IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

ARTEMIO Y. AGDINAOAY,
Petitioner/Defendant-Appellant.

SCWC-18-0000755

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000755; CASE NO. 1FFC-18-0000989)

NOVEMBER 30, 2021

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

Defendant Artemio Agdinaoay pled no contest to Violation of a Temporary Restraining Order, a misdemeanor. The family court sentenced Agdinaoay to prison, and ordered him to undergo domestic violence intervention (DVI). The Majority concludes that sentence was illegal, because in its view, DVI could only be ordered as a condition of probation.

However, the plain language of the restraining order statute provides that the defendant "shall" undergo DVI as ordered by the court. Hawai'i Revised Statutes (HRS) § 586-4 (Supp. 2020). Nowhere does the statute suggest that DVI can be ordered only if the court imposes a sentence of probation. To the contrary, the statute explicitly provides that in addition to the requirement of DVI, the family court can impose any of the sanctions available in sentencing a defendant for a misdemeanor – which include imprisonment for up to a year. HRS §§ 586-4(e) and 706-663.

The Majority's statutory arguments to the contrary are unavailing, and its concerns about the efficacy of DVI that is not part of a probationary sentence are, respectfully, misplaced. We should not substitute our judgment for that of the legislature in assessing the effectiveness of the sanctions it adopts for violations of penal laws. Accordingly, I respectfully dissent.

I. BACKGROUND

Agdinaoay pled no contest to Violation of a Temporary Restraining Order in violation of HRS § 586-4. The Family Court of the First Circuit sentenced Agdinaoay to 181 days of imprisonment, with credit for time served, and ordered him to undergo DVI.

Agdinaoay filed an Ex Parte Motion for Reconsideration contesting the family court's order to attend DVI. Agdinaoay argued that the court lacked jurisdiction to order him to attend DVI because it did not sentence him to probation, and that the court could not have sentenced him to probation in conjunction with a prison sentence of more than 180 days. At the hearing, Agdinaoay asserted that he would not have the support and resources to complete DVI without court supervision or guidance. The family court granted in part and denied in part Agdinaoay's Motion for Reconsideration, and amended the judgment to provide more specificity regarding completion of DVI.

Agdinaoay appealed to the Intermediate Court of Appeals (ICA), raising one point of error: whether the family court erred when it concluded that HRS § 586-4 required the court to order him to undergo DVI in addition to his term of imprisonment. The ICA affirmed the family court's sentence and stated in relevant part:

> Agdinaoay is correct that under HRS §§ 706-605(2) and 706-624(2)(a), the Family Court was not permitted to sentence him to probation and a 181-day term of imprisonment. However, as Agdinaoay concedes, he was not sentenced to probation. Moreover, nothing in HRS § 586-4(e) or HRS Chapter 706 requires that DVI be ordered only in conjunction with probation.

State v. Agdinaoay, 148 Hawai'i 333, 474 P.3 682, 2020 WL 6268277, at *3 (App. 2020)(SDO).

Agdinaoay applied for a writ of certiorari, arguing that the family court could sentence him to DVI as a condition of probation, or 181 days imprisonment, but not both.

II. DISCUSSION

A. The Plain and Unambiguous Language of HRS § 586-4 Requires an Offender to Undergo DVI in Addition to a Jail Sentence.

"[T]he fundamental starting point for statutory-interpretation is the language of the statute itself." First Ins. Co. of Hawai'i v. A & B Props., 126 Hawai'i 406, 414, 271 P.3d 1165, 1173 (2012). Longstanding principles of statutory interpretation require that "where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." State v. Wheeler, 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009)(quoting Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of Honolulu, 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007)).

Here, HRS § 586-4(e) unequivocally states:

> When a temporary restraining order is granted and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:
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> (1) Except as provided in paragraph (2), for a first conviction of a violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than $150 nor more than $500; provided that the court shall not sentence a defendant to pay a fine unless the

> defendant is or will be able to pay the fine . . . .
>
> Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

HRS § 586-4(e)(emphasis added).

