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NO. 25362

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
GODFREY A. AKINA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-Cr. No. 01-1-323K)

MEMORANDUM OPINION

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

Defendant-Appellant Godfrey A. Akina (Akina or Mr. Akina) appeals from the Judgment entered by the Family Court of the Third Circuit^{1/} (the family court) on September 3, 2002, which convicted Akina of, and sentenced him for, abuse of a family or household member, in violation of Hawaii Revised Statutes (HRS) section 709-906 (Supp. 2001), and terroristic threatening in the second degree, in violation of HRS section 707-717 (1993). We affirm in part, and vacate and remand for resentencing in part.

A.

The family court sentenced Akina to a one-year term of imprisonment for each offense, to be served consecutively, and ordered Akina to pay \$50 to the "Crime Victim's Compensation Commission" for each offense. The family court also suspended execution of the entire terroristic-threatening imprisonment sentence and six months of the abuse-of-a-family-or-household-

^{1/} The Honorable Colin L. Love presided.

E.M. RICHMOND
CHIEF, APPELLATE COURTS
STATE OF HAWAII

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member imprisonment sentence, on condition that Akina: (1) not contact in any way the victim, his ex-wife, Bernalita Figueroa; (2) enter and participate in psychiatric/psychological counseling until clinically discharged or until the end of his suspended sentence; (3) be monitored by the Probation Department; (4) participate in an alcohol/drug assessment; and (5) at his own expense, submit himself to the Probation Department for random testing of his blood, breath, urine and/or hair for presence of alcohol and/or drugs.

In State v. Eline, 70 Haw. 597, 778 P.2d 716 (1989), the Hawai'i Supreme Court held that under HRS section 706-605(3),^{2/} which delineates the dispositional alternatives available to a sentencing court, the only condition that may be attached to a suspended sentence is that the defendant "not commit another offense during the term of suspension[.]" Id. at 599, 778 P.2d at 718. Akina argues, the State concedes, and we agree, that in light of Eline, the family court was not authorized to attach any conditions to Akina's suspended sentence for the terroristic-threatening offense, except the condition that Akina remain free from further convictions during the term of suspension.

^{2/} It is not clear from the opinion in State v. Eline, 70 Haw. 597, 778 P.2d 716 (1989), which codification and supplement of Hawaii Revised Statutes (HRS) section 706-605(3) the supreme court was construing. However, the subsection related to the suspended sentence dispositional alternative has not changed since Eline.

As to the abuse-of-a-family-or-household-member conviction, however, we note that HRS section 709-906(6) (Supp. 2001) specifically allows certain conditions to be attached to a suspended sentence:

Abuse of family or household members; penalty. . . .

(6) Whenever a court sentences a person pursuant to [abuse of a family or household member as a misdemeanor], it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under subsection (5)(a) and (b), upon the condition that the defendant remain arrest-free and conviction-free or complete court-ordered intervention.

(Emphasis added.)

We conclude that the conditions imposed on Akina's suspended sentence for the charge of abuse of a family or household member were in the nature of "court-ordered intervention" and were thus authorized under HRS section 709-906(6). Moreover, the record on appeal contains sufficient factual basis to support the family court's order that Akina complete court-ordered intervention programs as a condition of his suspended sentence for abuse of a family or household member. See State v. Kahawai, 103 Hawai'i 462, 467, 83 P.3d 725, 730 (2004).

B.

Akina's second argument on appeal is that the family court had no authority to combine the suspended sentence with imprisonment. Akina explains that the family court suspended only six months of the one-year sentence for Count I (abuse of a

family or household member) and in so doing, "the family court sentenced Mr. Akina to two different dispositions -- imprisonment and a suspended sentence." According to Akina, this partial suspended sentence is contrary to HRS section 706-605 and Eline.

Akina's reliance on HRS section 706-605 and Eline is misplaced. HRS section 706-605(3) expressly states that "[i]n addition to any disposition authorized in subsection (1) of this section, [^{3/}] the court may sentence a person convicted of a misdemeanor or petty misdemeanor to a suspended sentence." HRS § 706-605(3) (emphasis added). Imprisonment is a disposition specifically authorized by HRS section 706-605(1)(c) and therefore, the clear language of HRS section 706-605(3)

^{3/} HRS section 706-605(1) (Supp. 2004) states now, as it did during the proceedings below, in relevant part, as follows:

Authorized disposition of convicted defendants. (1) Except as provided in parts II [relating to probation] and IV [relating to imprisonment] of this chapter or in section 706-647 [relating to civil enforcement of a fine and restitution order] and subsections (2) and (6) of this section and subject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:

- (a) To be placed on probation as authorized by part II of this chapter;
- (b) To pay a fine as authorized by part III and section 706-624 of this chapter;
- (c) To be imprisoned for a term as authorized by part IV of this chapter;
- (d) To make restitution in an amount the defendant can afford to pay; . . . or
- (e) To perform services for the community under the supervision of a governmental agency or benevolent or charitable organization or other community service group or appropriate supervisor[.]

authorizes a court to sentence a misdemeanor defendant like Akina to imprisonment and also suspend part of Akina's sentence.

Additionally, relative to Akina's suspended sentence for abuse of a family or household member, HRS section 709-906(6) specifically provides that "the court may suspend any portion of a jail sentence, except for the mandatory sentences under subsection (5)(a) and (b)[.4/]" (Footnote added.) Thus, the family court was authorized to suspend any portion of Akina's sentence, except for the mandatory forty-eight hours or thirty days of imprisonment, respectively, that Akina would be required to serve under HRS section 709-906(5)(a) (if this were his first offense) or under HRS section 709-906(5)(b) (if this were his second or subsequent offense that occurred within one year of the previous offense).

Since Akina was required by the family court's sentence to serve six months in prison, the sentence met the minimum

^{4/} Pursuant to the statute:

Abuse of family or household members; penalty. . . .

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

- (a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
- (b) For a second offense and any other subsequent offense that occurs within one year of the previous offense, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

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sentencing requirements imposed by HRS section 709-906(5)(a) and (b).

C.


Based on the foregoing discussion, we affirm that part of the family court's Judgment that convicted Akina of, and sentenced him for, abuse of a family or household member. We vacate that part of the Judgment that sentenced Akina for terroristic threatening in the second degree and remand for resentencing consistent with this opinion.

DATED: Honolulu, Hawai'i, August 10, 2005.

On the briefs:

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