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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

LOGOVII TALO,
Petitioner/Defendant-Appellant.

SCWC-20-0000457

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-20-0000457; CR. NO. 1PC161000667)

March 15, 2023

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND
DISSENTING IN PART, IN WHICH CIRCUIT JUDGE MALINAO,
IN PLACE OF NAKAYAMA, J., JOINS

I. INTRODUCTION

I agree with the majority's holding that Special Condition Q complies with Hawai'i Revised Statutes (HRS) § 706-624(2) (2016) and this court's holding in State v. Kahawai, 103 Hawai'i 462, 83 P.3d 725 (2004) insofar as it relates to defendant's possession of firearms and ammunition. However, I

respectfully disagree with the majority's reasoning. In my view, Special Condition Q would be a permissible condition of probation even if the predicate crime was not a felony or a crime of violence.

A key purpose of probation is to deter probationers from committing crimes. See HRS § 706-606(2) (2014) (The aims of probation include "afford[ing] adequate deterrence to criminal conduct" and "protect[ing] the public from further crimes."). Contraband is, by definition, goods that are illegal to possess. Enabling probation officers to undertake warrantless searches for contraband deters probationers from acquiring illegal goods, and allows probation officers to protect public safety by investigating potential criminal activity. For these reasons, Special Condition Q is "reasonably related" to the aims of probation and involves only "reasonably necessary" deprivations of liberty under HRS § 706-606, irrespective of the probationer's original offense. Kahawai, 103 Hawai'i at 462-63, 83 P.3d at 725-26 (quoting HRS § 706-624(2)).

I respectfully dissent from the majority's analysis, and concur only in the judgment.

II. BACKGROUND

Special Condition Q, which tracks the language of HRS § 706-624(2)(q), required that Petitioner/Defendant-

Appellant Logovii Talo:

Q. Submit at reasonable times to a search of your person, residence, vehicle, or other sites and property under your control by any probation officer, with or without a warrant, based on reasonable suspicion that illicit substance(s) or other contraband, may be in the place(s) of a search. Any illicit substance(s) or contraband found or observed in such a search may be seized

(Emphasis added.)

III. DISCUSSION

A. The Definition of "Contraband" is Goods that are Illegal to Possess

As the majority notes, "contraband" is defined as "[g]oods that are unlawful to import, export, produce, or possess."¹ In the context of Special Condition Q, the plain meaning of "contraband" is any goods that are illegal for the probationer to possess.²

I disagree that the meaning of the term "contraband" in Special Condition Q is ambiguous. In order to be ambiguous, a statutory term must be understandable in "two or more different senses." Farmer v. Admin. Dir. of Court, State of Haw., 94 Hawai'i 232, 236, 11 P.3d 457, 461 (2000) (quoting Konno v. County of Hawai'i, 85 Hawai'i 61, 71, 937 P.2d 397, 407

¹ Black's Law Dictionary also defines "contraband" as "[i]llegal or prohibited trade; smuggling," but it is clear from context that "[g]oods that are unlawful to . . . possess" is the correct definition. Contraband, BLACK'S LAW DICTIONARY (11th ed. 2019).

² The Merriam Webster definition echoes Black's Law Dictionary, defining contraband as "property that is unlawfully produced, possessed, or transported." Contraband (Legal Definition), MERRIAM-WEBSTER (11th ed. 2019).

(1997)). Within the context of Special Condition Q, which requires that the probationer submit to warrantless searches upon reasonable suspicion of "illicit substance(s) or other contraband," contraband can only refer to goods, other than illicit substances, that are illegal to acquire or to possess.

Since there is no alternative way in which "contraband" might be construed - and the majority does not propose one - there is no ambiguity.

