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NO. CAAP-14-0001079

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SAMUEL EAGER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 13-1-0145)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Reifurth and Ginoza, JJ.)

Defendant-Appellant Samuel Eager appeals from the Judgment of Conviction and Sentence ("Judgment"), which the Circuit Court of the First Circuit ("Circuit Court")^{1/} entered on June 30, 2014. Eager was convicted of Assault in the Second Degree, in violation of Hawaii Revised Statutes ("HRS") § 707-711(1)(b) (2014).^{2/} Eager's conviction arose out of an incident in which Eager allegedly assaulted the complaining witness, then-79-year-old Hua Zhao Liang, on the sidewalk adjacent to the intersection of Kapiolani Boulevard and Cooke Street in Honolulu, Hawai'i.

Upon Eager's motion to order an HRS § 704-404 examination, the Circuit Court appointed a "3-member panel" of

^{1/} The Honorable Randal K.O. Lee presided.

^{2/} The statute states, in relevant part:

(1) A person commits the offense of assault in the second degree if:

.

(b) The person recklessly causes serious or substantial bodily injury to another[.]

physicians to assess Eager's fitness to proceed to trial and to be held penally responsible for his conduct: Dr. Leonard S. Jacobs, Dr. Duke E. Wagner, and Dr. Olaf K. Gitter. Each of the doctors separately interviewed and assessed Eager before submitting their joint report to the Circuit Court, which subsequently issued a Judicial Determination of Fitness to Proceed and Order on June 13, 2013 finding that Eager was fit to proceed. Following a bench trial, the Circuit Court found Eager guilty and sentenced him to five years of incarceration and ordered restitution in the amount of \$559.36 to the Department of Human Services and \$267.60 to the Crime Victim's Compensation Commission. Eager timely appealed from the Judgment.

On appeal, Eager alleges that (1) he was deprived of a fair trial because Dr. Wagner "considered the expert opinion of Dr. Jacobs in his testimony," which, Eager argues, improperly bolstered Dr. Jacobs' opinions, and (2) the trial court abused its discretion in sentencing Eager to five years imprisonment because there were strong mitigating factors to withhold a prison sentence and instead sentence Eager to probation.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments they advance and the issues they raise, we resolve Eager's points of error as follows, and affirm.

(1) In the Points on Appeal section of his opening brief, Eager contends that he was deprived of a fair trial because Dr. Wagner considered in his testimony, and therefore bolstered, Dr. Jacobs' expert opinion. Eager's argument regarding this contention, however, consists of three statutory citations, two case citations, and one paragraph that essentially reiterates the point of error and adds his request that he be granted a new trial.

At the outset, we note that Eager's argument makes no attempt to connect the facts of the case to the law he presents, which means that we may "disregard [the] particular contention [because he] makes no discernible argument in support of that position." *Kakinami v. Kakinami*, 127 Hawai'i 126, 144 n.16, 276 P.3d 695, 713 n.16 (2012) (quoting *In re Guardianship of*

Carlsmith, 113 Hawai'i 236, 246, 151 P.3d 717, 727 (2007) (internal quotation marks omitted)); see Haw. R. App. P. 28(b)(7). Due to our policy of "affording the litigants the opportunity 'to have their cases heard on the merits, where possible[,]'" however, we nonetheless proceed on the merits insofar as we can discern them. *Marvin v. Pflueger*, 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012) (quoting *Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004)). And in so doing, we conclude that Eager's first point is without merit.

Dr. Wagner's trial testimony did not improperly bolster the opinion of Dr. Jacobs. At trial, Eager objected when the State asked Dr. Wagner whether or not he reviewed Dr. Jacobs' report and findings:

[BY PROSECUTOR]:

Q. Now, do you agree with his summary?

[PUBLIC DEFENDER]: That's what I'm --

THE COURT: Same objection, I sustained.

Counsel, the form of the question, Counsel, is whether or not based on what Dr. Jacobs has written, in terms of his opinion, whether or not that would change Dr. Wagner's opinion as a result of what he read.

[PUBLIC DEFENDER]: Yes, Your Honor.

THE COURT: Or does it have any effect on Dr. Wagner's opinion, not whether or not he agrees or disagrees with Dr. Jacobs, because at that point Dr. -- you're asking Dr. Wagner to testify about the credibility of another witness.

[PROSECUTOR]: Mm-hm, okay.

THE COURT: So I'm going to sustain the objection, but you can ask him whether or not, based on what Dr. Jacobs had written, whether or not it would change Dr. Wagner's opinion.

[PROSECUTOR]: Okay.

THE COURT: That's a fair question.

Dr. Wagner subsequently testified that Dr. Jacobs' report did not change Dr. Wagner's opinion as to penal responsibility, but gave him additional helpful information, from the perspective of a psychiatrist, regarding the effect of Eager's use of medications and substances. Eager contends that this constitutes error because "[e]xpert testimony on a witness'

credibility is inappropriate." Pursuant to HRS § 704-404(4)(f) (2014), however, "[a]fter all reports are submitted to the court, examiners may confer without restriction." In this case, Dr. Wagner testified about whether Dr. Jacobs' report changed Dr. Wagner's opinion; he did not provide any impermissible testimony on the subject of Dr. Jacobs' credibility. We conclude that Dr. Wagner did not improperly bolster Dr. Jacobs' credibility, and Eager was not deprived of a fair trial.

(2) Eager's second argument on appeal is that the Circuit Court abused its discretion in sentencing him to five years of imprisonment because, he claims, there were strong mitigating factors that should have caused the court to sentence him to probation rather than incarceration. We disagree.

Eager has failed to show that the Circuit Court abused its discretion or that it did not consider the factors in HRS § 706-606. That statute states, in relevant part:

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.

Haw. Rev. Stat. § 706-606 (2014). Although "[a] trial court is 'duty-bound to consider' the[se] factors . . . before imposing a sentence[,] 'the fact that a court does not orally address [each one] at the time of sentencing does not mean the court failed to consider th[em].'" *State v. Thorp*, No. CAAP-13-0000414, 2014 WL

4914623, *1 (Hawai'i App. Sept. 30, 2014) (original brackets omitted) (citing *State v. Sinagoga*, 81 Hawai'i 421, 428, 918 P.2d 228, 235 (App. 1996), *overruled on other grounds by State v. Veikoso*, 102 Hawai'i 219, 74 P.3d 575 (2003)) (explaining further that "[t]he weight to be given the factors . . . is a matter generally left to the discretion of the sentencing court, taking into consideration the circumstances of each case" (quoting *State v. Kong*, 131 Hawai'i 94, 101, 315 P.3d 720, 727 (2013) (internal quotation marks omitted))). In fact, "absent clear evidence to the contrary, it is presumed that a sentencing court will have considered all the *factors*." *State v. Hussein*, 122 Hawai'i 495, 518, 229 P.3d 313, 336 (2010) (brackets omitted) (applied in the context of concurrent/consecutive sentencing).

In this case, the record demonstrates that the Circuit Court carefully considered Eager's arguments in the context of the case. There is nothing in the record to indicate that the Circuit Court failed to consider the factors set forth in HRS § 706-606. In weighing these factors, the Circuit Court emphasized the nature and circumstances of Eager's offense, his prior criminal history, and the danger he posed to the community. We conclude that the Circuit Court did not abuse its discretion in sentencing Eager to five years of imprisonment instead of probation.

Therefore, the Judgment of Conviction and Sentence filed in the Circuit Court of the First Circuit on June 30, 2014 is affirmed.

DATED: Honolulu, Hawai'i, June 20, 2016.

On the briefs:

Shawn A. Luiz
for Defendant-Appellant.

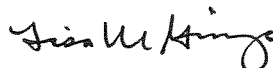
Loren J. Thomas,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge