SCWC-17-0000055

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

STEVEN E. YOUNG,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000055; CR. NO. 16-1-0432)

DISSENT
(By: Nakayama, J., in which Recktenwald, C.J., joins)

I respectfully dissent from the Majority's SDO vacating the ICA's September 11, 2018 Judgment on Appeal and remanding this matter to the circuit court for resentencing. I believe that, as neither party raised the factual issue of Young having completed sex offender treatment before his December 1, 2016 sentencing, this court should not raise the issue sua sponte and

vacate the judgment on that ground. Moreover, I do not believe that the circuit court abused its discretion in sentencing Young to further sex offender treatment as a special condition of probation without determining whether or not Young completed sex offender treatment previously. Accordingly, I would affirm the ICA's Judgment on Appeal.

I. BACKGROUND

Young has been convicted of nine felonies, six misdemeanors, and two petty misdemeanors since his first arrest at age 20.[1] In 2000, Young was convicted of Assault in the Third

[1] Like the majority's SDO, this opinion contains information and quotations from Young's pre-sentence investigation report (pre-sentence report). See SDO at 3. The information contained in Young's pre-sentence report is critical to our review of whether the circuit court abused its discretion in sentencing Young to further sex offender treatment.

Appellate courts have previously included details from pre-sentence reports in opinions and orders. For example, we quoted a defendant's pre-sentence report in our majority opinion in State v. Heggland. See 118 Hawaiʻi 425, 443, 193 P.3d 341, 359 (2008). The ICA included personal information from a pre-sentence report in its SDO in State v. Chavira. See No. 29082, 2009 WL 458772, at *1 (App. Feb. 25, 2009) (SDO).

Of course, it is axiomatic that sentencing courts may address the contents of a pre-sentence report on the record in open court. See State v. Hussein, 122 Hawaiʻi 495, 525, 229 P.3d 313, 343 (2010) ("[O]ur courts have sanctioned the use of information contained in the [pre-sentence report] in open court in determining the proper sentence to be imposed, and this court has never held that such procedure violates HRS § 806-73 in nearly twenty-five years."). HRS §§ 806-73(b) and 706-605 presume that personal information contained in a pre-sentence report may be disclosed on the record in open court at sentencing hearings. See Hussein, 122 Hawaiʻi at 522, 529, 229 P.3d at 340, 347 (noting that Black's Law Dictionary defines "confidential" as "the state of having the dissemination of certain information restricted" and defines "public" as "open or available for all to use, share, or enjoy" (emphasis in original)). Indeed, "[w]hat HRS §§ 806-73(b) and 706-605 prohibit is not such use of the report, but public disclosure and access to the [pre-sentence report] itself." Id. (emphasis in original). In addition, "the legislature [] previously determined, when it imposed the confidentiality requirement in 1985, that the balance [of privacy and other issues] weighed in

(continued...)

Degree, Sex Assault in the Third Degree, and Sex Assault in the Second Degree after sexually assaulting his former girlfriend. Young was initially sentenced to five years probation and one year confinement, but was re-sentenced to ten years confinement when his probation was revoked in 2001. Young's sentence compelled him to register as a sex offender, which comes with numerous reporting requirements under HRS Chapter 846E.[2] The circuit court also ordered Young to complete a Sex Offender Treatment Program.

Despite being notified multiple times of his registration requirements as a convicted offender, Young failed

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[1](...continued)
favor of an exception for use of the [pre-sentence report] at sentencing hearings under HRS § 706-604." Id. at 528, 229 P.3d at 346.

Further, it makes no sense to encourage a sentencing court to read from a pre-sentence report on the record, but at the same time prohibit an appellate court from citing to the pre-sentence report in order to review a sentencing determination. As sentencing courts are "statutorily required to the [pre-sentence report]," Hussein, 122 Hawai'i at 525, 229 P.3d at 343 (quotations omitted), and "may address the contents of the [pre-sentence report] on the record[,]" id. at 524, 229 P.3d at 342, an appellate court tasked with determining whether the sentencing court abused its discretion should similarly be permitted to make use of and refer to the pre-sentence report to explain the reasoning behind its determination that a sentencing court did or did not abuse its discretion.

It appears to me that based on the foregoing and in light of this court's previous uncontested quotation to personal information from a pre-sentence report in Heggland, it is appropriate here to reference Young's pre-sentence report to explain how, based on the information before the circuit court, the circuit court did not abuse its discretion in sentencing Young to further sex offender treatment.

[2] HRS Chapter 846E is titled "Registration of Sex Offenders and Other Covered Offenders and Public Access to Registration Information." Young was found guilty and convicted of violating provisions of HRS § 846E-9 (2013), "Failure to Comply with Covered Offender Registration Requirements."

to report quarterly in October 2014, January 2015, April 2015, July 2015, October 2015, and January 2016 in violation of HRS §§ 846E-9(a)(2) & (c) (2013) and HRS §§ 846E-9(a)(12) & (c) (2013).

After a March 30, 2016 traffic stop that resulted in two additional drug convictions, the State charged Young with two counts of Failure to Comply with Covered Offender Registration Requirements (Criminal No. 16-1-0432). Young pled no contest, and the circuit court adjudicated him guilty on both counts. The circuit court ordered that a pre-sentence investigation (PSI) take place.

The report that resulted from the PSI (pre-sentence report) indicated that Young enrolled in, and was prematurely discharged from, at least three sex offender treatment programs. In September 2000, Young enrolled in sex offender treatment at a family therapy center in Honolulu. A report from the center indicated that Young had been terminated from the treatment by January 2001 "due to noncompliance with attendance and a lack of progress including a continued denial of his sex offense." The pre-sentence report noted that Young "displayed serious cognitive distortions about appropriate relationships" and that "[Young's] participation in treatment was considered minimal and he had not completed any worksheets given to him."

After being discharged from that program, Young was referred to another provider in July 2001. After Young failed to appear at his follow-up appointment with that provider, he entered group treatment in August 2002. In group treatment, the provider indicated that

> [Young] did not take any responsibility for, not only his predicament of being late/missing a session, but his offense as well. It was also noted that [Young] was suspicious of people in authority and blamed them for his failures. [Young] also reportedly did not see himself as having a problem and did not see the need for participating in treatment. He also did not seem credible and it was noted his history suggested that he had not surrendered his self-destructive behavior patterns. [Young] was deemed not motivated for treatment but rather was going through the motions to

The provider listed Young's prognosis as "poor" and noted that Young referred to his sex offense as "lame." Young "continued to not take any responsibility for his offense and focused on faulting the victim." Young was discharged from treatment in September 2001 due to unexcused absence.

Young was admitted into a third sex offender treatment program in October 2001 after he "reluctantly agreed to take responsibility for his offense, as required by the program[.]" Young attended only one group session, during which he fell asleep and had to be awakened. Young's probation was revoked on November 5, 2001 and he was resentenced to ten years confinement. Young told the probation officer who prepared the pre-sentence

report that he later completed sex offender treatment while in custody. In the pre-sentence report, the probation officer wrote that Young's claim "was not verified as Hawaii Paroling Authority records were unavailable for review."

At sentencing, both the Deputy Prosecuting Attorney ("DPA") and the Deputy Attorney General ("DAG") requested that Young serve five-year concurrent terms of imprisonment for each count. The DAG also requested that the circuit court order Young to complete sex offender treatment if the circuit court was inclined to grant probation. Young again alleged that he had already completed the sex offender treatment program imposed by the circuit court in 2000.

The circuit court sentenced Young to a four-year term of Hawaiʻi Opportunity Probation with Enforcement (HOPE probation) with certain special conditions, including one year confinement, and that Young "participate satisfactorily in the Hawaii sex offender treatment program as approved by [his] probation officer . . . ."

On appeal to the ICA, Young argued: (1) the circuit court's adjudication of Young's guilt under HRS § 846E-9 violated Young's right to equal protection, and (2) the circuit court abused its discretion in sentencing Young to probation with

special conditions of one year incarceration and the completion of sex offender treatment because Young was not convicted of a new sex crime but of failing to report for previous sex crimes.

The ICA affirmed the circuit court's judgment and held, inter alia, that the circuit court's sentence of one year incarceration as a special condition of his probation was in accord with the guidelines set forth in State v. Sumera, 97 Hawaiʻi 439, 39 P.3d 557 (2002), and was therefore not an abuse of discretion. Further, the ICA noted that since "it appears that Young never completed the sex offender treatment stemming from his previous sexual assault convictions . . . the Circuit Court did not abuse its discretion in ordering Young to undergo sex offender treatment."

Young raised the same arguments on application for writ of certiorari that he raised to the ICA. This court accepted certiorari on November 23, 2018 and held oral argument on February 21, 2019. At oral argument, neither party could confirm or deny Young's claim that he had completed the sex offender treatment imposed by the circuit court in 2000.

II. DISCUSSION

The Majority vacates the ICA's judgment and remands this matter to "address whether Young previously completed the

sex offender treatment program while in custody and, if deemed relevant, the effect this fact has on Young's sentence for failing to comply with sex offender reporting requirements." SDO at 7. I respectfully dissent because I believe this court should not remand this case to augment the record on an issue of fact that neither party raised, and because the circuit court did not abuse its discretion in sentencing Young to further sex offender treatment without resolving this issue of fact.

We should not remand this case to confirm or deny Young's claim that he completed sex offender treatment when neither party raised this claim as an issue of fact. Though Young stated to a probation officer and at his sentencing hearing that he eventually completed a sex offender treatment program, neither Young's attorney, nor the State, nor the circuit court found these allegations credible enough to confirm or deny before sentencing. Moreover, Young raised other issues to challenge his sentence on appeal, but did not raise his alleged completion of sex offender treatment for any purpose. This court's role is to make a judgment of law on the record before it. See HRS § 602-5 (2016). Just as I believe it is improper for this court to notice issues of law that the parties did not raise absent exceptional circumstances, see State v. Miller, 122 Hawaiʻi 92, 140-41, 223 P.3d 157, 205-06 (2010) (Nakayama, J., dissenting), I

also believe it is improper for this court to notice issues of fact that were not addressed at trial or raised on appeal. As such, I would not remand this case for resolution of this issue of fact.

Moreover, even if Young had raised on appeal the factual issue of whether or not he completed sex offender treatment, we should not vacate his sentence because the circuit court did not abuse its discretion in sentencing Young without first resolving this issue of fact. The circuit court generally has broad discretion in imposing a sentence. State v. Valera, 74 Haw. 424, 435, 848 P.2d 376, 381 (1993). A sentence will not be disturbed on appeal absent an abuse of discretion, State v. Johnson, 68 Haw. 292, 296, 711 P.2d 1295, 1298 (1985), that is, when "the court clearly exceed[s] the bounds of reason or disregard[s] rules or principles of law or practice . . . ." Keawe v. State, 79 Hawaiʻi 281, 284, 901 P.2d 481, 484 (1995). The circuit court is not precluded from sentencing a defendant to sex offender treatment for a non-sex crime. See State v. Solomon, 107 Hawaiʻi 117, 131, 111 P.3d 12, 26 (2005).

Whether Young completed sex offender treatment or not, the circuit court did not abuse its discretion in sentencing Young to additional sex offender treatment. The Majority cites no authority that indicates a circuit court may not sentence a

defendant to further sex offender treatment if the defendant has already completed sex offender treatment. Indeed, the Legislature has vested the circuit courts with "wide latitude in the selection of penalties from those prescribed and in the determination of their severity." State v. Kumukai, 71 Haw. 218, 224, 787 P.2d 682, 686 (1990) (quotations omitted).

Here, whether Young completed sex offender treatment or not, the record indicates that it was within the circuit court's discretion to sentence Young to further sex offender treatment. The record before the circuit court showed that Young entered and was discharged from multiple sex offender treatment programs. Young was consistently late or absent, demonstrated self-destructive behavior patterns, did not see himself as having any problems, hesitated to take responsibility for his offense, and blamed the victim. Even if Young completed a sex offender treatment program in custody, in light of Young's past performance in sex offender treatment, the circuit court's decision to sentence Young to further sex offender treatment did not "exceed[] the bounds of reason[.]" See Keawe, 79 Hawaiʻi at 284, 901 P.2d at 484.

Therefore, although the circuit court sentenced Young without confirming or denying his statement that he had

previously completed sex offender treatment, the circuit court did not abuse its discretion in sentencing Young to further sex offender treatment without this information. I would therefore affirm the ICA's September 11, 2018 Judgment on Appeal.

I respectfully dissent.

DATED: Honolulu, Hawaiʻi, July 3, 2019.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama