IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

MICHAEL C. TIERNEY, Petitioner/Defendant-Appellant.

NO. SCWC-29939

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29939; CR. NO. 1P108-6561)

MAY 7, 2012

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

In criminal cases where a defendant's fitness to proceed becomes an issue, the Hawaiʻi Penal Code authorizes a trial judge to suspend proceedings in the case, Hawaiʻi Revised Statutes (HRS) § 704-404(1) (Supp. 2011), and "appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant." HRS § 704-404(2) (Supp. 2011). The Code also envisions a situation where a defendant is

unwilling to be examined for this purpose: "If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of physical or mental disease, disorder, or defect." HRS § 704-404(5) (1993) (emphasis added). The majority holds that the trial court abused its discretion in proceeding to trial in this case even though it was not possible for the examiner to include such an opinion. See Majority Opinion at 30. In thus holding, the majority reads the words "if possible" out of HRS § 704-404(5); accordingly, insofar as this is the only issue before this court, I respectfully dissent.

As we have noted in the interpretation of statutes, "this court recognizes that its primary duty is to ascertain and give full effect to the intent of the legislature." Shimabuku v. Montgomery Elevator Co., 79 Hawai'i 352, 356, 903 P.2d 48, 52 (1995) (citing Sol v. AIG Hawai'i Ins. Co., 76 Hawai'i 304, 307, 875 P.2d 921, 924 (1994)). "The intention of the legislature is to be obtained primarily from the language contained in the statute itself." Kam v. Noh, 70 Haw. 321, 325, 770 P.2d 414, 416 (1989) (citing In re Hawaiian Telephone Co., 61 Haw. 572, 577, 608 P.2d 383, 387 (1980)). "The first cardinal rule of statutory construction is that legislative enactments are presumptively

valid and, if possible, every word, clause, and sentence of a statute should be interpreted in such a manner as to give them effect." Sato v. Tawata, 79 Hawai'i 14, 22, 897 P.2d 941, 949 (1995) (emphasis added) (Ramil, J., dissenting) (quoting Richardson v. City & Cnty. of Honolulu, 76 Hawai'i 46, 54, 868 P.2d 1193, 1201 (1994) (internal quotation marks and brackets omitted); see also Methven-Abreu v. Hawaiian Ins. & Guar. Co., 73 Haw. 385, 392, 834 P.2d 279, 284 (1992) (quoting Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984)) (noting that "courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute"); The King v. Kahele, 7 Haw. 388, 389 (1888) ("[W]e are bound to give effect to every word of a statute if it is possible so to do.").

In reading HRS § 704-404(5) so as not to exclude any words, I note that it contains two discrete requirements in relation to the examiner's report. First, "[i]f the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state[.]" During both of the attempted examinations on July 11, 2008 and August 4, 2008, Tierney stated that he was unwilling to participate on account of his Fifth Amendment rights and then

left the interview room; both of the examiner's reports state this. Second, if the defendant is unwilling to participate, "the report . . . shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of physical or mental disease, disorder, or defect." (Emphasis added). Although "shall" is a mandatory term, as the majority points out, Majority Opinion at 25, the statute plainly requires such an opinion only when it is possible to include such an opinion. Given the circumstances of both aborted examinations--both times, Tierney left after two minutes--and the fact that, as stated in the two reports, no other psychiatric records were available for review, it appears from the record that it was not possible for the examiner to form and include an opinion as to whether Tierney's unwillingness "was the result of physical or mental disease, disorder, or defect."

Nevertheless, the majority states that in both the July 11, 2008 report and the August 4, 2008 report, "there is no opinion offered by [the] examiner in response to" the court's order, which mirrors the language of the statute, that the report "shall include, if possible, an opinion as to whether defendant's unwillingness was the result of physical or mental disease, disorder or defect." Majority Opinion at 22 (emphasis added; internal quotation marks omitted). In holding that the trial court abused its discretion in proceeding to trial in this case,

the majority ignores the "if possible" language in the statute and requires medical examiners appointed under HRS § 704-404 to produce opinions even when they are clearly unable to do so.

Additionally, I must also note my disagreement with the majority's analysis of State v. Wilkerson, 330 S.W.3d 851 (Mo. App. 2011). In that case, the Missouri Court of Appeals vacated Wilkerson's conviction and sentence because the trial court erroneously proceeded to trial without first receiving the report of mental examination it had ordered regarding Wilkerson's fitness to proceed. Id. at 852-53. As in this case, a mental health examiner had been appointed by the court to examine Wilkerson; at the correctional center, Wilkerson refused to meet with the examiner and undergo examination. Id. at 853. Instead of submitting a report, the examiner sent a letter to the court explaining that he was unable to examine Wilkerson; the court took no further action regarding the examination and proceeded to trial. Id. The appellate court vacated the judgment of the trial court there because the examiner simply "failed to provide a mental health report" as required by the statute and the trial court found Wilkerson fit and proceeded to trial without having received or considered the report. Id. at 854. Moreover, the statute at issue, Vernon's Annotated Missouri Statutes (V.A.M.S.) § 552.020, does not provide for a situation where the defendant is unwilling to undergo the examination. V.A.M.S. § 552.020.2

only requires that when a psychiatrist or psychologist is ordered to examine a defendant for fitness to proceed, "[t]he order shall direct that a written report or reports of such examination be filed with the clerk of the court." According to V.A.M.S. § 552.020.3,

> A report of the examination made under this section shall include:
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> (1) Detailed findings;
>
> (2) An opinion as to whether the accused has a mental disease or defect;
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> (3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;
>
> (4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination, by the court, of mental fitness to proceed; and
>
> (5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

Neither subsection 3 nor any other part of V.A.M.S. § 552.020 contemplates what the examiner may do in the event that the defendant is unwilling to undergo examination. Thus, V.A.M.S. § 552.020 and HRS § 704-404 are not "similar competence statute[s]" in this regard as the majority posits, Majority Opinion at 24, and when the majority states that "[t]he language of [HRS § 704-404] is mandatory ('shall') with regard to the nature of the report when the defendant is unwilling to cooperate[,]" it ignores the "if possible" language in the statute. Majority

Opinion at 25. Thus, I cannot say, as the majority does, that the examiner "did not comply with HRS § 704-404(5) or with the court's June 20, 2008 [and July 18, 2008] order[s]." Majority Opinion at 26.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama