

**Electronically Filed  
Supreme Court  
SCWC-11-0000393  
10-DEC-2013  
08:54 AM**

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

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

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SCWC-11-0000393

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

DECEMBER 10, 2013

RECKTENWALD, C.J., NAKAYAMA, J., AND CIRCUIT JUDGE AYABE,  
IN PLACE OF POLLACK, J., RECUSED, WITH ACOBA, J.,  
DISSENTING SEPARATELY, WITH WHOM MCKENNA, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, C.J.

Stanley S.L. Kong was charged with Promoting a Dangerous Drug in the Second Degree and Prohibited Acts Related to Drug Paraphernalia. He was admitted into the Maui Drug Court program, but subsequently self-terminated from the program. The Circuit Court of the Second Circuit then found Kong guilty as

charged, and sentenced him to a ten year indeterminate term of imprisonment and a five year indeterminate term of imprisonment, respectively.<sup>1</sup> The circuit court ordered that the terms run consecutively, for a total of 15 years, due to Kong's history of "extensive criminality."

In his application, Kong argues that the circuit court's statement regarding his "extensive criminality" was insufficient to justify his consecutive sentence based on the requirements set forth in State v. Hussein, 122 Hawai'i 495, 229 P.3d 313 (2010). He also argues that his sentence constitutes plain error because it was based on crimes he did not commit. Finally, Kong argues that the colloquy conducted by the circuit court regarding his self-termination from the Drug Court program was insufficient to establish that he knowingly, voluntarily, and intelligently waived his right to a termination hearing.

For the reasons set forth below, we reject each of Kong's arguments. We affirm the judgment of the Intermediate Court of Appeals, which affirmed the circuit court's judgment of conviction and sentence.

### **I. Background**

The following factual background is taken from the record on appeal.

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<sup>1</sup> The Honorable Shackley F. Raffetto presided.

**A. Circuit Court Proceedings**

Kong was charged with Promoting a Dangerous Drug in the Second Degree in violation of Hawai'i Revised Statutes (HRS) § 712-1242,<sup>2</sup> and Prohibited Acts Related to Drug Paraphernalia in violation of HRS § 329-43.5.<sup>3</sup>

Kong subsequently petitioned for admission into the Maui Drug Court program. Kong signed a petition for admission, in which he waived his right to a trial, confirmed his understanding that the charges against him would be dismissed if he successfully completed the program, and confirmed his understanding that he would proceed to a stipulated facts trial

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<sup>2</sup> HRS § 712-1242 (Supp. 2007) provides, in relevant part:

(1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

. . . .

(b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(i) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

. . . .

(2) Promoting a dangerous drug in the second degree is a class B felony.

<sup>3</sup> HRS § 329-43.5 (1993) provides, in relevant part:

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

if he was unsuccessful in the program. He also admitted to the charges against him.

That same day, the circuit court held a hearing, in which it orally informed Kong of the legal rights that he would surrender if he chose to enter the Drug Court program. The circuit court also reviewed the petition with Kong and explained to Kong that he would be terminated from the program if he violated any of the rules set forth in the Drug Court Program Admission Agreement, which Kong also had signed. The circuit court conducted a detailed colloquy with Kong regarding the rights he was waiving by agreeing to enter the program, including his right to a trial on the charges and the rights associated with a public trial. The circuit court confirmed that Kong admitted to the charges and wanted to proceed. The circuit court found that Kong voluntarily, knowingly, and intelligently waived his rights as indicated in the petition, and admitted Kong into the program.

Kong subsequently attended numerous status hearings over a period of approximately six months. However, at a January 26, 2011 status hearing,<sup>4</sup> Kong's counsel, a Deputy Public Defender (DPD) indicated her understanding that the Drug Court program was recommending that Kong be terminated from the program. The DPD stated that Kong instead wanted to self-

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<sup>4</sup> The Honorable Joseph E. Cardoza presided.

terminate from the program. Kong's Drug Court treatment team confirmed that Kong had failed to appear for a urinalysis, treatment group, and scheduled status hearing, and recommended that the court set a termination hearing. The circuit court addressed Kong:

[Mr. Kong], although the treatment team has recommended a termination hearing, I'm going to take you through some questions that . . . are similar to the questions I asked of someone else who indicated they wanted to terminate, or that person wanted to terminate.

You have the right to have a hearing on that. Just because someone recommends termination, it doesn't mean it's automatic. And at that hearing the Government would basically have to present an appropriate basis for terminating you from the drug court program. If the Court determines that that's not the appropriate course, then you can remain in the program and participate in the program. If, on the other hand, it is determined that termination is the appropriate result, then you would be terminated from the program.

But what I want to emphasize is that what's important here is that you understand that you have a right to have a hearing on that, and you have the right to have your attorney present and represent you during that hearing. So in addition to what the Prosecutor might do at the hearing and the burden that the Prosecution would carry, you have the right to have your attorney present whatever you would like your attorney to present during the termination hearing and have a fair hearing on that before that decision is made.

