NO. 22099

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

v.

JOHN E. SINAGOGA, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 93-0421)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe, J., and
Circuit Judge Crandall,
in place of Lim, J., disqualified)

Defendant-Appellant John E. Sinagoga (Sinagoga) appeals the circuit court's November 6, 1998 Order of Resentencing. We affirm.

BACKGROUND

The detention of Sinagoga in this case commenced on February 12, 1993.

On February 13, 1993, two complaints were filed in the District Court of the First Circuit, each charging Sinagoga with Terroristic Threatening in the First Degree, Hawaiʻi Revised Statutes (HRS) § 707-716(1)(a) (1993). On February 16, 1993, Sinagoga was committed to the First Circuit Court for further proceedings.

Criminal No. 93-0421 began on February 24, 1993, when Plaintiff-Appellee State of Hawaiʻi (the State) filed a complaint in the First Circuit Court charging Sinagoga with three counts of

Terroristic Threatening in the First Degree. The alleged dates of the offenses were February 4, 1993, February 5, 1993, and February 8, 1993. The first two counts involved the same alleged victim.

On March 4, 1993, Sinagoga pleaded not guilty.

On August 9, 1993, Sinagoga appeared with his counsel at a change of plea hearing. In preparation for the hearing, Sinagoga had entered into a plea agreement with the State. Under the terms of the agreement, Sinagoga would plead no contest to Count I, Terroristic Threatening in the First Degree, as defined in HRS § 707-716(1)(d) (1993)[1/] and guilty to Counts II and III, Terroristic Threatening in the First Degree, as defined in HRS § 707-716(1)(a) (1993).[2/] In exchange, the State would agree to Sinagoga's request for probation for five years with one year of incarceration and credit for time served. The State also agreed not to seek "enhanced" sentencing.

On August 9, 1993, Sinagoga pleaded no contest to Count I and guilty to Counts II and III. The court accepted Sinagoga's pleas and then, through its clerk, informed the parties that sentencing would take place before "Judge Spencer" on September 29, 1993. At the subsequent sentencing hearing

---

1/ Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993) provides, in pertinent part, that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

2/ HRS § 707-716(1)(a) (1993) provides, in pertinent part, that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [b]y threatening another person on more than one occasion for the same or a similar purpose[.]"

before Judge Leland H. Spencer, both the prosecutor and the public defender requested that the court follow the plea agreement. Instead, Judge Spencer orally reviewed Sinagoga's prior criminal record, which included convictions in various jurisdictions for burglary, assault, driving under the influence, and possession of drug and concealed weapon. Judge Spencer noted that the offenses Sinagoga was charged with in the present case were felonies involving violence and that Sinagoga was not a young man. Judge Spencer then declared that Sinagoga would be "a danger to people, whether in Hawaii [Hawai‘i] or any other state where he happens to be; and that as long as he's free to do so, he's going to continue to be a danger to both people and to property." Thereafter, Judge Spencer sentenced Sinagoga to an indeterminate term of imprisonment of five years on each count, with the terms to run consecutively.

Sinagoga's October 26, 1993 motion for reconsideration and modification was denied on January 13, 1994. Under the Judgment filed on September 29, 1993, Sinagoga was sentenced to consecutive indeterminate prison terms of five years each on Counts I, II, and III. On appeal, Sinagoga challenged only the sentences imposed by the Judgment. Sinagoga contended that his prior criminal convictions could not be relied on by Judge Spencer in imposing consecutive sentences because the State failed to establish that he was represented by counsel when he was previously convicted. This court decided in relevant part as follows:

> Therefore, we conclude that, henceforth, the following are the steps to be taken by Hawai'i courts in cases where ordinary sentencing procedures are applicable and there is a possibility that the court may use the defendant's prior conviction(s) as a basis for the imposition or enhancement of a prison sentence. Step one, the court shall furnish to the defendant or defendant's counsel and to the prosecuting attorney a copy of the presentence report, HRS § 706-604, and any other report of defendant's prior criminal conviction(s). Step two, if the defendant contends that one or more of the reported prior criminal convictions was (1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant, the defendant shall, prior to the sentencing, respond with a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge. Step three, prior to imposing the sentence, the court shall inform the defendant that (a) each reported criminal conviction that is not validly challenged by the defendant is defendant's prior, counseled, validly entered, criminal conviction, and (b) a challenge to any reported prior criminal conviction not made by defendant before sentence is imposed may not thereafter, absent good cause, be raised to attack the court's sentence. Step four, with respect to each reported prior criminal conviction that the defendant challenges, the HRE shall apply, and the court shall expressly decide before the sentencing whether the State satisfied its burden of proving to the reasonable satisfaction of the court that the opposite of the defendant's challenge is true. Step five, if the court is aware of the defendant's prior uncounseled or otherwise invalid criminal conviction(s), it shall not impose or enhance a prison sentence prior to expressly stating on the record that it did not consider it or them as a basis for the imposition or enhancement of a prison sentence.
>
> CONCLUSION
>
> Accordingly, we remand the case. Step one has been taken. If [Sinagoga] does not validly challenge, in accordance with step two, the validity of any of the prior criminal convictions reported in the Presentence Report, the sentence is affirmed. If, in accordance with step two, [Sinagoga] validly challenges the validity of any of the reported prior criminal convictions, the sentence is vacated, and the circuit court and the parties shall proceed on to steps three, four, and five.

