SCWC-11-0000393

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

STANLEY S.L. KONG, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000393; CR. NO. 09-1-0683(2))

DISSENT BY ACOBA, J. TO REJECTION OF ORAL ARGUMENT

I would accept the application for certiorari with oral argument, because respectfully this case presents questions of manifest and substantial errors by the circuit court of the second circuit (the court) and the Intermediate Court of Appeals (ICA). Holding oral argument in this case is necessary for a complete understanding of the ramifications of the issues. For "'[o]ral arguments can assist judges in understanding issues, facts, and arguments of the parties, thereby helping judges decide cases appropriately.'" Blair v. Harris, 98 Hawaiʻi 176,

186, 45 P.3d 798, 808 (2002) (Acoba, J., concurring and dissenting) (citing R.J. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 Iowa L. Rev. 1, 4 (1986)). Therefore, I respectfully dissent from the denial of oral argument in this case.

I.

Petitioner/Defendant-Appellant Stanley S.L. Kong (Kong) was convicted of one count of Promoting a Dangerous Drug in the Second Degree, HRS § 712-1242 (Supp. 2011) (Count I) and Prohibited Acts Related to Drug Paraphernalia, HRS § 329-43.5 (2010) (Count 2), following Kong's self-termination from the Drug Court program. On April 11, 2011 the court conducted a continued sentencing hearing in Kong's case, at the conclusion of which the court sentenced Kong as follows:

> Taking into consideration all of the factors set forth in [HRS §] 706-606, including the extensive record of the defendant, which includes six burglary convictions, which really represents -- I'm sorry. Yeah, six burglary convictions, ten felonies, which represents a lot of harm in our community.
>
> The [c]ourt is going to impose the following sentence in this matter. The defendant will be committed to the care and custody of the Director of the Department of Public Safety for a period of ten years on Count 1, five years on Count 2.
>
> . . . .
>
> In view of his extensive criminality, the Court is going to make these counts run consecutive for a total of fifteen years, mittimus forthwith, full credit for time served.
>
> I will order that he be given an opportunity to participate in the Cash Box drug treatment program at the earliest convenience of the Department of Public Safety.

On the same date, the court entered its Judgment of Conviction and Sentence. In a published opinion, the ICA upheld the court's Judgment of Conviction and Sentence, State v. Kong, 129 Hawai'i

135, 145, 295 P.3d 1005, 1015 (App. 2013), and Kong seeks certiorari from this court.

II.

It is not disputed that, in sentencing Kong, the court relied on two prior convictions that did not exist when it stated that the defendant had "six burglary convictions, . . . ten felonies [that included the six burglaries]." In fact, these were two of the "ten felonies" relied on by the court in arriving at its sentencing decision.

Under these circumstances, plain error would appear to apply, because the court's error in considering two non-existent convictions "affects substantial rights of the defendant," State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999), and we must notice plain error to "correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Miller, 122 Hawai'i 92, 100, 223 P.3d 157, 165 (2010) (internal quotation marks and emphases omitted). It would appear nothing could be more injurious to the fairness and integrity of our judicial system than for any court to sustain a sentence based on convictions that in fact do not exist.

There is nothing to indicate how the court weighed these two dismissed convictions in arriving at its ultimate sentence. For example, the court might have imposed a different sentence if it knew that Kong's total number of convictions was

less that what it stated. All that is known is that the court based its sentence on Kong's "extensive criminal record" without further explanation. But, as a matter of fact Kong's record was not as "extensive" as the court believed it to be. As such, there can be no speculation as to what the outcome would have been had the court been aware that the two convictions listed as Cr. No. 92-0138(3) had been dismissed. Similarly, there can be no speculation of what sentence the court would impose were the case remanded. See Kong, 129 Hawai'i at 143, 295 P.3d at 1014.

The brevity of the court's statement makes it impossible to conclude that the court's error in considering the dismissed convictions was harmless error. See State v. Hussein, 122 Hawai'i 495, 509-510, 229 P.3d 313, 327-38 (2010) (noting that one of the rationales behind requiring a statement of reasons is to demonstrate to the appellate court that a particular sentence was fair). This error seemingly requires that Kong must be resentenced.

III.

Additionally, in Hussein, this court held that "a court must state its reasons as to why a consecutive sentence rather than a concurrent one was required." 122 Hawai'i at 509, 229 P.3d at 327. It was explained that "reasons identify the facts or circumstances within the range of statutory factors that a court considers important in determining that a consecutive sentence is appropriate." Id. (emphasis added). Such a statement "evince[s] not merely consideration of the factors but

recites the specific circumstances that led the court to impose sentences consecutively." Id. (emphasis added). Moreover, the statement of reasons also serves to inform the defendant "that the decision to impose consecutive sentences was deliberate, rational, and fair."[1] Id. at 510, 229 P.3d at 328.

In the instant case, the court devoted only a single statement to explain the necessity of imposing a consecutive sentence. The court merely stated that "[i]n view of his extensive criminality, the Court is going to make these counts run consecutive." This abbreviated explanation would appear to contravene the holding in Hussein. It provided no assurance to Kong, or the public, or the appellate courts, "that the decision to impose consecutive sentences was deliberate, rational, and fair," nor did it provide any basis for understanding the specific circumstances that motivated the imposition of a consecutive sentence. Id. at 509, 229 P.3d at 327.

The ICA noted that the court's statement that it was "'[t]aking into consideration all of the factors set forth in HRS Section 706-606, including the extensive record of the defendant, which includes six burglary convictions . . . ten felonies, which represents a lot of harm in our community," represented a statement of reasons that satisfied Hussein. Kong, 129 Hawai'i

[1] Hussein explained that the statement of reasons could specifically inform the defendant "that the court has concluded that he or she is dangerous to the safety of the public, or poses an unacceptable risk of re-offending, or that rehabilitation appears unlikely due to his or her lack of motivation and a failure to demonstrate any interest in treatment, or that the multiplicity of offenses and victims and the impact upon the victims' lives warrant imposition of a consecutive term." 122 Hawai'i at 509, 229 P.3d at 327.

at 141, 295 P.3d 1011. However, Kong had requested probation and Respondent/Plaintiff-Appellee the State (the State) had requested an "open ten year term." The statements of the court prior to its single sentence rendition of a consecutive term served to justify the court's decision to sentence Kong to a prison term, instead of probation, as had been requested by Kong.

Apparently, no one requested a sentence of consecutive terms. Hence, the only justification for the consecutive sentence was the court's single statement about Kong's "extensive criminality." In these circumstances, the court's solitary statement seemingly violated its duty to recite the specific circumstances and the statement of factors that led it to impose a consecutive, as opposed to a concurrent, sentence despite the lack of any recommendation to that effect from anyone.

Central to this case is Hussein, in which the public interest in sentencing procedures played a pivotal role. In that connection, "oral argument [would] play[] an educational function, informing the public as to fundamental legal issues which [as in this case] can, and will, impact our community." Blair, 98 Hawai'i at 187, 45 P.3d at 809.

IV.

Moreover, the ICA may have gravely erred by applying the analysis set forth in State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 288 (App. 1996) in determining that the Petitioner's failure to contest the dismissal of the convictions was attributable to Kong. In Sinagoga, the ICA outlined a five-step procedure which

applied when the defendant argued that a prior conviction "was (1) uncounseled, (2) otherwise invalidly entered, and/or (3), not against the defendant." Id, at 447, 918 P.2d at 254. However, in State v. Veikoso, 102 Hawai'i 219, 74 P.3d 575 (2003), this court held that the "otherwise invalidly entered" language "should be disregarded," thereby limiting Sinagoga's holding to the first and third prongs. Id. at 226 n.8, 74 P.3d at 582 n.8; see also State v. Heggland, 118 Hawai'i 425, 440 n.7, 193 P.3d 356 ("Pursuant to Veikoso's modification of the Sinagoga procedure, a defendant is permitted to challenge a prior conviction on the grounds that it was (1) uncounseled and/or (2) not against the defendant."); Heggland, 118 Hawai'i at 447, 193 P.3d at 363 (Acoba, J., concurring)("[T]he import of Veikoso is that the Sinagoga five-step analysis does not apply in situations where the defendant does not raise a good faith challenge based on an uncounseled prior conviction and/or a prior conviction that was not rendered against the defendant.").

