



State v. Domingo

113 P.3d 223 (2005) | Cited 0 times | Hawaii Supreme Court | June 14, 2005

NOT FOR PUBLICATION

SUMMARY DISPOSITION ORDER

By: Moon, C.J., Levinson, and Nakayama, JJ., with Duffy, J., concurring separately and dissenting, in which Acoba, J., joins

The defendant-appellant Joseph Domingo appeals from the judgment of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, convicting him of and sentencing him for five counts of sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993 & Supp. 2001). On appeal, Domingo argues (1) that the circuit court erred in refusing to instruct the jury pursuant to his proposed supplemental specific unanimity instruction, in violation of *State v. Arceo*, 84 Hawaii 1, 928 P.2d 843 (1996), (2) that the circuit court's responses to jury communications were impermissible pursuant to this court's decision in *State v. Fajardo*, 67 Haw. 593, 699 P.2d 20 (1985), and (3) that the circuit court erred in imposing concurrent ten-year extended terms of imprisonment in violation of his constitutional right to a jury trial under the sixth amendment to the United States Constitution and article I, section 14 of the Hawaii Constitution (1978).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the judgment and sentence of the circuit court and hold as follows.

(1) The circuit court complied with this court's decision in *Arceo*, 84 Hawaii 1, 928 P.2d 843, by giving the jury one specific unanimity instruction, stating, inter alia, "that all twelve jurors must unanimously agree that the same act has been proven beyond a reasonable doubt." Inasmuch as *Arceo* does not preclude a single specific unanimity instruction expressly applicable to all relevant counts, the circuit court did not err in refusing to give Domingo's proposed supplemental specific unanimity instructions tailored to each count.

(2) The circuit court's responses to the jury's communications were not erroneous, nor did they mirror the instruction allowed in *Allen v. United States*, 164 U.S. 492 (1896), but rejected as improper by this court in *Fajardo*, 67 Haw. 593, 699 P.2d 20, and *State v. Villeza*, 72 Haw. 327, 334-35, 817 P.2d 1054, 1058 (1991). The circuit court's instruction to the jury to continue deliberating by explaining that "[t]he law requires a unanimous decision in criminal cases. Please continue your deliberations with a view to reaching an agreement if you can do so without violating your individual judgment"



State v. Domingo

113 P.3d 223 (2005) | Cited 0 times | Hawaii Supreme Court | June 14, 2005

did not have the effect of "blasting" a verdict out of a deadlocked jury. Fajardo, 67 Haw. at 597, 699 P.2d at 22 (citation omitted). "[W]hen read and considered as a whole, the instructions given" were not "prejudicially insufficient, erroneous, inconsistent, or misleading," State v. Kinnane, 79 Hawaii 46, 49, 897 P.2d 973, 976 (1995), and the circuit court did not err in instructing the jury. See also State v. Hoey, 77 Hawaii 17, 38, 881 P.2d 504, 525 (1994).

(3) Domingo's arguments against his extended terms of imprisonment have been foreclosed by this court's decision in State v. Rivera, 106 Hawaii 146, 150, 102 P.3d 1044, 1048 (2004), which held that Hawaii's extended term sentencing scheme is not incompatible with the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004). See also State v. Kaua, 102 Hawaii 1, 72 P.3d 473 (2003); State v. Hauge, 103 Hawaii 38, 79 P.3d 131 (2003). Therefore,

IT IS HEREBY ORDERED that the judgment and sentence from which this appeal is taken are hereby affirmed.

CONCURRING AND DISSENTING OPINION BY DUFFY, J. IN WHICH ACOBA, J., JOINS

I concur with the majority on points (1) and (2). Based upon Justice Acoba's Dissenting Opinion in State v. Rivera, 106 Hawaii 146, 102 P.3d 1044 (2004), in which I joined, I would vacate the sentence imposed and remand for sentencing consistent with the Dissenting Opinion in State v. Rivera.

