NO. 25255

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

VICTORIA FEINBERG, Petitioner-Appellee, v.
KURT BUTLER, Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
WAILUKU DISTRICT
(CIVIL NO. 2SS01-190(W))

MEMORANDUM OPINION

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

Respondent-Appellant Kurt Butler (Butler) appeals from the "Amended Order Granting Petition For Injunction Against Harassment" (amended order) entered on July 11, 2002, by Judge Douglas H. Ige (Judge Ige), District Court of the Second Circuit. The petition for injunction was filed by Petitioner-Appellee Victoria Feinberg (Feinberg). The amended order, made effective as of December 19, 2001, enjoined Butler from contacting, threatening, or physically harassing Feinberg for a period of three years. It also contained several special conditions, including one providing that "[Butler] shall not publish or make public of [sic] any disparaging allegations against [Feinberg] that serve no legitimate purpose."

On appeal, Butler requests that we void the above-quoted special condition.[1] For the reasons set forth below, we agree with Butler that the challenged special condition, in its present form, violates Butler's constitutional right to freedom of speech.

BACKGROUND

Although the record is not clear, it appears that Butler and Feinberg at one time were involved in a relationship. Sometime after the relationship ended, Butler wrote and mailed a series of correspondence that contained unflattering and derogatory comments about Feinberg. The correspondence included a notice entitled, "Beware," containing Feinberg's picture and three pages of accompanying text that Butler sent to 12 to 15 of their mutual acquaintances, a letter Butler sent to Feinberg, and a letter Butler sent to Feinberg's boyfriend.

On December 5, 2001, Feinberg filed a "Petition for Ex Parte Temporary Restraining Order and For Injunction Against Harassment," naming Butler as the respondent. The petition was filed pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (Supp.

[1] Petitioner-Appellee Victoria Feinberg (Feinberg) did not file an answering brief.

2003).[2] In the petition, Feinberg alleged that Butler had recently sent her another "hate" letter, and that she was afraid Butler might hurt her and her daughter. Feinberg also alleged that Butler had verbally harassed her. On the same day the petition was filed, District Court Judge Geronimo Valdriz (Judge Valdriz) granted Feinberg's request for a temporary restraining order.

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[2] Hawaii Revised Statutes § 604-10.5 (Supp. 2003) provides in relevant part:

§ 604-10.5 Power to enjoin and temporarily restrain harassment. (a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

. . . .

(2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(b) The district courts shall have power to enjoin or prohibit or temporarily restrain harassment.

. . . .

(f) . . . If the court finds by clear and convincing evidence . . . that harassment as defined in paragraph (2) of that definition exists, it shall enjoin for no more than three years further harassment of the petitioner; . . . .

. . . .

(h) A knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor. . . .

(i) Nothing in this section shall be construed to prohibit constitutionally protected activity.

On December 19, 2001, Judge Valdriz held a hearing on Feinberg's petition for a preliminary injunction and heard testimony from both Feinberg and Butler. The series of correspondence Butler had mailed that contained unflattering and derogatory statements about Feinberg was admitted into evidence. At the end of the hearing, Judge Valdriz orally granted the petition for injunction against harassment. The court found by clear and convincing evidence that Butler had harassed Feinberg by engaging in a course of conduct that alarmed, disturbed, and continually bothered Feinberg, served no legitimate purpose, and would cause a reasonable person to suffer emotional distress. Judge Valdriz found, however, that Butler had not harassed Feinberg by means of physical harm or threat of imminent physical harm. At Feinberg's request, and over Butler's objection, Judge Valdriz prohibited Butler from publishing or making public allegations against Feinberg's character.

On December 19, 2001, Judge Valdriz filed a written order granting Feinberg's petition for injunction against harassment. The order enjoined Butler and any person acting on his behalf from:

> a. Contacting, threatening, or physically harassing [Feinberg] and any person(s) residing at [Feinberg's] residence[;]
>
> b. Telephoning [Feinberg][;] [and]
>
> c. Entering or visiting [Feinberg's] residence, including yard and garage and place of employment.

The order further prohibited Butler from possessing or controlling firearms or ammunition, and it directed him to turn such items over to the police for safekeeping. The order also contained a special condition that "[Butler] shall not publish or make public of [sic] any allegations against [Feinberg]" (hereinafter referred to as the no-publication special condition). Other special conditions prohibited Butler from sending any letters to [Feinberg] and required him to turn in his firearms by December 21, 2001. The order provided that the injunction would take effect on December 19, 2001 and remain in effect for three years. It notified Butler that "any knowing or intentional violation of this order against harassment shall be punishable as a misdemeanor under [HRS] § 604-10.5."

On April 3, 2002, Butler filed a motion to modify the December 19, 2001, order by striking the no-publication special condition. Butler argued that the no-publication special condition was an unconstitutional prior restraint on his free speech and that the district court did not have jurisdiction to impose the restriction. On May 20, 2002, Judge Ige held a hearing on the motion.[3] Judge Ige rejected Butler's jurisdictional argument, but he partially granted the motion by amending the no-publication special condition to add the

[3] District Court Judge Geronimo Valdriz had earlier recused himself after receiving a letter from Respondent-Appellant Kurt Butler (Butler).

requirements that the prohibited allegations be "disparaging" and made with "no legitimate purpose."

On July 11, 2002, Judge Ige filed the amended order that modified the no-publication special condition to read: "[Butler] shall not publish or make public of [sic] any disparaging allegations against [Feinberg] that serve no legitimate purpose" (hereinafter referred to as the amended no-publication special condition). No other changes were made to the December 19, 2001, order.

On August 9, 2002, Butler filed a notice of appeal from the July 11, 2002, amended order.

DISCUSSION

The only aspect of the July 11, 2002, amended order that Butler challenges on appeal is the amended no-publication special condition.[4] Butler claims that this special condition is invalid on the grounds that: 1) a ruling in a separate criminal case involving the no-publication special condition collaterally estops the enforcement of the amended no-publication special condition; 2) the district court lacked jurisdiction to

[4] On appeal, Butler does not challenge the district court's finding that he harassed Butler. Nor does Butler challenge any provision of the July 11, 2002, "Amended Order Granting Petition For Injunction Against Harassment" (amended order) other than the no-publication special condition. We therefore affirm the remaining provisions of the July 11, 2002, amended order that, among other things, prohibit Butler from contacting, threatening, or physically harassing Feinberg, possessing any firearm or ammunition, telephoning or sending letters to Feinberg, or visiting her residence or place of employment.

impose the amended no-publication special condition; and 3) the amended no-publication special condition violates Butler's right to freedom of speech under the First Amendment to the United States Constitution and Article I, Section 4 of the Hawai‘i Constitution.

1. The Doctrine of Collateral Estoppel Does Not Apply.

Butler states in his opening brief that he was arrested on March 7, 2002, and charged in a separate proceeding with two counts of criminal contempt for publishing a booklet about Feinberg that he sent to Feinberg's landlord. Butler asserts that Count 1 charged him with violating the no-publication special condition, and that Second Circuit Judge Joel August (Judge August) dismissed that count because he found the no-publication special condition violated the First Amendment. Butler argues that Judge August's ruling precludes the enforcement of the amended no-publication special condition under the doctrine of collateral estoppel.

In support of his factual representations regarding the criminal contempt prosecution, Butler attaches in the appendix to his brief a hearing transcript and other documents pertaining to State of Hawaii v. Kurt Butler, Cr. No. 02-1-0128. Unfortunately for Butler, he did not make the documents relating to his criminal case part of the record in this appeal, and therefore we may not consider them. We can, however, take judicial notice of

the pleadings in that criminal case, and we will do so to the extent necessary to dispose of Butler's collateral estoppel claim. Roxas v. Marcos, 89 Hawai‘i 91, 110 n.9, 969 P.2d 1209, 1228 n.9 (1998) (finding that courts may in appropriate circumstances take judicial notice of proceedings in other courts if those proceedings have a direct relation to the matter at issue).

Butler's criminal complaint was filed on March 14, 2002. The charges therefore must have been based on the no-publication special condition contained in the December 19, 2001, order and not the amended no-publication special condition contained in the July 11, 2002, amended order. Accordingly, Judge August's dismissal of Count 1 only considered the constitutionality of the no-publication special condition. The court did not pass upon the amended no-publication special condition that added the requirements that the allegations be "disparaging" and made with "no legitimate purpose."

For the doctrine of collateral estoppel or "issue preclusion" to apply, the party asserting the doctrine must establish that the issue decided in the prior adjudication was "identical" to the one presented in the instant action. Bremer v. Weeks II, 104 Hawai‘i 43, 54, 85 P.3d 150, 161 (2004). Because Judge August did not decide the validity of the amended no-publication special condition, the issue in the prior

adjudication was not identical to the issue in this appeal, and the doctrine of collateral estoppel does not apply.

2. The District Court Had Jurisdiction to Impose the Amended No-Publication Special Condition.

HRS § 604-5(c) (Supp. 2003) provides that "[t]he district courts shall have jurisdiction in all statutory proceedings as conferred by law upon district courts." The amended no-publication special condition was part of the remedy granted on a petition to enjoin harassment filed under HRS § 604-10.5. HRS § 604-10.5(b) specifically grants the district courts the power "to enjoin or prohibit or temporarily restrain harassment," and HRS § 604-10.5(f) authorizes the court, upon a finding of harassment, to "enjoin . . . further harassment of the petitioner." We conclude that by virtue of HRS §§ 604-5(c) and 604-10.5, the district court had jurisdiction to issue the July 11, 2002, amended order, including the amended no-publication special condition.

In contesting the district court's jurisdiction, Butler cites HRS § 604-10.5(i), which provides that nothing in the statute authorizing the court to enjoin harassment "shall be construed to prohibit constitutionally protected activity." He also cites HRS § 604-5(d) (Supp. 2003), which states, in relevant part, that the district courts "shall not have cognizance of . . . actions for libel, slander, and defamation of character . . . ." Butler reasons that the district court acted

in excess of its jurisdiction because the amended no-publication special condition violates his constitutional right to free speech and was based on an implicit finding that his prior writings were defamatory. Butler's claims are without merit.

The court's amended no-publication special condition was not issued pursuant to an action for libel, slander, or defamation; nor was it based on the court's determination that Butler had libeled, slandered, or defamed Feinberg in the past. Thus, HRS § 604-5(d) is inapposite. The district court had jurisdiction pursuant to HRS § 604-10.5 to determine Feinberg's harassment petition and to enjoin Butler from harassing Feinberg in the future. While we conclude that the district court had jurisdiction to enjoin Butler from harassing Feinberg in the future, a matter which Butler does not dispute, we still must review whether the means chosen by the court to protect Feinberg against future harassment was proper, a question to which we now turn.

3. The Amended No-Publication Special Condition Violates Butler's Free Speech Rights.

Butler can be criminally prosecuted if he violates the amended no-publication special condition. Under HRS § 604-10.5(h), a knowing or intentional violation of an injunction against harassment can be prosecuted as a misdemeanor. Butler can also be charged under HRS § 710-1077(1)(g) (1993) with criminal contempt of court for knowingly disobeying the amended

no-publication special condition. The contempt offense is punishable as a misdemeanor or petty misdemeanor. HRS § 710-1077(2) and (3).

Butler contends that the amended no-publication special condition constitutes a prior restraint based on the content of his speech in violation of the First Amendment to the United States Constitution and Article I, Section 4 of the Hawai‘i Constitution.[5] We review claims based on the constitutional right to free speech de novo. In re Doe, 76 Hawai‘i 85, 93-94, 869 P.2d 1304, 1312-13 (1994).

In analyzing free speech rights under the First Amendment, the United States Supreme Court has held that governmental restrictions based on the content of the ideas expressed are presumptively invalid. R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992). The presumption of invalidity also applies to prior restraints on expression. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). For content-based speech restrictions to pass muster under the First Amendment, they must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

[5] The First Amendment to the United States Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech[.]" In similar terms, Article I, Section 4 of the Hawai‘i Constitution provides in relevant part that "[n]o law shall be enacted . . . abridging the freedom of speech[.]"

The protection given to free speech under the First Amendment, however, is not absolute. Virginia v. Black, 538 U.S. 343, 358 (2003). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" R.A.V. v. St. Paul, 505 U.S. at 382-83 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). For example, speech constituting "fighting words," "true threats," or defamation may be prohibited consistent with the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. at 572 ("fighting words"); Watts v. United States, 394 U.S. 705 (1969) ("true threats"); Beauharnais v. Illinois, 343 U.S. 250 (1952) (defamation).

In analyzing whether anti-harassment and similar laws violate constitutional free speech rights, courts have drawn a distinction between statutes directed at the communication itself and those that are directed at the injurious effects of the communication. Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses § 5-4(c) at 286-87 (1996) (cited in In re Doe, 76 Hawai‘i at 94 n.16, 869 P.2d at 1313 n.16). Laws directed at forbidding the communication itself have been struck down. State v. Spencer, 611 P.2d 1147, 1148 (Or. 1980) (holding that a disorderly conduct

statute directed at the act of communicating certain words was unconstitutional). Laws directed at the injurious effects of the communication, either by requiring that the communication be made with the intent to accomplish the forbidden harm, or by requiring that the communication actually result in the forbidden harm, have survived constitutional challenge. E.g., Virginia v. Black, 538 U.S. at 363 (finding that the First Amendment would permit a state to outlaw cross burnings done with the intent to intimidate); State v. Brown, 85 P.3d 109, 112-13 (Ariz. Ct. App. 2004) (relying in part on harassment statute's requirement that the communication be made with the "intent to harass" in rejecting First Amendment challenge); State v. Moyle, 705 P.2d 740, 745-50 (Or. 1985) (en banc) (upholding under the Oregon Constitution's free speech provision a harassment statute requiring that the charged communication actually alarm the recipient and that such alarm be reasonable).

Even laws directed at forbidding the injurious effects of the communication may be struck down if they are overbroad. State v. Robertson, 649 P.2d 569, 578 (Or. 1982). The legislature's focus and purpose in enacting a statute may have been to prohibit only unprotected speech, such as "true threats," "fighting words," or defamatory statements, and related conduct. However, if the statutory language chosen by the legislature is broad enough to reach constitutionally protected speech, the

statute may be invalidated as overbroad. Id. at 589-90 (holding that coercion statute was invalid as unconstitutionally overbroad because it reached areas of protected expression).

We apply these principles in analyzing the amended no-publication special condition, the knowing violation of which will expose Butler to criminal sanctions. The amended no-publication special condition is directed at prohibiting the communication itself. Butler is prohibited from publishing or making public any disparaging allegations against Feinberg that serve no legitimate purpose. The amended no-publication special condition does not directly tie the prohibited communication to any injurious effect. It does not require that the prohibited disparaging allegations actually cause any harm to Feinberg. Nor does it require that Butler make the prohibited remarks with the intent to harass Feinberg. For example, if Bulter makes a disparaging remark about Feinberg during a casual conversation with a friend that is not revealed to Feinberg, Butler may nevertheless have violated the amended no-publication special condition and be exposed to criminal sanctions.

For these same reasons, the amended no-publication special condition is overbroad. Its language reaches beyond unprotected speech and related conduct proscribable as harassment to prohibit constitutionally protected speech. While the "no legitimate purpose" limitation restricts the scope of the amended

no-publication special condition, it does not go far enough to confine the special condition to communications proscribable as harassment.

We therefore conclude that in imposing the amended no-publication special condition, the district court chose an impermissible and overbroad means of protecting Feinberg against future harassment by Butler. As written, the amended no-publication special condition violates Butler's right to free speech under the First Amendment to the United States Constitution and Article I, Section 4 of the Hawai‘i Constitution.

Conclusion

We remand the case to the district court and direct it to strike the amended no-publication special condition from the July 11, 2002, amended order, or, if requested by Feinberg, to reformulate the special condition in a manner that renders it constitutional. In all other respects, the July 11, 2002, amended order is affirmed.

DATED: Honolulu, Hawai‘i, August 12, 2004.

On the briefs:

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Rhonda M. Fosbinder
for respondent-appellant.

Chief Judge

Associate Judge

Associate Judge