The statute required the family court to sentence Agdinaoay to DVI, and impose a jail sentence of at least two days. As noted above, nowhere in HRS § 586-4 is there a requirement that DVI be imposed only if it is as a condition of probation. To the contrary, the statute further provides that "[n]othing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor." HRS § 586-4(e).[1]

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[1] Other provisions regarding restraining orders similarly demonstrate the legislature's intent to give judges the authority to impose DVI without a condition of probation. For example, HRS § 586-5 provides that after a hearing the family court can enter a protective order, and that,

> The protective order may include all orders stated in the temporary restraining order and may provide relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including . . . orders to either or both parties to participate in domestic violence intervention.

Similarly, HRS § 586-5.5, in relevant part, states:

> The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. . . .
>
> The extended protective order may include . . . order[s] to either or both parties to participate in domestic violence intervention services.

This reflects a clear acknowledgement by the legislature that the court may order DVI independent of the sentencing options applicable to misdemeanors under Chapter 706 of the Hawai'i Penal Code – options which include a one year prison sentence. See HRS §§ 706-605, -663 (Supp. 2016). Under the Majority's reading of HRS § 586-4, this provision would be unnecessary, since chapter 706 of the penal code would provide the only sentencing options available to the court.

Where specific and general statutes conflict, the specific statute should be followed. Richardson v. City & Cnty. of Honolulu, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994) ("[W]here there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored." (quoting Mahiai v. Suwa, 69 Haw. 349, 356–57, 742 P.2d 359, 366 (1987))). Thus, to the extent HRS § 586-4(e) conflicts with HRS § 706-605, it is the specific statute – HRS § 586-4(e) - that should control. The Majority concedes this rule of construction but holds that "this principle is a mere tool of statutory interpretation designed for use where legislative intent is unclear. It does not override or undermine otherwise clear legislative intent." Majority at 16-17.

In my view, the plain language of the statute is evidence enough of the Hawai'i Legislature's clear intention that

any person convicted under HRS § 586-4 undergo DVI; to hold otherwise ignores our most fundamental statutory canons. The legislative history of the 1998 amendments to the statute further indicates the intent to "requir[e] persons convicted of violations of temporary restraining orders to undergo domestic violence intervention." S. Stand. Comm. Rep. No. 3252, in 1998 Senate Journal, at 1314; see also id. at 1315 (describing the bill as "[m]aking it mandatory for a person convicted of a temporary restraining order violation to undergo domestic violence intervention"). Nothing in the statute or the legislative history requires that DVI can only be imposed as a condition of probation.

The Majority contends that the 1998 amendment to extend the probation period from one to two years evinces an intent to give offenders more time to complete DVI as part of their probation sentence. Giving more time to complete DVI as part of probation is separate and distinct from requiring probation as a predicate to ordering DVI. In fact, the legislature amended the bill to "[a]llow[] the court the discretion to sentence a defendant convicted under section 586-4 or 709-906, Hawai'i Revised Statutes, to a period of probation not exceeding two years[.]" H. Stand. Comm. Rep. No. 578-98, in 1998 House Journal, at 1265 (emphasis added). If the legislature intended for probation to be mandated in conjunction

with DVI, it would not have given judges the discretion to impose probation. It is not our role to override clear legislative intent.[2]

B. DVI May Be Imposed as a Standalone Sentencing Option.

The Majority argues that any imposition of DVI is necessarily a condition of probation because (1) DVI on its own is not one of the four listed dispositions in HRS § 706-605(1),[3] Majority at 4-6, (2) other Penal Code sections "allow a court to impose DVI as a condition of probation," Majority at 5 (emphasis omitted), and (3) practical considerations preclude enforcement of DVI orders and support for offenders undergoing mandatory DVI, Majority at 8-13.

