

NO. 28987

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MICHAEL CHANG, Defendant-Appellant

EMERILINDO
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APPEAL FROM THE CIRCUIT COURT OF THE CIRCUIT CIRCUIT
(CR. NO. 07-1-1190)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley and Leonard, JJ.)

Defendant-Appellant Michael Chang (Chang) appeals from the Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit (circuit court).¹

On November 8, 2007, a jury convicted Chang of Count I, Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (Supp. 2006); Counts II, III, and IV, Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2008); Count V, Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993); Count VI, Promoting a Dangerous Drug in the Fourth Degree, in violation of HRS § 712-1246.5 (1993); and Count VII, Driving Without a License, in violation of HRS § 286-102 (Supp. 2004). The circuit court sentenced Chang to ten years of imprisonment on Count I; five years of imprisonment for each of Counts II, III, IV, and V; and one year of imprisonment for each of Counts VI and VII. The circuit court further sentenced Chang, as a repeat offender, to a mandatory minimum term of imprisonment of three years and four months on Count I and a mandatory minimum term imprisonment of one year and eight months on each of Counts II, III, and IV. The circuit court ordered

¹ The Honorable Karl K. Sakamoto presided.

that Count I was to run consecutively to Count II and Counts III through VII were to run concurrently with each other and with Counts I and II.

On appeal, Chang contended (1) the circuit court erred by not dismissing the charges pursuant to Rule 48 of the Hawai'i Rules of Penal Procedure (HRPP) and (2) the imposition of consecutive terms requires a jury finding under State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007), and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007).

On June 25, 2009, this court, by Summary Disposition Order (SDO), affirmed the Amended Judgment of Conviction and Sentence. On September 23, 2009, Chang filed an Application for Writ of Certiorari, which the Hawai'i Supreme Court accepted on November 2, 2009.

In its November 2, 2009 Summary Disposition Order, the supreme court vacated this court's SDO and Judgment on Appeal, remanded the case to this court with instructions to remand to the circuit court for entry of appropriate findings of fact and conclusions of law and a written order disposing of Chang's HRPP Rule 48 motion, and order the parties to submit additional briefs on the findings of fact and conclusions of law.

The circuit court having issued findings of fact and conclusions of law; the parties having submitted additional briefs pursuant to the November 2, 2009 supreme court Summary Disposition Order; and this court having carefully considered the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Chang's point of error as follows:

(1) On May 14, 2007, Chang's counsel orally requested that the charges against Chang be dismissed. In the written order prepared by Chang's counsel, it states that Chang moved the circuit court to dismiss the charges. Dismissal of charges with or without prejudice is at the discretion of the circuit court.

State v. Jackson, 81 Hawai'i 39, 54-55, 912 P.2d 71, 86-87 (1996).

Contrary to Chang's claim, HRPP Rule 48(b)(2) applies. The circuit court dismissed without prejudice the charges against Chang upon his motion. The State re-filed the same charges against Chang on June 27, 2007. Chang's trial commenced on October 31, 2007. Six months had not elapsed between the re-filing of the charges and Chang's trial. Therefore, the circuit court did not err by denying Chang's oral motion to dismiss pursuant to HRPP Rule 48.

(2) Chang's claim that his consecutive sentences without a jury finding of fact violated Maugaotega and Cunningham is without merit. The Hawai'i Supreme Court has held that the imposition of consecutive sentences does not require a jury to make findings of fact. State v. Kahapea, 111 Hawai'i 267, 279-80, 141 P.3d 440, 452-53 (2006).

Therefore,

The Amended Judgment of Conviction and Sentence filed on January 31, 2008 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 22, 2010.

On the briefs:

Joseph R. Mottl
for Defendant-Appellant.

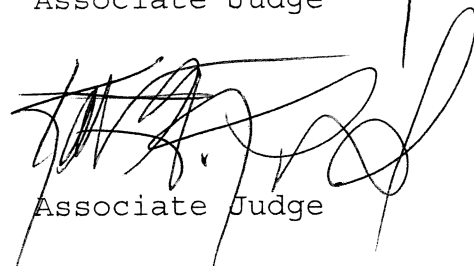
Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge