

NO. CAAP-15-0000681

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,  
v.  
FOE LIULAMA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 14-1-1432)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, Foley and Ginoza, JJ.)

Defendant-Appellant Foe Liulama (Liulama) appeals from the Judgment of Conviction and Sentence (Judgment), filed on August 26, 2015 in the Circuit Court of the First Circuit (circuit court).<sup>1</sup> Judgment was entered against Liulama for two counts of Promoting a Dangerous Drug in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 712-1243 (2014), a (5) years each in counts 1 and 2, with a mandatory minimum of one (1) year, eight (8) months as a repeat offender. Counts [1] and [2] to be served concurrently with each other." The mandatory minimum term of one year and eight months was based on Plaintiff-Appellee State of Hawaii's motion to sentence Liulama as a repeat offender under HRS § 706-606.5 (2014).<sup>2</sup>

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<sup>1</sup> The Honorable Glenn J. Kim presided.

<sup>2</sup> HRS § 706-606.5(1)(a)(iv) provides in pertinent part:

(continued...)

Liulama contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence under HRS § 706-606.5 because: (1) article I, §§ 5, 10 and 14 of the Hawai'i Constitution require that the Complaint state all allegations, which if proved, would subject Liulama to repeat offender sentencing; (2) the Sixth and Fourteenth Amendments to the United States Constitution require the question of Liulama's qualification as a repeat offender to have been submitted to a jury and proven beyond a reasonable doubt; and (3) article I, §§ 5, 10, and 14 of the Hawai'i Constitution also require the question of Liulama's qualification as a repeat offender to have been submitted to a jury and proven beyond a reasonable doubt. As to each point of error, Liulama further contends that the Hawai'i Supreme Court's prospective-only ruling in State v. Auld, 136 Hawai'i 244, 361 P.3d 471 (2015) should not apply to Liulama because he preserved his objections before the circuit court.

Upon careful review of 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, as well as the relevant statutory and case law, we resolve Liulama's points of error as follows and affirm.

Most of the arguments that Liulama raises in this case were addressed by this court in State v. Auld, No. CAAP-13-0002894, 2015 WL 356288 (Haw. App. Jan. 27, 2015). In Auld, we

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<sup>2</sup>(...continued)

**§706-606.5 Sentencing of repeat offenders. (1)**

Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies: . . . section 712-1243 relating to promoting a dangerous drug in the third degree; . . . and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: . . . any of the class C felony offenses enumerated above, . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

(a) One prior felony conviction:

. . .

(iv) Where the instant conviction is for a class C felony offense enumerated above--one year, eight months[.]

affirmed the defendant's mandatory minimum sentence under HRS § 706-606.5 as a repeat offender, concluding that under materially similar circumstances as this case, the defendant's constitutional rights to a trial by jury and due process were not violated. In particular, we held that: under the federal and state case law at that time, a prior conviction for purposes of mandatory minimum sentencing did not need to be proven to a jury beyond a reasonable doubt; and the defendant's due process rights were not violated where his prior convictions were not included in the charging document.

The Hawai'i Supreme Court accepted an application for certiorari in Auld, overruled prior precedent, and expressly noted that "we announce new rules in this case." Auld, 136 Hawai'i at 255, 361 P.3d at 482. The Hawai'i Supreme Court held that "under article I, sections 5 and 10 of the Hawai'i Constitution, the State must allege the predicate prior conviction(s) in a charging instrument in order to sentence the defendant to a mandatory minimum sentence as a repeat offender under HRS § 706-606.5." Id. at 257, 361 P.3d at 484. The Hawai'i Supreme Court further held that "as a matter of state law," the ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000), which provides an exception for the "fact of [a] prior conviction"<sup>3</sup> "does not apply to repeat offender sentencing under HRS § 706-606.5, and [thus] a jury is required to find that the defendant's prior conviction(s) have been proved beyond a reasonable doubt to trigger the imposition of a mandatory minimum sentence under that statute." Id.

The Hawai'i Supreme Court considered the application of its rulings in Auld, noting that "we expressly overrule precedent upon which the 'contest would otherwise be decided differently,' which counsels in favor of a prospective-only application." Id. at 256, 361 P.3d at 483. The court further noted that:

prior to this case, the "parties may previously have

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<sup>3</sup> In Apprendi, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added).

regulated their conduct" consistently with the rules set forth in [*State v. Freitas*, 61 Haw. 262, 602 P.2d 914 (1979)], [*Loher v. State*, 118 Hawai'i 522, 193 P.3d 438 (App. 2008)] and [*State v. Gonsalves*, 108 Hawai'i 289, 119 P.3d 597 (2005)] that did not require a charging instrument to allege predicate prior convictions, or a jury to find, beyond a reasonable doubt, that a defendant's prior convictions subject him or her to a mandatory minimum sentence as a repeat offender under HRS § 706-606.5. This further counsels in favor of a prospective-only application.

Id. The Hawai'i Supreme Court thus concluded that "[a]s these new rules result from the express overruling of prior appellate precedent holding that the Apprendi rule did not apply to mandatory minimum sentencing and that notice of repeat offender sentencing did not need to be given in a charging instrument, they are given prospective effect only." Id. at 257, 361 P.3d at 484. (emphasis added). Therefore, the Hawai'i Supreme Court affirmed this court's judgment on appeal in Auld, which had affirmed the defendant's conviction and sentence in the circuit court based on the existing law at that time.