In the instant case, Kong "did not raise an uncounseled conviction or a mistaken identity challenge." Heggland, 118 Hawai'i at 364, 193 P.3d at 364 (Acoba, J., concurring). To the contrary, Kong challenged the convictions relied on by the court on the basis that those convictions did not exist. Hence, Sinagoga would not seem to apply at all and the State should not "benefit from the presumption of validity accorded an alleged prior conviction, as provided under step three of the Sinagoga analysis." Id.

Apparently the ICA, however, accorded Kong's prior convictions a presumption of validity under Sinagoga. See Kong, 129 Hawai'i at 143, 295 P.3d 1013 (holding that Kong "conceded his prior convictions in Cr. No. 92-0138(3)" because he "did not avail himself of the opportunity to controvert the PSI report's listing of the convictions in Cr. No. 92-0138(3)"). In doing so the ICA may have violated this Court's precedent established by Veikoso. Instead, the burden would appear to be on the State to provide evidence that "'reasonably satisfies the court' of the prior conviction" Heggland, 118 Hawai'i at 448, 193 P.3d at 364 (Acoba, J., concurring) (quoting State v. Freitas, 61 Haw. 262, 277, 602 P.2d 914, 925 (1979)).

In this instance, the input of the attorneys would be crucial. "As Stanley Mosk, a justice of the California Supreme Court, has explained, 'skillful interrogation of counsel from the bench may reveal how a proposed . . . judicial rule will actually perform in day-to-day practice.'" Blair, 98 Hawai'i at 186, 98 P.3d at 808 (citing S. Mosk, In Defense of Oral Argument, 1 J. App. Prac. & Process 25, 27 (1999)). Thus, "[a] dialogue among the members of the court and counsel" in this situation would leads us, as justices to "better understand the practical ramifications of [this] decision[]." Id.

V.

Lastly, there is a genuine issue as to whether Kong validly waived his right to a Drug Court program termination hearing. The ICA recognized that Kong had a right to a hearing

upon termination from the drug court program, pursuant to article I, section 5 of the Hawai‘i Constitution. Kong, 129 Hawai‘i at 144, 295 P.3d at 1014.

Waiver of Kong's right to a termination hearing must have been "knowingly, intelligently, and voluntarily" undertaken. State v. Friedman, 93 Hawai‘i 63, 68-69, 996 P.2d at 268, 273-74 (2000). In this case, although the ICA held that Kong's waiver was "'voluntary and intelligently undertaken' under 'the totality of the facts and circumstances[,]'" Kong, 129 Hawai‘i at 144, 295 P.3d at 1014 (quoting State v. Friedman, 93 Hawai‘i at 68-69, 996 P.2d at 273-74), there are several points raised by Kong in his Application that call this conclusion into question.

Kong asks whether the waiver was valid in light of the fact that the court at the February 3, 2011 stipulated facts trial and termination hearing, the court only asked Kong four cursory questions regarding his decision to terminate, and that, as part of its totality of the circumstances analysis, the ICA relied on a colloquy conducted at the Drug Court program admission hearing, which had taken place about a year prior to Kong's termination hearing. See Kong, 129 Hawai‘i at 144, 295 P.3d at 1014.

This court has not had occasion to opine on what procedure is required, pursuant to due process, where a defendant has self-terminated from the Drug Court program. Namely, there is an outstanding question of what constitutes a valid waiver of a termination hearing. Because of the widespread impact the drug

court program has on the community, oral argument should be held on this issue. Respectfully, "I do not believe it engenders confidence in our decision when we forego an open and visible airing of the [serious] issues" presented in this case. Blair, 98 Hawai'i at 187, 45 P.3d at 809. "The consideration [] that justice should always been seen to be done [] is applicable." Id.

VI.

In light of the magnitude of the issues, oral argument is essential. "In deciding cases such as this one, the benefit of oral argument is evident." Id. at 186, 45 P.3d at 808. In sum, "we should take part in a complete deliberative process, for the impact of our decision extends beyond the facts and parties involved in this case." Id. at 187, 45 P.3d at 809. Therefore, I respectfully dissent from the order of no oral argument.

DATED: Honolulu, Hawai'i, June 13, 2013.

/s/ Simeon R. Acoba, Jr.