B. Warrantless Searches for Contraband Do Not Violate Kahawai, Regardless of the Underlying Offense

Warrantless searches conditioned on reasonable suspicion of illicit substances or contraband are an important tool for probation officers to monitor and enforce the conditions of probation.³ The majority would hold that Special Condition Q was permissible under Kahawai because Talo was convicted of a felony offense as well as a crime of violence. Respectfully, Special Condition Q would have been justified under Kahawai no matter what crime Talo had committed. Allowing probation officers to conduct a warrantless search on reasonable suspicion that a probationer is committing a crime is both

³ Notably, the standard condition of probation, which was Condition No. 1 imposed on Talo, requires that a probationer obey all laws. It reads: "You shall not commit another federal or state crime or engage in criminal conduct in any foreign jurisdiction or under military jurisdiction that would constitute a crime under Hawaii law during your deferred term or term of probation"

essential to probation officers' monitoring and supervision of probationers, and reasonably related to the deterrent purposes of probation.

Probation officers have the complex task of supporting a probationer's rehabilitation while monitoring their conduct to prevent recidivism.⁴ See HRS § 806-73(a) (Supp. 2017) (providing that probation officers must monitor probationers and help them bring about improvement in their conduct and condition). The probation officer is the main - often, the only - person tasked with monitoring probationers to ensure they do not commit crimes while on probation, which in turn serves the purposes of probation by protecting the public and upholding the law. Fields, 67 Haw. at 277-78, 686 P.2d at 1387 (explaining that the twin aims of probation are rehabilitation of the offender and

⁴ We have described the role of a probation officer as follows:

The probation officer has been described as "a social therapist in an authoritative setting." The system he serves demands that he be a helper, a monitor, and an enforcer; it instructs him to aid and guide an individual who has displayed antisocial and criminal behavior, to evaluate and report on his progress toward integration into the community, and to curb his criminal tendencies. . . . [T]he system gives the probation officer "a special and unique interest in invading the probationer's privacy."

[The probation officer's] reason for intruding into the private world of the probationer, unlike that of the police officer, is [the probationer's] demonstrated need for correctional supervision, which [the probationer] presumably accepted as the preferred alternative to imprisonment.

State v. Fields, 67 Haw. 268, 280, 686 P.2d 1379, 1388-89 (1984) (citations and footnotes omitted).

the protection of the public); see HRS § 706-606(2) (the aims of probation include "afford[ing] adequate deterrence to criminal conduct," "promot[ing] respect for law," and "protect[ing] the public from further crimes.").

In Kahawai, we vacated a sentence requiring a probationer to report for alcohol and substance abuse assessment and testing, though there was no indication in the record that the probationer had a substance abuse problem. 103 Hawai'i at 466-68, 83 P.3d at 729-31. In affirmatively imposing an assessment and testing requirement that restricted probationer's use of both controlled substances and legal substances such as alcohol, the conditions proved far removed from the offense the probationer had committed, and not "reasonably related" to the factors in HRS § 706-606.⁵ Id. at 467, 83 P.3d at 730. In contrast, Special Condition Q only comes into effect if a probation officer reasonably suspects that a probationer has contraband, which is necessarily illegal. Allowing probation officers to conduct warrantless searches upon reasonable suspicion of illegal activity serves the purposes in HRS § 706-606, because it deters conduct that the law already forbids.

⁵ In Kahawai, we held that discretionary probation conditions must have "a factual basis in the record indicating that such conditions 'are reasonably related to the factors set forth in [HRS §] 706-606' and insofar as such 'conditions involve only deprivations of liberty or property[,] that they 'are reasonably necessary for the purposes indicated in [HRS §] 706-606(2)[.]'" 103 Hawai'i at 462-63, 83 P.3d at 725-26 (quoting HRS § 706-624(2)) (alterations in original).

Other courts have considered and rejected the majority's position. In Carswell v. State, Carswell was convicted of child molestation and argued that his crime "did not involve the use of an instrumentality or contraband" and that the warrantless search condition imposed upon him was therefore not sufficiently related to his rehabilitation or protecting the public. 721 N.E.2d 1255, 1263 (Ind. Ct. App. 1999). The court rejected the argument, reasoning that a warrantless search condition "is an extremely valuable aid in rehabilitation because if the probationer knows that he can be searched at any time without warning, he is less likely to engage in criminal activity." Id. The court further found that the requirement of "reasonable suspicion" for the search was sufficient protection of Carswell's constitutional privacy interests. Id.