In Auld, the Hawai'i Supreme Court also addressed what it means to prospectively apply a new rule, stating that a purely prospective effect of a new rule "means that the rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision[.]" Id. at 255, 361 P.3d at 482. By contrast, a limited or pipeline retroactive effect means that "the rule applies to the parties in the decision and all cases that are on direct review or not yet final as of the date of the decision[.]" Id. at 256-57, 361 P.3d at 482-83.

Liulama argues that Auld's prospective-only ruling should not apply to him because, unlike in Auld, he argued in the circuit court that the charging document failed to include repeat offender language and that the question of whether he qualified as a repeat offender under HRS § 706-606.5 should have been submitted to a jury and proven beyond a reasonable doubt. Auld, by contrast, first raised these arguments on appeal. However, the Hawai'i Supreme Court's analysis in Auld related to its prospective-only ruling was not based on whether the defendant preserved the issues in the trial court. Rather, the Hawai'i

Supreme Court focused on the fact that the court was overruling precedent under which the case "would otherwise be decided differently." Id. at 256, 361 P.3d at 483. Thus, notwithstanding the new rules it announced, the court affirmed the mandatory minimum sentence in Auld.<sup>4</sup>

The precedent overruled in Auld is applicable to this case. The Hawai'i Supreme Court issued Auld on November 24, 2015. The Judgment in this case was filed on August 26, 2015. Thus, because Liulama was charged, convicted, and sentenced before the Auld opinion was issued, Auld's prospective rule changes do not apply to Liulama. For purposes of this case, therefore, we consider this court's ruling in Auld, CAAP-13-0002894, 2015 WL 356288, under the existing case law at that time, which was affirmed by the Hawai'i Supreme Court.

#### **1. Due Process**

Liulama contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence because the Complaint failed to allege that HRS § 706-606.5 subjected Liulama to sentencing as a repeat offender, thus violating Liulama's due process rights under article I, §§ 5, 10 and 14 of the Hawai'i Constitution.

In Auld, No. CAAP-13-0002894, relying on the case law at that time, we noted that the Hawai'i Supreme Court in State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008), "cited favorably to the federal standard that prior convictions are an exception to the mandate to include sentence enhancements in the charging instrument." Auld, CAAP-13-0002894, 2015 WL 356288, at \*2 (citing Jess 117 Hawai'i at 397-98, 184 P.3d at 149-50). In addition, we noted that in State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979), the Hawai'i Supreme Court expressly stated that "[w]hile due process does not require that notice be given prior to the trial of the underlying offense, it does require that a defendant to be sentenced under HRS § 706-606.5 be given

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<sup>4</sup> Liulama further argues that federal case law counsels against the prospective-only ruling in Auld. We will not address these arguments as we are bound by the Hawai'i Supreme Court's ruling in Auld.

reasonable notice and afforded the opportunity to be heard." Auld, No. CAAP-13-0002894, 2015 WL 356288, at \*2 (brackets omitted) (quoting Freitas 61 Haw. at 277, 602 P.2d at 925). This court concluded that because the defendant, Auld, filed an opposition to the State's motion for imposition of the mandatory minimum sentence, was represented by counsel who presented argument at the hearing on the State's motion, did not object to the circuit court receiving into evidence the sealed and certified judgments from Auld's two prior felony convictions, and did not object to judicial notice of the records in both prior convictions, Auld's due process rights were not violated. Auld, No. CAAP-13-0002894, 2015 WL 356288, at \*2.

With regard to whether Liulama was given reasonable notice and afforded the opportunity to be heard, similar to Auld, Liulama filed an opposition to the State's motion to sentence him as a repeat offender, was represented by counsel who presented argument at the hearing on the State's motion, did not object to the evidence of Liulama's prior felony conviction, and did not contest that Liulama has a prior conviction which renders him eligible for repeat offender sentencing. Thus, similar to our reasoning in Auld, No. CAAP-13-0002894, 2015 WL 356288, Liulama's due process rights were not violated in this case.

## **2. Trial by jury**

Liulama contends that the circuit court erred in imposing a repeat offender mandatory minimum sentence under HRS § 706-606.5, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, as well as article I, §§ 5, 10, and 14 of the Hawai'i Constitution, because the question of Liulama's qualification as a repeat offender should have been submitted to a jury and proven beyond a reasonable doubt.

Given the case law at that time, this court rejected the same argument in Auld, No. CAAP-13-0002894. Although the Hawai'i Supreme Court later overruled prior precedent and announced new rules, it affirmed this court's judgment in Auld based on the existing law applicable to that case.

Similar to our decision in Auld, No. CAAP-13-0002894, 2015 WL 356288, under the law applicable at that time and as

applicable to this case, Liulama's arguments in this appeal must fail.

Therefore,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence, filed on August 26, 2015 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 2, 2016.

On the briefs:

Phyllis J. Hironaka,  
Deputy Public Defender,  
for Defendant-Appellant.

Chief Judge

James M. Anderson,  
Deputy Prosecuting Attorney,  
for Plaintiff-Appellee.

Associate Judge

Associate Judge