Kong acknowledged that he understood what the circuit court explained. The circuit court also explained to Kong the consequences of termination:

And, now, at a termination hearing, if you are terminated, you are a Track II participant, so what would happen is your -- your case would proceed to what's called a stipulated facts trial, in other words, where the facts are agreed on. So if you get past the point of termination, for example, if you self-terminate, for example, or if it's determined that you should be terminated, then the stipulated facts trial is basically a very short trial. Because essentially what you will have done already is admitted to all of the parts of the charge. So that's

presented and the trial doesn't even last a minute and you are found guilty as charged. You understand that?

Kong again acknowledged that he understood what the circuit court explained. The circuit court then stated, "And the reason I'm asking you that question is I want to make sure you understand . . . what consequences flow from the decision to self-terminate." (Emphasis added). The circuit court again asked Kong if he understood the consequences of a decision to self-terminate from the Drug Court program, and Kong responded, "Yeah, I understand in part. Yes, I do." The circuit court then explained:

Okay. So, basically there's no hearing. You give up the right to a termination hearing, number one, if you self-terminate; number 2, you move onto a stipulated facts trial where it's almost virtually certain, unless your attorney files any constitutionally based motions on your behalf, it's virtually certain that you will be found guilty as charged. And if the motions are filed, if there are any motions that could be filed, then those are heard. But if those are not successful, then that leads to a stipulated facts trial and that would . . . essentially result in a finding of guilty. Do you understand all of that?

Kong responded, "Yeah. Yeah." Kong then stated, "I want to self-terminate," but indicated that "just for the record" that "[u]p until this point the Public Defender's Office was, to my understanding, was never allowed to represent me in any felony cases because of conflict of interest in the past. They represented people who testified against me." The DPD stated:

I know [] Kong wanted to raise this to the Court today to preserve the issue, just to have it be on the record. And we did have this conversation about what appears to be a prior conflict with the Public Defender's Office with [] Kong as a juvenile in First Circuit on Oahu.

. . . . .  
[I]n looking in our data base, closed and opened files, there was no such conflict, and we were never told of a conflict. And I did raise the issue, and we can continue to talk about whether [Kong] wants to file a motion to withdraw, and that would be fine. But further discussion can be had, and I do understand that [] Kong still wanted to proceed with this self-termination, but possibly maybe with a new attorney.

Kong then stated that he "wanted to state [the possible conflict] on the record, and then still proceed with the termination." The circuit court was hesitant to proceed with termination in light of Kong's desire to preserve for appeal the issue of a possible conflict of interest. Accordingly, the circuit court set a hearing for a motion to withdraw counsel for February 3, 2011, and a termination hearing for March 7, 2011.

Kong ultimately did not file a motion for withdrawal and substitution of counsel pertaining to any alleged conflict of interest in relation to the circuit court proceedings. At the February 3, 2011 hearing,<sup>5</sup> the issue of withdrawal of counsel was not addressed. Instead, the following exchange occurred at the beginning of the hearing:

[DPD]: Good morning, your Honor. [The DPD] on behalf of [] Kong who is present, ready to self-terminate from the drug court program. Although he did benefit from the program and he would like to continue, he understands and would like to self-terminate in order to speed up the process.  
THE COURT: Okay.  
[Kong], is that right?  
[Kong]: Yes, your Honor.  
THE COURT: You want to self-terminate from the program?  
[Kong]: Yes, your Honor.  
THE COURT: Is your mind clear today about saying that?

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<sup>5</sup> The Honorable Shackley F. Raffetto presided.

[Kong]: Yes, it is.  
THE COURT: Are you taking any medicines or drugs?  
[Kong]: I'm not.  
THE COURT: All right.

The Court finds the defendant voluntarily, knowingly, and intelligently terminates from the adult drug court program.

We can go ahead with the stip facts trial then[.]

The circuit court determined that Kong was guilty as charged on all counts.

A sentencing hearing was held approximately two months later. At the hearing, the DPD indicated, "[W]e are prepared to proceed with sentencing. We have received the pre-sentence investigation [(PSI)] report. There are no changes at this time." (Emphasis added). The DPD requested that the circuit court consider sentencing Kong to "probation with long term treatment[.]" However, sentencing was continued because there was apparent confusion over whether one of the charges had been reduced.

At the continued sentencing hearing,<sup>6</sup> the DPD indicated that "Kong does not want to stipulate to the contents of the [PSI] report in this case[,]" to which the circuit court responded, "That's fine." The State then clarified that the charges had not been reduced. The DPD requested a sentence of probation or, alternatively, concurrent sentences.

The State then stated:

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<sup>6</sup> The Honorable Shackley F. Raffetto presided.



We will ask the Court to impose the prison term. [Kong] has previously served five and ten year prison terms, and his parole was revoked repeatedly in '93, '99, 2001, 2002. He was given a chance as a high risk candidate for drug court, and he just skipped out. So he's not probation eligible and would just ask that you impose the prison term at this point.