State v. Lee does not support the majority's position. 10 Haw. App. 192, 862 P.2d 295 (1993). The defendant in Lee was forbidden to make contact with particular individuals as a condition of probation, and the court gave him oral - not written - notice of that condition. Id. at 195-97, 862 P.2d at 296-97. When Lee violated the condition, we reversed his revocation of probation on the basis that he had not received a "written copy of the conditions of his probation" as required by HRS § 706-624 (1985). Id. at 198, 862 P.2d at 298. Lee's

suggestion that courts provide probationers with written notice of "what is expected of [them]" does not mean that courts must inform probationers of the law in writing before expecting them to comply. Id. (quoting HRS § 706-624 cmt. (1985)).

The goods designated by the term "contraband" may vary depending on the probationer's predicate offense, but this does not make the term "contraband" ambiguous. "Contraband" included firearms for Talo because, pursuant to HRS § 134-7(b) (2011), he was forbidden from possessing firearms as a convicted felon.⁶ For other probationers, "contraband" might not include firearms, but it would include anything that a non-probationer is prohibited from possessing, including child pornography, illegal fireworks, military equipment, or endangered animals. The meaning of Special Condition Q is clear: if a probation officer has reasonable suspicion that a probationer is in possession of illegal goods - in other words, if he suspects a probationer is actively committing a crime - the probationer may be subject to a warrantless search.

⁶ HRS § 134-7(b) reads:

No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

C. Warrantless Searches Upon Reasonable Suspicion of Contraband Comport with Article I, Section 7 of the Hawai'i Constitution

Requiring reasonable suspicion of contraband to authorize a warrantless search ensures that the search does not unduly infringe on probationers' privacy rights, and conforms to Kahawai's requirement that probation conditions must "'involve only deprivations of liberty or property[]" that . . . 'are reasonably necessary for the purposes indicated in HRS § 706-606(2).'" See Kahawai, 103 Hawai'i at 463, 83 P.3d at 726 (quoting HRS § 706-624(2)). As the majority points out, while probationers maintain the right to enjoy a "significant degree of privacy and liberty," they are also "subject to limitations from which ordinary persons are free." Fields, 67 Haw. at 277, 279, 686 P.2d at 1387-88 (quoting United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975)).

Since "contraband" - regardless of the underlying offense - is illegal to possess, warrantless searches of a probationer's home are a "reasonably necessary" invasion of the probationer's limited privacy. See HRS § 706-624(2). Jurisdictions with heightened constitutional privacy protections, like Hawai'i's, allow broader intrusions than those at issue here. For example, Florida's constitution recognizes a right against unreasonable search and seizures as well as a

"right to be let alone and free from governmental intrusion into the person's private life." Fla. Const. art. I, §§ 12, 23. Nonetheless, Florida permits probation officers to conduct warrantless searches of probationers' homes without reasonable suspicion, and without a warrantless search being made a condition of probation. Harrell v. State, 162 So.3d 1128, 1131-32 (Fla. Dist. Ct. App. 2015) (quoting Grubbs v. State, 373 So.2d 905, 909 (Fla. 1979)) (warrantless searches are "absolutely necessary for the proper supervision of probationers.").

California likewise recognizes privacy as an "inalienable" right in its constitution and prohibits unreasonable searches and seizures. Cal. Const. art I, §§ 1, 13. Notwithstanding those constitutional protections, California allows a condition of probation to be held invalid only if the condition has no relationship to the underlying offense, relates to conduct that is not itself criminal, and requires or forbids conduct that is not reasonably related to future criminality. See People v. Kasinger, 129 Cal. Rptr. 483, 484 (Cal. Ct. App. 1976). Warrantless search conditions for contraband relate to conduct that is in itself criminal, and would not be invalidated under this standard.

IV. CONCLUSION

For the reasons above, I respectfully dissent from the majority's reasoning, and concur only in the judgment.

/s/ Mark E. Recktenwald

/s/ Clarissa Y. Malinao

