

NO. 25111

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
GEORGE GARY PEABODY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
MOLOKA'I DIVISION
(CASE NOS.: CTR3-6,8,9:5/16/00)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Foley and Fujise, JJ.)

Defendant-Appellant George Gary Peabody (Peabody) appeals from the Judgments filed on January 12, 2004 in the District Court of the Second Circuit, Moloka'i Division (district court).^{1/} Peabody was convicted of (1) three counts of failing to keep a dog under restraint, in violation of Maui County Code (MCC) § 6.04.040 (eff. 1997)^{2/}; (2) two counts of acquiring a

^{1/} The Honorable Rhonda I.L. Loo presided.

^{2/} Maui County Code § 6.04.040 (eff. 1997) states in relevant part:
6.04.040 Animal regulations--General.

A. An owner of a dog shall keep the dog under restraint, except the following:

1. A dog being used by law enforcement agencies for law enforcement purposes;
2. A dog used during hunting; accompanied by its owner, and used with the consent of the owner of the real property upon which the hunting occurs; and
3. A dog used during organized competitions, or during training for such competitions, accompanied by its owner, and used with the consent of the owner of the real property upon which the

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firearm without registration, in violation of Hawaii Revised Statutes (HRS) § 134-3(b) (Supp. 2004)^{3/}; and (3) one count of Harassment, in violation of HRS § 711-1106 (Supp. 2004).^{4/}

On appeal,^{5/} Peabody contends (1) there was insufficient evidence that Peabody violated MCC § 6.04.040;

^{2/}(...continued)
dog is used.

^{3/} Hawaii Revised Statutes (HRS) § 134-3(b) (Supp. 2004) states in relevant part that "[e]very person who acquires a firearm pursuant to section 134-2 shall register the firearm in the manner prescribed by this section within five days of acquisition."

^{4/} HRS § 711-1106 (Supp. 2004) states in relevant part:

§711-1106 Harassment. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

^{5/} This court notes that Peabody's opening brief does not comply with the following Hawai'i Rules of Appellate Procedure (HRAP):

HRAP Rule 28(a) -- counsel failed to serve a copy of the opening brief on the attorney alleged to have been ineffective when an ineffective assistance of counsel claim was raised on appeal.

HRAP Rule 28(b)(4) -- counsel fails to state where in the record the alleged error occurred, was objected to, or was brought to the court's attention.

HRAP Rule 28(b)(10), which states in relevant part that "[a]nything that is not part of the record shall not be appended to the brief, except as provided in this rule[,]" -- counsel appended an 11-page "Supplemental Argument by Appellant" to the opening brief (which will not be considered by this court).

HRAP Rule 32(a) -- "[e]ach sheet shall have a margin at the top and bottom of not less than 1 inch[.]"

Counsel is warned that any future violations of HRAP Rules 28 or 32 may result in sanctions against him.

(2) there was insufficient evidence that Peabody violated HRS § 711-1106; (3) there was insufficient evidence to substantiate the district court's factual finding regarding credibility; (4) the district court erred in not finding that Animal Control Officer Mark Marting (Marting) was trespassing on Peabody's property when Marting came to pick up a stray dog at Peabody's request; (5) the district court erred in not finding that Marting should have obtained a search warrant; (6) the district court erred in not finding that Peabody could use force to protect his property; (7) the district court erred by not finding that Peabody could use force to prevent the commission of a crime; (8) there was insufficient evidence to convict Peabody of violating HRS § 134-3(b); (9) there was insufficient evidence to support the district court's finding that Peabody had the requisite state of mind to violate HRS § 134-3(b); (10) the district court erred by not making a legal ruling that the offense was of a *de minimis* nature; (11) the district court erred by not finding that there was entrapment; (12) the district court erred by not finding that there was ignorance or mistake of fact; (13) the district court erred by imposing its sentence pursuant

to HRS § 134-17(c) (Supp. 2004)^{5/}; and (14) his trial counsel did not provide effective assistance of counsel.^{1/}

Upon careful review of the record and the briefs submitted by the parties, we hold:

(1) There was sufficient evidence that Peabody violated MCC § 6.04.040 because he admitted that the dogs were not kept under restraint, the dogs were not being used by law enforcement, he was not hunting, and he was not training the dogs for an organized competition, but rather engaging them in a general exercise regime.

(2) There was sufficient evidence that Peabody violated HRS § 711-1106 because his intent to harass, annoy, or alarm could be substantially inferred from the circumstances. State v. Hopkins, 60 Haw. 540, 544, 592 P.2d 810, 812-13 (1979).

(3) Peabody's protection of property argument is without merit since he admitted at trial that the dog was not his dog and he had called the police to come and get the dog.

^{5/} HRS § 134-17 (Supp. 2004) states in relevant part:

§134-17 Penalties.

. . . .
c) . . . Any person who violates section 134-3(b) shall be guilty of a petty misdemeanor and the firearm shall be confiscated as contraband and disposed of, if the firearm is not registered within five days of the person receiving notice of the violation.

^{1/} On June 16, 2004, Peabody's court-appointed counsel filed Peabody's opening brief. On June 22, 2004, Peabody filed a pro se ex-officio opening brief. We hereby strike the June 22, 2004 pro se brief of Peabody because a criminal defendant does not have a constitutional right to "hybrid representation," State v. Hيرانo, 8 Haw. App. 330, 333-35, 802 P.2d 482, 484-85 (1990), and we consider only the arguments raised in the June 16, 2004 opening brief.

(4) There was sufficient evidence to support the district court's finding that Peabody violated HRS § 134-3(b) with the reckless state of mind. HRS § 702-206 (1993).

(5) Peabody was properly sentenced under HRS § 134-17(c).

(6) Peabody has failed to fulfill his burden of proving that his trial counsel did not provide effective assistance of counsel. Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993).

(7) We do not address Peabody's point (3) because, as the Hawai'i Supreme Court stated in State v. Eastman, 81 Hawai'i 131, 913 P.2d 57 (1996), "[a]n appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge." Id. at 139, 913 P.2d at 65.

(8) Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7), points (4), (5), (7), (10), (11) and (12) are deemed waived for Peabody's failure to argue these points.^{2/}

Therefore,

^{2/} HRAP Rule 28(b)(7) states that the opening brief shall contain an argument section consisting of "the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived." (Emphasis added.)

NOT FOR PUBLICATION

IT IS HEREBY ORDERED that the Judgments filed on January 12, 2004 in the District Court of the Second Circuit, Moloka'i Division, are affirmed.

DATED: Honolulu, Hawai'i, April 7, 2005.

On the briefs:

David W. Cain
for defendant-appellant
(George Gary Peabody
on the reply brief).

Bonnie K. A. Watanabe
Acting Chief Judge

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Daniel R. Foley
Associate Judge

Alisa M. Fujita
Associate Judge