I disagree that DVI may only be ordered as a condition of probation. As the ICA correctly noted, nothing in HRS § 586-4 signals that an offender must be sentenced to probation;

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[2] Indeed, under the Majority's approach, the legislature's intent will be frustrated, since conditioning DVI on the imposition of probation in effect means that courts cannot impose a prison sentence of more than 180 days, despite the clear statement in § 586-4(e) that the "additional sanctions" of the penal code – which include up to a year in jail – are available to the family court in sentencing.

[3] HRS § 706-605(1) provides:

> [S]ubject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:
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> (a) To be placed on probation as authorized by part II;
> (b) To pay a fine as authorized by part III and section 706-624;
> (c) To be imprisoned for a term as authorized by part IV; or
> (d) To perform services for the community . . . .

however, the statute does plainly require an offender to undergo DVI. And as the ICA noted, "nothing in HRS Chapter 706 requires that DVI be ordered only in conjunction with probation." The Majority argues that "the absence of 'DVI' as a 'standalone' authorized disposition for convicted defendants under HRS § 706-605 and the express authorization of 'mental health treatment' such as DVI as a discretionary condition of probation indicate that DVI is imposable only as a condition of probation." Majority at 6 (emphasis omitted). However, just because DVI may be considered a type of "mental health treatment" available as a condition of probation under HRS § 706-624(2)(j), it does not follow that DVI can only be ordered as a condition of probation.[4]

The Majority suggests that its dismissal of the plain language of HRS 584-6 is justified by two provisions of the Penal Code, HRS 706-600 ("No sentence shall be imposed otherwise than in accordance with this chapter."), and 701-102(3) ("the provisions of chapters 701 through 706 of the Code are applicable to offenses defined by other statutes unless the code otherwise provides."). There are several problems with this

[4] HRS § 706-624(2)(j), in relevant part, states:

> The court may provide, as further conditions of a sentence of probation . . . that the defendant: . . . (j) Undergo available medical or mental health assessment and treatment, including assessment and treatment for substance abuse dependency, and remain in a specified facility if required for that purpose . . . .

approach. First, it violates the well-established principle that one legislature cannot pass laws which restrict action by a subsequent legislature. Fletcher v. Peck, 10 U.S. 87, 135 (1810)("[O]ne legislature cannot abridge the powers of a succeeding legislature."); The King v. Testa, 7 Haw. 201, 204 (1888)("It is claimed that one Legislature cannot bind a succeeding one[.]"); Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So.2d 949, 957 (Ala. 2004)("One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation . . . and no action by one branch of the legislature can bind a subsequent session of the same branch."); LeRoux v. Secretary of State, 640 N.W.2d 849, 861 (Mich. 2002)("It is a fundamental principle that one Legislature cannot bind a future Legislature or limit its power to amend or repeal statutes."); State ex rel. Stenberg v. Moore, 544 N.W.2d 344, 349 (Neb. 1996)("Therefore, absent a constitutional restriction on the legislative power, one legislature cannot restrict or limit the right of a succeeding legislature to exercise the power of legislation."); Iowa-Nebraska L. & P. Co. v. City of Villisca, 261 N.W. 423, 429 (Iowa 1935)("The power of the Legislature is derived from the Constitution and thereunder one Legislature cannot bind a succeeding Legislature . . . .")(emphasis omitted). In the current circumstances, this means that the 1972 legislature,

which adopted the Penal Code, cannot preclude subsequent legislatures from adopting sentencing provisions outside of the Code which provide for additional sentencing options.

Second, the Majority's approach would presumably invalidate the provision in HRS § 586-4(e)(1) which requires a minimum 48-hour jail sentence, since the penal code provision governing misdemeanor prison sentences provides only for the maximum sentence of a year in prison, and does not authorize or otherwise recognize a mandatory minimum sentence. HRS § 706-663.

