

SCWC-18-0000501

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

PATRICK H. OKI,
Petitioner/Defendant-Appellant/Cross-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000501; CR. NO. 1PC151000488)

DISSENT
(By: Wilson, J.)

I respectfully dissent to the Majority's denial of Petitioner Oki's application for writ of certiorari. His sentence of twenty years of incarceration in Count 8 and 9 for theft committed by the use of a computer¹ is illegal. Prior to his trial, and therefore prior to his sentencing, the offense

¹ HRS § 708-893(1)(a) (2014) provided, in relevant part:

(1) A person commits the offense of use of a computer in the commission of a separate crime if the person: (a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree.

for which he was convicted and sentenced was repealed.² The maximum sentence he can receive on the remaining counts for which he was convicted is ten years for theft in the First Degree in counts 2 and 3.³ His illegal sentence of twenty years must be vacated and a legal sentence of ten years imposed on remand.

Petitioner Oki was charged on April 1, 2015 for offenses committed between January 23, 2011 through July 18,

² The Hawaii Legislature's amendment removed theft by use of a computer as an offense. Act 231 removed the language of HRS § 708-893(1)(a):

(1) A person commits the offense of use of a computer in the commission of a separate crime if the person
~~(a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree; or~~

~~(b) Knowingly~~ knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses . . .

2016 Haw. Sess. Laws Act 231 § 42 at 758-59.

³ Oki was convicted and sentenced as follows:

Counts 1-3:	Theft in the First Degree (HRS §§ 708-830.5(1)(a) and 708-830(2)) 10 years in each count
Count 4:	Theft in the Second Degree (HRS §§ 708-831(1)(b) and 708-830(2)) 5 years
Counts 5-7:	Money Laundering (HRS §§708A-3(1)(a)(ii)(A)) 10 years in each count
Counts 8-9:	Use of a Computer in the Commission of a Separate Crime (HRS § 708-0893(1)(a)) 20 years in each count
Counts 10-13:	Forgery in the Second Degree (HRS §§ 708-852) 5 years in each count

Oki's sentence was to run concurrently in each count.

2013 and August 3, 2013 through October 9, 2013. He was charged in counts 8 and 9 with the use of a computer to commit theft in the first degree. Seven months before the February 6, 2017 jury-waived trial, the legislature repealed the crime for which Petitioner was charged.⁴ The amending statute contained a clause, Section 70, defining the proceedings to which the repeal applied:

SECTION 70. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date; provided that sections 54, 55, and 56 shall apply to offenses committed before the effective date of this Act: provided that sections 54, 55, and 56⁵ shall apply to offenses committed before the effective date of this Act.⁶

2016 Haw. Sess. Laws Act 231 § 42 at 758-59 (emphasis added).

Section 70 makes clear that, as proceedings begun after the effective date of the Act, Petitioner Oki's trial and sentencing are proceedings affected by the repeal of the offenses for which he was convicted and sentenced. Consistent with the intent of Section 70, counts 8 and 9 are proceedings affected by the amendment to HRS § 708-893(1)(a) and must be dismissed.

⁴ 2016 Hawaii Session Laws Act 231, section 42.

⁵ Sections 54, 55 and 56 apply to drug offenses. The sections were also repealed, but unlike the offense for which Petitioner Oki was charged --using a computer to commit theft in the first degree--the repeal of Sections 54, 55 and 56 does not apply to offenses that were "committed" before the Act became effective. The legislative intent to treat drug and theft offenses differently is apparent.

⁶ 2016 Hawaii Session Laws Act 231, section 70.

This court has interpreted the term "proceedings" as used in language amending a sentencing statute to permit bail on appeal. In State v Avilla, 69 Haw. 509, 750 P.2d.78 (1988), this court defined the term "proceeding" to include a sentencing hearing as a proceeding begun after the effective date of the amending statute. The amending statute contained language identical to the language in Section 70: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." Id. at 511, 750 P.2d at 79.

The Avilla court rejected the State's argument that the term "proceedings" must be interpreted to mean "prosecutions"; and thus denied the State's contention that the amendment would not affect proceedings—including sentencings—occurring after the inception of the prosecution.

The State maintains the trial court read the crucial language correctly. It claims "proceedings that were begun" before the effective date of Act 139 clearly are prosecutions that were begun before June 5, 1987 and our ruling should reiterate that rendered by the trial court. We do not agree.

Id. at 512, 750 P.2d at 80 (emphasis added).

The Avilla court found sentencing to be a "proceeding" that occurred after the effective date of the Act and therefore the amendment to the sentencing statute applied to Avilla's sentence and required the court to consider Avilla's request for bail on appeal. 69 Haw. at 513, 750 P.2d at 80-81. The court

noted that the interpretation of “proceedings” to include sentencing comported with the remedial purpose of the statute to provide for release on bail where previously no such opportunity was available to the accused on appeal.

In light of this regard for the plight of persons whose convictions may well be set aside on appeal, we cannot conclude the legislature meant to deny every convicted criminal whose prosecution began before the amendment of HRS § 804-4 became effective an opportunity to seek release on bail pending appeal. An acceptance of the State's position would be inconsistent with the legislative purpose to prevent the injustice of a criminal defendant, particularly one whose release would pose no danger to others, being imprisoned while there is pending a substantial question of law or fact that casts doubt on the validity of his conviction.

Id. at 513, 750 P.2d at 80.

As in Avilla, the amendment repealing the offense for which Petitioner was convicted is also remedial. It deems less severe the behavior that previously constituted a class A penalty punishable by twenty years of incarceration; and the consequent reduction of the sentence from 20 years to zero reduces the penalty for the behavior that was previously deemed criminal. It is consistent with this remedial purpose to interpret the sentencing and trial of Petitioner Oki as “proceedings” begun after the effective date of Act 231.⁷

⁷ In State v. Reis, the term “proceeding” was deemed to start when the prosecution filed charges against the defendant. 115 Haw. 79, 99, 165 P.3d 980, 999 (2014). As noted in footnote 6, the intent of the legislature was not to apply such a definition to Section 70. And, as in Avilla, the clear remedial purpose of the statute dictates a definition of “proceeding” consistent with legislative intent to remove the excessively punitive consequence of a mandatory twenty-year sentence for use of a computer to commit theft in the first degree.

Conclusion

As proceedings begun after the effective date of Act Act 231, the trial and sentencing could not include Counts 8 and 9. The twenty year sentence for both counts arising from the trial and sentencing proceedings was therefore illegal. To correct Petitioner's illegal sentence⁸, his Petition for writ of certiorari should be granted, counts 8 and 9 should be dismissed and, on remand, the circuit should impose a concurrent sentence of ten years with credit for time served.

DATED: Honolulu, Hawai'i, October 16, 2020.

/s/ Michael D. Wilson

Associate Justice



⁸ Petitioner's sentence can be corrected pursuant to Rule 35 of the Hawai'i Rules of Penal Procedure:

Reduction of Sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.