition of restitution as a condition of probation was mandated by statute. Pursuant to Hawaii Revised Statutes (HRS) § 706-646(2) (Supp. 2006), a court is required to order the defendant to make restitution when requested by the victim. Curioso does not dispute that the amount of the restitution that the circuit court ordered in granting his motion for deferral was proper. In addition, under HRS § 706-624(1)(g) (Supp. 2006), a court is required to make restitution ordered pursuant to HRS § 706-646 a mandatory condition of probation. In my view, the circuit court's failure to impose restitution as a mandatory condition of probation when it sentenced Curioso to probation on September 1, 2011, as required by HRS §§ 706-646(2) and 706-624(1)(g),

rendered Curioso's sentence an illegal sentence. Under Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (2003), a court may correct an illegal sentence at any time. Therefore, the circuit court did not err in entering its May 1, 2013, order, which modified Curioso's probation and corrected its illegal sentence by making Curioso's payment of restitution a condition of his probation. See State v. Fry, 61 Haw. 226, 228-31, 602 P.2d 13, 15-17 (1979) (rejecting the defendant's challenge to the trial court's correction of an illegal sentence pursuant to HRPP Rule 35).

Craig H. Nakamura