Even more so, the Majority's interpretation would have wider consequences beyond HRS § 586-4. For example, based on the Majority's reading of HRS Chapter 706, the sentencing provisions in HRS Chapter 291E, which governs the use of intoxicants while operating a vehicle, would be invalidated because HRS Chapter 291E imposes sentencing schemes outside the Hawai'i Penal Code. For example, a first-time offender found to commit the offense of operating a vehicle under the influence of an intoxicant "shall be sentenced without the possibility of probation" and is required, inter alia, to attend a "fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court[.]" HRS § 291E-61(b). Additionally, a court "shall require that the offender be referred to the

driver's education program for an assessment, by a certified substance abuse counselor deemed appropriate by the court, of the offender's substance abuse or dependence and the need for appropriate treatment. . . . All costs for assessment and treatment shall be borne by the offender." HRS § 291E-61(h); see HRS § 291E-61.5(e)(requiring the court to mandate that a habitual offender, after either being sentenced to imprisonment or probation, "be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment.")(emphasis added).[5]

The availability of DVI as a condition of domestic abuse protective orders, see HRS § 586-4, also undercuts the Majority's assertion that "[i]t would be absurd and impracticable to construe HRS § 586-4(e) as requiring [offenders] to locate, enroll in, pay for, and complete court-approved DVI without any support or guidance from the probation office." Majority at 12. DVI is already imposed outside of probation on parties subject to domestic abuse protective orders, who are not receiving assistance from probation

[5] To cite another example, HRS § 187A-13 provides judges with the ability to sentence violators of aquatic resources laws to "complete an aquatic resources educational class" administered by the Department of Land and Natural Resources. Presumably, this standalone alternative sentencing option would be invalidated under the Majority's rationale. HRS § 187A-13(b).

officers. While it may be true that some offenders find it inconvenient or even impracticable to undergo DVI without the support and resources of a probation officer, that does not rise to a level of absurdity needed to negate the statute.

Finally, I note that the Majority raises the concern that recognizing DVI as a standalone sentence would be unenforceable through contempt charges. Majority at 8-12. I agree that contempt charges for failing to complete DVI would be inappropriate, but I do not agree that this means the legislature intended for DVI to be imposed only as a condition of probation. It is not our role to second-guess the efficacy of penal laws that have been duly enacted by the legislature. The legislature could have determined that many offenders would complete DVI even if there was no immediate sanction for failing to do so. And, a defendant's failure to complete DVI could be taken into account in determining an appropriate sentence if the defendant were to reoffend later. These are policy judgments for the legislature to make, and we should not substitute our views for theirs. In sum, the "practical considerations" raised by the Majority should not negate the clear legislative intent that all persons convicted under HRS § 586-4 shall undergo DVI, whether or not they are also sentenced to probation.

C. DeMello is Distinguishable.

The Majority agrees with Agdinaoay's assertion that the court's holding in State v. DeMello is analogous to his case. Majority at 5 n.3. In DeMello, the ICA held that the court illegally sentenced the defendant to serve the maximum term for a petty misdemeanor and attend anger management classes. 130 Hawai'i 332, 340, 310 P.3d 1033, 1041 (App. 2013), vacated on other grounds 136 Hawai'i 193, 361 P.3d 420 (2015). The court held that because no existing provision allowed "the imposition of anger management or other treatment programs," the order to attend anger management classes amounted to a condition of probation. See id. at 339-40, 310 P.3d at 1040-41.

DeMello is distinguishable from the instant case because there, the defendant was convicted of harassment under HRS § 711-1106(2), which does not contain any specific sentencing provisions other than noting that harassment is a petty misdemeanor. Accordingly, the ICA looked exclusively to HRS § 706-605 for sentencing options, and concluded that anger management could only be imposed as a mental health condition that was part of "a discretionary term of probation." Id. at 339-40, 310 P.3d at 1040-41 (citing HRS §§ 706-605, 706-624(2)(j)). In contrast, Agdinaoay was sentenced under HRS § 586-4, which expressly sets forth additional sentencing

provisions specifically applicable to violations of restraining orders: a minimum jail term of two days and a requirement to complete DVI. Thus, DeMello is not instructive.

III. CONCLUSION

For the foregoing reasons, I would affirm the ICA and hold that the family court can impose DVI as a standalone sentencing option. Since Agdinaoay's sentence was therefore legal, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama