

NO. 22483

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MICHAEL E. MAKEKAU, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-Cr. No. 97-173)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

In this appeal, Defendant-Appellant Michael E. Makekau (Defendant) contends that the District Court of the Third Circuit (the district court) improperly entered an April 5, 1999 Order of Resentencing that revoked his sentence of one year's probation and resented him to another year of probation. We agree.

The record reveals that following his February 28, 1998 conviction of Assault in the Third Degree, a violation of Hawai'i Revised Statutes (HRS) § 707-712 (1993), Defendant was sentenced to serve a one-year term of probation. The sentencing order, which was completed on a standard court form, ordered Defendant to "comply in all respects" with six listed mandatory terms and conditions, as well as "the special conditions (listed on the back of this Order)[,]" and to appear on April 17, 1998, at 1:30 p.m. for a proof of compliance hearing. On the back of the order was a list of seventeen different "special terms and

conditions of probation," with a blank line before each item. An "x" was typed on the blank lines before items 2, 5, 7, 8, and 14 to indicate the "special terms and conditions of probation" that Defendant was being ordered to comply with. Item 14 specifically ordered Defendant as follows:

You shall obtain an alcohol/drug/anger management . . . assessment and submit to treatment as determined by your probation officer at your own expense.

Item 4, which was not marked with an "x," provided:

You will enter and complete the [Alternatives to Violence]ATV/ACCESS¹ _____ program and participate in counseling and/or treatment until clinically discharged. You shall contact said program within two weeks from your release from imprisonment/date of this order[.]

On April 24, 1998, Plaintiff-Appellee State of Hawai'i (the State) filed a motion requesting the district court to revoke Defendant's probation, resentence Defendant, and issue a warrant of arrest directing that Defendant be arrested and brought before the court to answer the allegations stated in the motion. The basis for the motion was an April 9, 1998 probation officer's report that stated, in relevant part:

XX The defendant is not currently enrolled in the ATV course or in the alternative not seen a mental health expert.

. . . .

XX The defendant has not submitted to a substance abuse assessment.

HRS § 706-625 (Supp. 1998) provides, in relevant part, that "[t]he court shall revoke probation if the defendant has

¹ It is not clear to us what the acronym "ACCESS" stands for.

inexcusably failed to comply with a substantial requirement imposed as a condition of the order[.]"

At the hearing on the State's motion, it was undisputed that Defendant had obtained the required alcohol/drug/anger management assessment. He had also attended, at his own expense, an anger management program run by Dr. Eric Wolf. However, Defendant had not entered and completed an ATV/ACCESS program, and as a result of this deficiency, the district court revoked Defendant's probation.

The State concedes in its answering brief that "the February 26, 1998 Judgment did not specifically order the Defendant to attend and/or complete the [ATV] Program." The State also concedes that "the trial court was under a misconception that the Defendant was ordered to attend the [ATV] Program." Moreover, our review of the record reveals no evidence that Defendant's probation officer ever advised Defendant that he was required to attend the ATV program.

In light of the record, juxtaposed against the lack of a specific requirement in the sentencing order that Defendant attend an ATV Program, we cannot conclude that Defendant's failure to attend an ATV Program constituted an inexcusable

failure to comply with a substantial condition of employment.
Accordingly, we reverse the April 5, 1999 Order of Resentencing.

DATED: Honolulu, Hawai'i. December 22, 2000.

On the briefs:

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(Crudele, DeLima & Shiroma)
for defendant-appellant.

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plaintiff-appellee.