Kong stated:

. . . I would like to thank the Court for giving me the opportunity to participate in drug court at that time. There's only been two judges who has ever given me a chance, Judge Marks and yourself, so that much I'm grateful for. Sorry I wasn't able to complete it and maybe waste the taxpayer's money. But, you know, hopefully on the path that I take now I can make better decisions, if the scenario like that presents itself to me again.

The circuit court then sentenced Kong:

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, . . . ten felonies, which represents a lot of harm in our community.

The Court 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.

Thereafter, the circuit court entered its Judgment of Conviction and Sentence, and Kong timely filed a notice of appeal.

## **B. Appeal**

On appeal, Kong raised three points of error: (1) whether the circuit court erred in imposing consecutive terms of imprisonment without adequately articulating a rationale; (2)

whether the circuit court violated Kong's due process rights by basing its sentence on certain crimes set forth in the PSI report, specifically crimes in Cr. No. 92-0138 that Kong alleged were "vacated, remanded, and ultimately dismissed"; and (3) whether the circuit court erred by terminating Kong from the Drug Court program without conducting an on-the-record colloquy advising Kong of the rights he would relinquish by self-terminating.

In its answering brief, the State argued that the circuit court "clearly stated the specific fact of Kong's extensive criminal record was the reason for its imposition of consecutive sentencing for the protection of the community." The State then argued that the circuit court properly considered the information contained in the PSI report. Specifically, the State argued that Kong did not challenge the information in the PSI report in the circuit court and, in any event, the circuit court did not plainly err in sentencing Kong based on his "extensive criminal record in general, and not specifically" the alleged inaccurate convictions. Finally, the State argued that the circuit court properly terminated Kong from the Drug Court program.

In a published opinion, the ICA held that the circuit court did not abuse its discretion in sentencing Kong to consecutive terms of imprisonment. State v. Kong, 129 Hawai'i 135, 295 P.3d 1005 (App. 2013). The ICA determined:

Here, the Circuit Court did not abuse its discretion by sentencing Kong to consecutive terms of imprisonment pursuant to HRS § 706-668.5 because it considered the factors set forth in HRS § 706-606. The Circuit Court explained its reasoning before imposing its sentence, stating, "Taking 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." The Circuit Court further stated, "In view of [Kong's] extensive criminality, the Court is going to make these counts run consecutive for a total of fifteen years[.]"

Kong's "extensive record" and the fact that he caused "a lot of harm in our community" are specific circumstances that led the Circuit Court to conclude that a consecutive sentence was appropriate in this case. Given these circumstances, the Circuit Court likely concluded that Kong was "dangerous to the safety of the public, or poses an unacceptable risk of re-offending[.]" Hussein, 122 Hawai'i at 509, 229 P.3d at 327. In fact, Kong had re-offended, admitting that he had used drugs while participating in the MDC program. Kong had been given a second chance when he was allowed to continue in the [Drug Court] program after relapsing. Yet, Kong decided to self-terminate from the program, suggesting that "rehabilitation appears unlikely due to his [] lack of motivation and a failure to demonstrate any interest in treatment[.]" Hussein, 122 Hawai'i at 509, 229 P.3d at 327. These specific circumstances support the conclusion that the Circuit Court's "decision to impose consecutive sentences was deliberate, rational, and fair." Hussein, 122 Hawai'i at 510, 229 P.3d at 328.

Id. at 141, 295 P.3d at 1011 (footnotes omitted).

The ICA also held that the circuit court properly considered Kong's PSI report. Id. at 141-43, 295 P.3d at 1011-13. Citing this court's opinion in State v. Heggland, 118 Hawai'i 425, 439-40, 193 P.3d 341, 355-56 (2008), the ICA determined that Kong "conceded his prior convictions" because "each conviction listed may be used against defendant except those as to which the defendant timely responds with a good faith challenge on the record that the prior criminal conviction was . . . not against the defendant." Kong, 129 Hawai'i at 143, 295

P.3d at 1013. The ICA further held that these circumstances “do not rise to the level of plain error” inasmuch as the circuit court based its sentence on Kong’s “extensive criminality” and not specifically on the convictions in Cr. No. 92-0138. Id.

Finally, the ICA held that the circuit court properly terminated Kong from the Drug Court program because, under the totality of the circumstances, Kong voluntarily and intelligently self-terminated from the Drug Court program, and waived his right to a terminating hearing. Id. at 143-45, 295 P.3d at 1013-15.

Kong timely filed an application for writ of certiorari. The State did not file a response.

## **II. Standards of Review**

### **A. Sentencing**

This court has stated,

A sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Factors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant’s contentions. And, generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Rivera, 106 Hawai‘i 146, 154-55, 102 P.3d 1044, 1052-53 (2004) (format altered) (quotation marks, brackets, and citations omitted), overruled on other grounds by State v. Maugaotega, 115 Hawai‘i 432, 442-43, 168 P.3d 562, 572-73 (2007); State v. Aplaca, 96 Hawai‘i 17, 25, 25 P.3d 792, 800 (2001).