State v. Sinagoga, 81 Hawai'i 421, 447, 918 P.2d 228, 254 (App. 1996).

On remand, Sinagoga challenged the validity of all of the out-of-state prior criminal convictions reported in the presentence report. The validity of those challenges was not then determined. The State asked the court to follow the original plea agreement. In accord with the original plea agreement, the circuit court resentenced Sinagoga on each count

to a concurrent term of probation for five years, with a special condition of one year incarceration, with credit for time served. Not in accord with the original plea agreement, the court commenced the probation on the July 5, 1996 date of the resentencing rather than on September 29, 1993.

Sinagoga was released from incarceration on July 11, 1996.

On June 18, 1998, the State moved to revoke Sinagoga's probation in Criminal No. 93-0421 because "[o]n May 20, 1998, [Sinagoga] was found guilty following a jury trial of two (2) counts of the offense of Terroristic Threatening in the First Degree under [Criminal] No. 97-0711. The date of offense for [Criminal] No. 97-0711 was March 19, 1997."

At the October 13, 1998 revocation/sentencing hearing, the circuit court decided "that the following prior criminal convictions alleged to be [Sinagoga's] were indeed [Sinagoga's], were adequately and effectively counseled and were other [sic] otherwise validly entered": January 7, 1992, Monroe County, Florida, Possession of Cocaine; September 17, 1990, Koweka County, Georgia, Theft by Taking.

The court noted that sentencing as a repeat offender was mandated in Criminal No. 97-0711. It sentenced Sinagoga, in Criminal No. 97-0711, to two consecutive ten-year indeterminate terms of imprisonment with a mandatory minimum of one year eight months. Notwithstanding Sinagoga's argument that "it was an illegal probation that was issued in the first place[,]" the

court revoked Sinagoga's probation in Criminal No. 93-0421, and resentenced him to three concurrent indeterminate five-year terms of incarceration, with credit for time served. It ordered the sentences, in Criminal No. 97-0711, to run consecutively and after the concurrent sentences in Criminal No. 93-0421.

Thus, in the instant case on appeal, Criminal No. 93-0421, the relevant events occurred as follows:

February 12, 1993	Sinagoga commenced his incarceration following his arrest for charges that ultimately were prosecuted in Criminal No. 93-0421.
September 29, 1993	Sinagoga was sentenced to consecutive terms of incarceration for five years on each of three counts.
July 5, 1996	In accord with the plea agreement, Sinagoga was resentenced on each count to probation for five years, incarceration for one year, with credit for time served, and the terms running concurrently. His probation commenced on this date. Sinagoga did not appeal this sentence.
July 11, 1996	Sinagoga's incarceration ended.[3/]
May 20, 1998	Sinagoga was found guilty of two counts of Terroristic Threatening in the First Degree.
June 18, 1998	The State filed its motion to revoke Sinagoga's probation.
October 13, 1998	The Court orally revoked Sinagoga's probation and sentenced him on each count to incarceration for five years, with credit for time served, and the terms running concurrently.
November 6, 1998	The Court entered its Order of Resentencing in accord with its October 13, 1998 oral

3/ The record does not reveal why the incarceration did not end on July 5, 1996, when the probation began.

order. This order stated "MITTIMUS TO ISSUE FORTHWITH."

HRS § 706-623 (1993)[4/] states as follows:

> **Terms of probation.** (1) When the court has sentenced a defendant to be placed on probation, the period of probation shall be five years upon conviction of a felony, one year upon conviction of a misdemeanor, or six months upon conviction of a petty misdemeanor, unless the defendant is discharged sooner by order of the court. The court, on application of a probation officer or of the defendant or on its own motion, may discharge the defendant at any time. Prior to granting early discharge, the court shall afford the prosecuting attorney an opportunity to be heard. The terms of probation provided in this part other than in this section shall not apply to sentences of probation imposed under section 706-606.3.
>
> (2) When a defendant who is sentenced to probation has previously been detained in any state or county correctional or other institution following arrest for the crime for which sentence is imposed, the period of detention following arrest shall be deducted from the term of imprisonment if the term is given as a condition of probation. The pre-sentence report shall contain a certificate showing the length of such detention of the defendant prior to sentence in any state or county correctional or other institution, and the certificate shall be annexed to the official records of the defendant's sentence.

HRS § 706-624(2)(a) (1993) states as follows:

> **Conditions of probation.** . . .
>
> (2) Discretionary conditions. The court may provide, as further conditions of a sentence of probation, to the extent that the conditions are reasonably related to the factors set forth in section 706-606 and to the extent that the conditions involve only deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 706-606(2), that the defendant:
>
> (a) Serve a term of imprisonment not exceeding one year in felony cases, and not exceeding six months in misdemeanor cases; provided that notwithstanding any other provision of law, any order of imprisonment under this subsection that provides for prison work release shall require the defendant to pay thirty per cent of the defendant's gross pay earned during the prison work release period to satisfy any restitution order. The payment shall be handled by the adult probation division and shall be paid to the victim on a monthly basis[.]

POINT ON APPEAL

Sinagoga contends that the July 5, 1996 sentence is illegal because it imposed more punishment than authorized when

---

4/ HRS § 706-623 was subsequently amended in 1994 and 1998.

it added five years of probation commencing July 5, 1996, on to the incarceration he had served from February 12, 1993, through July 11, 1996. In his view, the most the court could sentence him to was probation through February 11, 1998, and that, pursuant to HRS § 706-630,[5/] his probation ended by operation of law on February 12, 1998, before the State filed its June 18, 1998 motion to revoke his probation.

Specifically, Sinagoga argues that

> [n]owhere in the penal code is a combination of three and a half years jail **and** five years probation authorized. Yet that is exactly what [Sinagoga] received by the resentencing court on July 5, 1996. In essence [the court] totally voided the three and a half years jail time given [Sinagoga] and gave him the additional sentence of five years probation -- for the same crime. This is not authorized and violates one's right not to suffer double punishment in violation of Art. I § 10, Hawaii Constitution and the 5th and 14th Amendments to the U.S. Constitution.

(Emphasis in original.)

Sinagoga points out that (1) under the Hawai'i Rules of Penal Procedure (HRPP) Rule 35, the court may correct an illegal sentence at any time, and (2) under HRS § 706-624 and State v. Viloria, 70 Haw. 58, 759 P.2d 1376 (1988), a petition for revocation of probation must be filed before the probation has ended.

The State responds that (a) there is no appellate jurisdiction because this is really an untimely appeal of the July 5, 1996 sentence; (b) the court did not abuse its discretion in resentencing Sinagoga pursuant to the plea agreement; and

---

5/ HRS § 706-630 (1993) states that "[u]pon the termination of the period of probation . . . the defendant shall be relieved of any obligations imposed by the order of the court and shall have satisfied the disposition of the court."

(c) Sinagoga's probation period did not expire prior to the State's filing its motion for revocation.

DISCUSSION

Initially, we conclude that HRPP Rule 35 authorizes this court in this appeal to decide the legality of the July 5, 1996 sentence.

In 1996, on remand for resentencing, there was no determination whether the court improperly considered prior criminal convictions when it imposed the September 29, 1993 sentence. The State's position was that it was bound by the plea agreement. On July 5, 1996, the court resentenced Sinagoga in accordance with the plea agreement except with respect to the date of the commencement of the probation. Sinagoga asked that the probation be commenced on the September 29, 1993 date of the original sentence. The State objected. The court commenced the probation on the date of the July 5, 1996 resentencing. Sinagoga did not appeal the re-sentence.

In summary, these are the relevant facts: (1) the September 29, 1993 sentence of incarceration for three times five (3 X 5) years was appealed, vacated, and remanded for a determination whether it was illegal or not and, if so, for resentencing; (2) on remand, there was no determination whether it was illegal or not and Sinagoga did not object; (3) on remand, on July 5, 1996, without objection by Sinagoga, the court resentenced Sinagoga in accordance with the original plea agreement to probation for five years and incarceration for one

year; (4) although in accordance with the original plea agreement Sinagoga requested that the probation be commenced on September 29, 1993, the probation was commenced on July 5, 1996, and Sinagoga did not appeal the sentence; and (5) pursuant to the State's June 18, 1998 Motion for Revocation of Probation and Resentencing (June 18, 1998 Motion), Sinagoga's probation was revoked on October 13, 1998, and he was resentenced to concurrent five-year terms of incarceration with credit for time served; and (6) Sinagoga now contends that the July 5, 1996 sentence to probation illegally extended his probation beyond February 11, 1998, and beyond the filing of the State's June 18, 1998 Motion.

HRS § 706-629(1) (1993) states that "[w]hen the disposition of a defendant involves more than one crime: . . . (b) Multiple periods of probation shall run concurrently from the date of the first such disposition." It follows that the longest sentence of probation that might have been imposed on September 29, 1993, was three concurrent five-year terms of probation commencing September 29, 1993. In other words, the circuit court was authorized to impose probation up to and including September 28, 1998.

The original sentence was imposed on September 29, 1993. The validity of Sinagoga's point on appeal depends entirely on his view that the maximum five-year term of probation commenced no later than February 12, 1993, the date he began his incarceration. This view is wrong. As noted above, HRS

§ 706-23(1) authorized the court to sentence Sinagoga to probation for "five years upon conviction of a felony." In other words, the five-year term commences on the date of the sentencing.

Thus, even if the court, on July 5, 1996, granted Sinagoga's request that the date of probation begin "nunc pro tunc back to the original sentencing date of September 29, 1993[,]" the probation would have continued through September 28, 1998.

Such a sentence would not violate the statutory requirement that the resentence may not be more severe than the prior sentence. HRS § 706-609 (1993).

Such a sentence would not violate the requirement that in resentencing, the defendant must be given credit for the part of the resentence that has already been satisfied during the serving of the original sentence. State v. Taparra, 82 Hawai‘i 83, 919 P.2d 995 (Hawai‘i App. 1996). The fact that Sinagoga spent part of his five-year term of probation in incarceration has no effect on the permissible term of the probation.

It follows that the State filed its June 18, 1998 Motion after May 20, 1998, when Sinagoga was found guilty of two counts of Terroristic Threatening in the First Degree but well before Sinagoga's lawfully imposed term of probation was scheduled to terminate on September 28, 1998.

We recognize that the State filed its June 18, 1998 Motion before its ground for revocation matured. In Criminal

No. 97-0711, Sinagoga was found guilty on May 20, 1998. The State's June 18, 1998 Motion was premised on that determination of guilt. However, Sinagoga was not sentenced in Criminal No. 97-0711 until October 13, 1998, the same day the State's June 18, 1998 Motion was granted and Sinagoga was resentenced in Criminal No. 93-0421.

HRS § 706-625(3) (1999) authorizes the revocation of probation when the defendant "has been convicted of another crime." HRS § 706-625(6) (1999) states that "[a]s used in this section, 'conviction' means that a judgment has been pronounced upon the verdict." This means there must be a pronouncement of "a judgment" in addition to "the verdict." The only way "a judgment" can be "pronounced upon the verdict" is for a sentence to be imposed after the verdict. The legislative history confirms this interpretation. The legislature expressly conformed statutory law with the statement in State v. Rodrigues, 68 Haw. 124, 132, 706 P.2d 1293, 1299 (1985) (citation omitted), that "in the eye of the law a person is not deemed to have been convicted unless it is shown that a judgment has been pronounced upon the verdict." In Criminal No. 97-0711, the "conviction" (verdict and sentence) did not occur until October 13, 1998.

The fact that Sinagoga was not the subject of a "conviction" (verdict and sentence) until after September 28, 1998, does not make the "conviction" untimely. Sinagoga's period of probation tolled upon the filing of the motion to revoke probation. HRS § 706-627 (1993) states as follows:

> **Tolling of probation**. (1) Upon the filing of a motion to revoke a probation or a motion to enlarge the conditions imposed thereby, the period of probation shall be tolled pending the hearing upon the motion and the decision of the court. The period of tolling shall be computed from the filing date of the motion through and including the filing date of the written decision of the court concerning the motion for purposes of computation of the remaining period of probation, if any. In the event the court fails to file a written decision upon the motion, the period shall be computed by reference to the date the court makes a decision upon the motion in open court. During the period of tolling of the probation, the defendant shall remain subject to all terms and conditions of the probation except as otherwise provided by this chapter.
>
> (2) In the event the court, following hearing, refuses to revoke the probation or grant the requested enlargement of conditions thereof because the defendant's failure to comply therewith was excusable, the defendant may be granted the period of tolling of the probation for purposes of computation of the remaining probation, if any.

CONCLUSION

Accordingly, we affirm the circuit court's November 6, 1998 Order of Resentencing.

DATED: Honolulu, Hawai‘i, August 23, 2000.

On the briefs:

Jack Schweigert
for Defendant-Appellant.

Chief Judge

Alexa D. M. Fujise,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Acting Associate Judge