"The weight to be given the factors set forth in HRS § 706-606 in imposing sentence is a matter generally left to the discretion of the sentencing court, taking into consideration the circumstances of each case." State v. Akana, 10 Haw. App. 381, 386, 876 P.2d 1331, 1334 (1994).

**B. Plain Error**

Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (2012) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (citation omitted).

The appellate court "will apply the plain error standard of review 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. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 980 (2006) (quoting State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998)). An appellate court's "power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system -- that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." Nichols,

111 Hawai'i at 335, 141 P.3d at 982 (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

### III. Discussion

#### A. The circuit court did not abuse its discretion in sentencing Kong to consecutive terms of imprisonment

Kong argues that the circuit court's statement regarding his "extensive criminality" was insufficient to justify the imposition of consecutive sentences and did not meet the requirements of Hussein. As explained below, the circuit court did not abuse its discretion in sentencing Kong to consecutive terms based on Kong's "extensive criminality."

A sentencing court has discretion to order multiple terms of imprisonment to run concurrently or consecutively. HRS § 706-668.5(1) (Supp. 2008) ("If multiple terms of imprisonment are imposed on a defendant . . . the terms may run concurrently or consecutively."). "The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606." HRS § 706-668.5(2) (1993). HRS § 706-606 (1993) provides:

The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
  - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
  - (b) To afford adequate deterrence to criminal conduct;

- (c) To protect the public from further crimes of the defendant; and
- (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
- (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"[A]bsent clear evidence to the contrary, it is presumed that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606." Hussein, 122 Hawai'i at 503, 229 P.3d at 321 (citations and brackets omitted). Nevertheless, in Hussein, this court determined that "circuit courts must state on the record at the time of sentencing the reasons for imposing a consecutive sentence." Id. at 510, 229 P.3d at 328 (emphasis added). This court explained:

Such a requirement serves dual purposes. First, 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. An express statement, which evinces not merely consideration of the factors, but recites the specific circumstances that led the court to impose sentences consecutively in a particular case, provides a meaningful rationale to the defendant, the victim, and the public.

Second, reasons provide the conclusions drawn by the court from consideration of all the facts that pertain to the statutory factors. It is vital, for example, for the defendant to be specifically informed 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. Hence, reasons confirm for the defendant, the victim, the public, and the appellate court, that the decision to impose consecutive sentences was deliberate, rational, and fair.

Id. at 509-10, 229 P.3d at 327-28.

In this case, the circuit court explained its reasoning for imposing its sentence:

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, . . . ten felonies, which represents a lot of harm in our community.

The Court 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.

(Emphasis added).

Kong characterizes the circuit court's justification for imposing consecutive terms of imprisonment as "terse, conclusory, and last[ing] two words." However, the sentencing court is not required to articulate and explain its conclusions with respect to every factor listed in HRS § 706-606. Id. at 518-19, 229 P.3d at 337-38. Rather, "it is presumed that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606." Id. at 503, 229 P.3d at 321 (citations omitted). Thus, the sentencing court is required to articulate its reasoning only with respect to those factors it relies on in imposing consecutive sentences. Id. at 509-10, 229 P.3d at 327-28.



Hussein set forth two purposes served by requiring the court to state on the record the reasons for imposing a consecutive sentence: (1) identifying the facts or circumstances within the range of statutory factors that the court considered, and (2) confirming for the defendant, the victim, the public, and the appellate court that the decision was deliberate, rational, and fair. Id. Here, the circuit court's rationale satisfied the dual purposes set forth in Hussein.

First, the circuit court's statement regarding Kong's "extensive criminality" identified the specific facts or circumstances within the range of statutory factors that the court considered in imposing a consecutive sentence. See id. at 509, 229 P.3d at 327 (requiring that the sentencing court state "the specific circumstances that led the court to impose sentences consecutively in a particular case"). Indeed, the circuit court's statement regarding Kong's "extensive criminality" relates directly to the first of the relevant statutory factors listed in HRS § 706-606(1): "the history and characteristics of the defendant[.]"

Second, the circuit court's statement regarding Kong's extensive criminality also "provide[d] the conclusions drawn by the court from consideration of all the facts that pertain to the statutory factors[,]" and confirms for Kong, the public, and this court that the decision to impose consecutive sentences was deliberate, rational, and fair. Hussein, 122 Hawai'i at 509-10,

229 P.3d at 327-28. Put simply, Kong's "extensive criminality" provided a rational and fair basis within the range of statutory factors for the imposition of consecutive sentences.

However, Kong also asserts that the ICA erred in providing a "post hoc justification" for the circuit court's rationale when it speculated as to what the circuit court "likely concluded[.]" Kong specifically refers to the following paragraph of the ICA's opinion:

Given these circumstances, the Circuit Court likely concluded that Kong was "dangerous to the safety of the public, or poses an unacceptable risk of re-offending[.]" In fact, Kong had re-offended, admitting that he had used drugs while participating in the [Drug Court] program. Kong had been given a second chance when he was allowed to continue in the [Drug Court] program after relapsing. Yet, Kong decided to self-terminate from the program, suggesting that "rehabilitation appears unlikely due to his [] lack of motivation and a failure to demonstrate any interest in treatment[.]" These specific circumstances support the conclusion that the Circuit Court's "decision to impose consecutive sentences was deliberate, rational, and fair."

Kong, 129 Hawai'i at 141, 295 P.3d at 1011 (citations omitted) (emphasis added).

In this paragraph, it appears that the ICA attempted to relate the circuit court's factual considerations to the examples given in Hussein that would justify the circuit court's imposition of a consecutive sentence:

It is vital, for example, for the defendant to be specifically informed 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.

Hussein, 122 Hawai'i at 509, 229 P.3d at 327.

The ICA's determination that "the [c]ircuit [c]ourt likely concluded that Kong was 'dangerous to the safety of the public, or poses an unacceptable risk of re-offending'" and that rehabilitation appeared unlikely arguably could be read as speculating as to the circuit court's reasoning. Such speculation would be contrary to the holding in Hussein that the circuit court justify its decision "on the record at the time of sentencing." However, when read in context, it appears the ICA was not speculating regarding the circuit court's reasoning, but rather attempting to link the circuit court's express reasoning to the examples given in Hussein.

To the extent doing so constituted error by the ICA, such error does not warrant vacating Kong's conviction. Hussein does not require the circuit court to address the specific "example[s]" discussed in the opinion. Indeed, requiring the sentencing court to address these "example[s]" would introduce sentencing factors in excess of the statutory factors set out by the legislature. Compare id. with HRS § 706-606. Although Hussein required that the court articulate its reasons for imposing a consecutive sentence on the record at the time of sentencing, the examples it provided were illustrative. Id. at 509, 229 P.3d at 327. The critical question remains whether the circuit court articulated a "meaningful rationale"

for the sentence in light of the factors set forth in HRS § 706-606. In this case, the circuit court's reason, i.e., Kong's "extensive criminality[,]" sufficiently justified the imposition of a consecutive sentence under HRS § 706-606.<sup>7</sup>

Accordingly, the circuit court did not abuse its discretion in imposing a consecutive sentence in this case.

**B. The circuit court properly considered Kong's PSI report**

Kong contends that "[t]he circuit court based its sentence . . . on crimes that were vacated almost fifteen years earlier. The ICA affirmed the sentence by extending the presumption of validity to those non-existent convictions. The ICA gravely erred by upholding a consecutive prison sentence based on crimes that [] Kong did not commit." Kong specifically argues that the procedure set out in State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (App. 1996), for challenging convictions contained in a PSI report should not "extend to cases where convictions did not exist at the time of sentencing," and alternatively, that Sinagoga should be overturned. As explained below, Kong's arguments are without merit.

In Sinagoga, the ICA considered whether a defendant bears the burden of challenging prior criminal convictions listed

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<sup>7</sup> To be clear, we are neither overruling nor "upend[ing]" this court's opinion in Hussein. See dissenting opinion at 20. Hussein clearly stands for the proposition that a sentencing court must provide a "meaningful rationale" on the record to justify its imposition of a sentence. 122 Hawai'i at 509-10, 229 P.3d at 327-28. We expressly reaffirm this holding. Here, we merely hold that, under the circumstances of this case, the circuit court did not abuse its discretion in determining that Kong's "extensive criminality" justified the imposition of a consecutive sentence.

in the PSI report that the defendant contends are invalid. Id. at 444, 918 P.2d at 251. The ICA concluded that a defendant does bear such a burden in "ordinary sentencing situations."<sup>8</sup> Id. Specifically, the ICA held that any convictions contained in a PSI report "may be used against the defendant except those as to which the defendant timely responds with a good faith challenge on the record that the prior criminal conviction was (1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant." Id. at 444-45, 918 P.2d at 251-52. The ICA's conclusion was based on the rationale that "the defendant, more than anyone else, knows whether or not his or her prior criminal conviction was uncounseled, otherwise invalid, or irrelevant." Id. at 445, 918 P.2d at 252. Accordingly, "if the presentence report states that the defendant has a prior criminal conviction, and the defendant does not respond to that report with a good faith challenge on the record . . . that prior criminal conviction is reliable for all sentencing purposes." Id.

The ICA set forth the following procedure for trial courts to follow in cases "where ordinary sentencing procedures are applicable and there is a possibility that the court may use

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<sup>8</sup> "Ordinary sentencing situations" include mandatory minimums, eligibility for probation, and consecutive sentences, but exclude extended term sentencing. Id. at 444, 918 P.2d 251.

the defendant's prior conviction(s) as a basis for the imposition or enhancement of a prison sentence"<sup>9</sup>:

Step one, the court shall furnish to the defendant or defendant's counsel and to the prosecuting attorney a copy of the presentence report, HRS § 706-604, and any other report of defendant's prior criminal conviction(s). Step two, if the defendant contends that one or more of the reported prior criminal convictions was (1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant, the defendant shall, prior to the sentencing, respond with a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge. Step three, prior to imposing the sentence, the court shall inform the defendant that (a) each reported criminal conviction that is not validly challenged by the defendant is defendant's prior, counseled, validly entered, criminal conviction, and (b) a challenge to any reported prior criminal conviction not made by defendant before sentence is imposed may not thereafter, absent good cause, be raised to attack the court's sentence. Step four, with respect to each reported prior criminal conviction that the defendant challenges, the HRE [(Hawaii Rules of Evidence)] shall apply, and the court shall expressly decide before the sentencing whether the State satisfied its burden of proving to the reasonable satisfaction of the court that the opposite of the defendant's challenge is true. Step five, if the court is aware of the defendant's prior uncounseled or otherwise invalid criminal conviction(s), it shall not impose or enhance a prison sentence prior to expressly stating on the record that it did not consider it or them as a basis for the imposition or enhancement of a prison sentence.

Id. at 447, 918 P.2d at 254 (emphasis added).

The Sinagoga framework is applicable to this case because this is a case where "ordinary sentencing procedures are applicable and there [was] a possibility that the court may use [Kong's] prior conviction(s) as a basis for the imposition or enhancement of a prison sentence." Id. at 447, 918 P.2d at 254.

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<sup>9</sup> This court adopted and applied the Sinagoga test in Heggland, with one modification, discussed *infra*. 118 Hawai'i at 439-41, 193 P.3d at 355-57.

Here, step one of the Sinagoga framework was satisfied because Kong was provided with a copy of the PSI report, which contained a list of his prior convictions. Kong was then required to "respond with a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge." Id.

However, Kong did not avail himself of the opportunity to controvert the PSI report, which he now argues listed convictions that were allegedly dismissed. At the April 7, 2011 sentencing hearing, Kong's counsel stated, "We have received the [PSI] report. There are no changes at this time." At the continued sentencing hearing on April 11, 2011, Kong's counsel simply indicated that Kong did not want to stipulate to the contents of the PSI report. However, neither Kong nor his counsel objected to any of the convictions listed in the PSI report. See Hegqland, 118 Hawai'i at 432 n.4, 193 P.3d at 348 n.4 (noting that the defendant must "respond with a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge." (emphasis added)); cf. State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988) ("Fairness to the trial court impels a recitation in full of the grounds supporting an objection to the introduction of inadmissible matters. Otherwise, the court would be denied the opportunity to give the objection adequate consideration and rule correctly."). Because Kong failed to raise a good faith

challenge to his convictions in the circuit court, the circuit court did not err in relying on the PSI report.<sup>10</sup> Sinagoga, 81 Hawai'i at 445, 918 P.2d at 252 ("[I]f the presentence report states that the defendant has a prior criminal conviction, and the defendant does not respond to that report with a good faith challenge on the record . . . that prior criminal conviction is reliable for all sentencing purposes.").

Nevertheless, Kong argues that Sinagoga is inapplicable because this court limited the applicability of the Sinagoga framework in State v. Veikoso, 102 Hawai'i 219, 74 P.3d 575 (2003), and Heggland. In Veikoso, this court considered whether a defendant may, in trial proceedings on a subsequent offense, collaterally attack a prior conviction that is the result of an allegedly invalid plea. 102 Hawai'i at 224-27, 74 P.3d at 581-83. There, the defendant was convicted of habitually driving under the influence (DUI) of intoxicating liquor, an offense which requires that the defendant be convicted of three or more prior DUI offenses within a specific period. Id. at 220, 219 P.3d at 576. The defendant sought to dismiss the habitual DUI charge on the ground that his prior, predicate DUI convictions were invalid because he had not received a proper colloquy prior

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<sup>10</sup> In this case, the Sinagoga analysis ceased at step two because the defendant failed to raise a challenge to the convictions listed in the PSI report. Because Kong failed to challenge the PSI report, the circuit court had no reason to proceed with the next steps in the Sinagoga analysis. See, e.g., Heggland, 118 Hawai'i at 439-41, 193 P.3d at 355-57 (not reaching steps three through five after concluding that defendant failed to raise a good-faith challenge to his prior conviction under Sinagoga).



to entering his plea. Id. The defendant's motion to dismiss was denied, and he subsequently pled guilty to habitual DUI.

On appeal, this court noted that none of the defendant's prior DUI convictions had been vacated at the time he pled guilty to habitual DUI. Id. at 223, 74 P.3d at 579. This court concluded that constitutional challenges to the validity of prior convictions must be raised either in a direct appeal or collaterally through a HRPP Rule 40 proceeding, rather than in proceedings on a subsequent offense. Id. at 226, 74 P.3d at 583. In a footnote, this court "recognize[d] the tension" between its holding and Sinagoga. Id. at 227 n.8, 74 P.3d at 583 n.8. This court acknowledged that Sinagoga allowed a defendant to challenge three types of convictions in a PSI report, i.e., those that are "(1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant." Id. (emphasis in original) (brackets omitted). This court stated, "Because the 'otherwise invalidly entered' language in Sinagoga may be construed as permitting collateral attacks whenever the validity of a conviction is challenged, we emphasize, in light of our holding today, that this language should be disregarded." Id. at 227 n.8, 74 P.3d at 583 n.8.

Subsequently, in Heggland, this court adopted and applied the Sinagoga test to determine whether the defendant had raised a good-faith challenge to his prior conviction out of state on the ground the conviction was uncounseled. 118 Hawai'i

at 439-41, 193 P.3d at 355-57. This court acknowledged the bases for challenging a prior conviction recognized by Sinagoga and modified by Veikoso (i.e., the conviction being uncounseled or not against the defendant). Id. at 440-42, 193 P.3d at 356-58. However, this court concluded that the defendant had not, in the trial court, raised a good faith challenge on either of these bases, and instead affirmatively stipulated to his prior conviction. Id. Accordingly, this court concluded that the defendant's arguments were without merit. Id. In a footnote, this court also quoted the ICA opinion in Heggland for the proposition that Veikoso had modified Sinagoga to "limit a defendant's ability to collaterally attack a prior conviction[.]" Id. at 440, 193 P.3d at 356 (quoting State v. Heggland, 116 Hawai'i 376, 383 n.7, 173 P.3d 523, 530 n.7 (App. 2007)).

Neither Veikoso nor Heggland supports Kong's assertion that Sinagoga is inapplicable in the instant case. First, claims that a conviction has been vacated would appear to fall within the provision allowing challenges for convictions that are "not against the defendant," rather than those that are "otherwise invalidly entered." Indeed, a conviction that has been vacated is void, see Black's Law Dictionary 1688 (9th ed. 2009) (defining "vacate"), and thus is not a conviction "against the defendant."

Although Kong appears to argue that convictions "not against the defendant" are only those in which identity is challenged, he cites no authority for this proposition.

Moreover, there is no logical reason for requiring a defendant to raise an identity challenge pursuant to the Sinagoga framework, but relieving a defendant of this burden for convictions that are vacated. Indeed, in both instances, "the defendant, more than anyone else, knows whether or not his or her prior criminal conviction was . . . irrelevant." Sinagoga, 81 Hawai'i at 445, 918 P.2d at 252.

Second, the sole purpose behind the limitation on Sinagoga set forth in Veikoso is not implicated in the instant case. That purpose was to prohibit collateral attacks on the validity of a prior conviction in proceedings for a subsequent offense. Veikoso, 102 Hawai'i at 227 n.8, 74 P.3d at 583 n.8. Here, Kong claims that his convictions in Cr. No. 92-0138 have already been "vacated, remanded, and dismissed[.]" Accordingly, this court's concerns regarding collateral attacks are not pertinent in the instant case.

Moreover, nothing in Veikoso or Heggland indicates that this court intended to relieve a defendant of the burden of challenging prior convictions in these circumstances. See id.; see also Heggland, 118 Hawai'i at 440, 193 P.3d at 356. Indeed, doing so would have the effect of requiring the State to prove the validity of each of the defendant's prior convictions at the time of sentencing or run the risk of having the sentence vacated on appeal, a proposition which this court has already rejected. Heggland, 118 Hawai'i at 441, 193 P.3d at 357 ("[T]he circuit

court misinterpreted the five-step procedure outlined in Sinagoga by requiring the prosecution to prove the validity of Heggland's prior conviction in the absence of a good-faith challenge by Heggland.").

Accordingly, Kong was required to raise "a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge." Heggland, 118 Hawai'i at 432 n.4, 193 P.3d at 348 n.4. Because he did not do so, the circuit court did not err in relying on the PSI report.<sup>11</sup>

Nor should this court utilize plain error review to address this issue despite Kong's failure to raise it in the circuit court. Although this court "may recognize plain error when the error committed affects substantial rights of the defendant," Staley, 91 Hawai'i at 282, 982 P.2d at 911 (citation omitted); see HRPP Rule 52(b), the alleged inaccuracy in the PSI report does not rise to the level of plain error because the record indicates that the circuit court based its imposition of a consecutive sentence on Kong's "extensive" criminal record as a whole and not solely on the specific convictions that Kong alleges are invalid (Cr. No. 92-0138). In addition, the PSI report, which the circuit court considered in imposing its

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<sup>11</sup> The dissent argues that the State and probation office would be "absolve[d]" of accountability and the defendant would "exclusively" bear the responsibility of ascertaining the accuracy of his or her criminal record. Dissenting opinion at 28. However, under the holding of Sinagoga, 81 Hawai'i at 446, 918 P.2d at 253, once the defendant raises a good faith argument before the sentencing court, the prosecution still has the ultimate burden of "proving to the reasonable satisfaction of the court that the opposite of the defendant's challenge is true."

sentence, contained all of Kong's prior charges and convictions and not just those in Cr. No. 92-0138.<sup>12</sup> Under these circumstances -- particularly where Kong was given ample time to review the PSI report, where he or his counsel failed to provide a good faith challenge on the record stating the bases for challenging the convictions listed in the PSI report, and where there was sufficient evidence to support the circuit court's determination that Kong had an "extensive" record of criminality -- it cannot be said that Kong's substantial rights were affected by the circuit court's use of the PSI report.<sup>13</sup>

**C. Kong voluntarily and intelligently self-terminated from the Drug Court program, and waived his right to a termination hearing**

Finally, Kong asserts that he did not voluntarily and intelligently waive his right to a termination hearing. Specifically, Kong asserts that the circuit court's colloquy

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<sup>12</sup> The PSI report also indicates that Kong was convicted of seven felony burglaries. Thus, even excluding the burglary conviction in Cr. No. 92-0138, the circuit court would have been correct in noting that Kong's "extensive record" included "six burglary convictions." Although the vacated convictions in Cr. No. 92-0138 would mean that Kong was convicted of 8 total felonies, as opposed to the ten noted by the circuit court, the PSI report nonetheless contained sufficient information for the circuit court to reasonably conclude that Kong had a history of "extensive criminality."

<sup>13</sup> The dissent argues that Kong's due process rights were violated when the circuit court sentenced him using the convictions in Cr. No. 92-0138. Dissenting opinion at 34. Kong, however, never asserted in his application that his due process rights were violated by the circuit court's use of the convictions listed in the PSI report. See Hawai'i Rules of Appellate Procedure Rule 40.1(d)(1) ("Questions not presented according to this paragraph will be disregarded."). Nevertheless, and as explained supra, the circuit court based its imposition of a consecutive sentence on Kong's "extensive" criminal record as a whole and not on the specific convictions that Kong alleges are invalid. Thus, on the record before us, it cannot be said that Kong's due process rights were violated.

prior to his self-termination at the February 3, 2011 hearing was not sufficient. Contrary to Kong's argument, and as set forth below, under the totality of the circumstances Kong voluntarily and intelligently self-terminated from the Drug Court program.

In State v. Friedman, this court concluded that "[a] waiver is the knowing, intelligent, and voluntary relinquishment of a known right." 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000) (citation omitted). Generally, the court will conduct a colloquy to ensure that the defendant's waiver of his or her rights is knowingly, voluntarily, and intelligently made. State v. Kaulia, 128 Hawai'i 479, 495-96, 291 P.3d 377, 393-94 (2013). To determine whether a waiver is voluntary and intelligent, "this court will look to the totality of facts and circumstances of each particular case."<sup>14</sup> Friedman, 93 Hawai'i at 68-69, 996 P.2d at 273-74.

In this case, Kong was advised of his right to a termination hearing, confirmed his understanding of that right, and repeatedly stated his decision to self-terminate from the Drug Court program. Specifically, at the January 26, 2011 hearing, the circuit court informed Kong that he had a right to a termination hearing, at which the State would be required to present "an appropriate basis for terminating [him] from the drug

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<sup>14</sup> This court has not previously determined that a personal on-the-record colloquy is required when a defendant decides to self-terminate from the Drug Court program. We assume, without deciding, that such a colloquy is required.

court program." Kong was advised that he had a right to have his attorney present at a termination hearing and to contradict the facts presented by the State. He also was advised that, following the hearing, the circuit court would determine whether he would remain in the program or would be terminated.

Kong also was advised of the result of self-terminating from the Drug Court program, or of being terminated following a termination hearing. Specifically, Kong was advised that his case would proceed to a stipulated facts trial "where it's almost virtually certain, unless your attorney filed any constitutionally based motions on your behalf, it's virtually certain that you will be found guilty as charged."<sup>15</sup> During the colloquy, Kong indicated several times that he understood that he had a right to a termination hearing and understood the consequences of self-termination.

Approximately one week later, on February 3, 2011, Kong again indicated that he wanted to self-terminate from the program. Following a brief colloquy in which Kong confirmed that his mind was clear and that he was not taking any drugs or medication, the circuit court accepted Kong's self-termination from the program.

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<sup>15</sup> The circuit court previously found that Kong knowingly, voluntarily and intelligently waived various trial rights upon his admission to the Drug Court program, and Kong does not raise any arguments with respect to these rights. The only issue on appeal is whether Kong validly waived his right to a termination hearing.

Although the extensive advisements regarding the right to a termination hearing did not occur at the February 3, 2011 hearing, the fact remains that Kong was advised of his rights, acknowledged he understood those rights, and repeatedly, in two hearings over the course of eight days, reaffirmed his desire to self-terminate. Under these circumstances, Kong voluntarily and intelligently self-terminated from the Drug Court program. Accordingly, Kong's self-termination was valid.

**IV. Conclusion**

For the foregoing reasons, we affirm the March 1, 2013 judgment of the ICA, which affirmed the circuit court's April 11, 2011 Judgment of Conviction and Sentence.

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/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Bert I. Ayabe

