

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ABDULNASER ABURABIE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2330)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama,
Ramil, and Acoba, JJ.)

The defendant-appellant Abdulnaser Aburabie appeals from the judgment of the first circuit court convicting him of and sentencing him for the offense of assault against a police officer, in violation of Hawai'i Revised Statutes (HRS) § 707-712.5 (1993).¹ On appeal, Aburabie contends that the circuit court: (1) erred in denying his motion for judgment of acquittal because the prosecution did not establish that the complainant was a "police officer"; and (2) committed plain error in failing (a) to dismiss the present matter, insofar as HRS § 707-712.5, see supra note 1, "is overly broad and vague because the term 'police officer' is not defined" and (b) to instruct the jury

¹ HRS § 707-712.5 provides in relevant part that "[a] person commits the offense of assault against a police officer if the person . . . [i]ntentionally, knowingly, or recklessly causes bodily injury to a police officer who is engaged in the performance of duty[.]" Pursuant to HRS § 707-700 (1993), "'[b]odily injury' means physical pain, illness, or any impairment of physical condition."

regarding HRS § 261-17 (Supp. 1996),² which Aburabie asserts "negates an element of the offense," to wit, whether the complainant was a police officer. We agree that the prosecution adduced insufficient evidence to support the charged offense of assault against a police officer and, therefore, vacate the circuit court's judgment of conviction and sentence, filed on June 10, 1999. However, inasmuch as sufficient evidence was adduced to sustain a conviction of the included offense of assault in the third degree, in violation of HRS § 707-712 (1993),³ we remand the matter to the circuit court for entry of

² HRS § 261-17, concerning law enforcement with regard to aeronautical facilities and activities, provides as follows:

(a) The director of transportation, officers, and employees of the department of transportation, and every state and county officer charged with the enforcement of state laws and ordinances, shall enforce and assist in the enforcement of this chapter [(HRS ch. 261, entitled "Aeronautics," of Title 15, "Transportation and Utilities")] and of all rules and orders issued pursuant thereto and of all other laws of the State; and in that connection each of the persons may inspect and examine at reasonable hours any premises, and the buildings and other structures thereon, where airports, air navigation facilities, or other aeronautical activities are operated or conducted. In aid of the enforcement of this chapter, the rules and orders issued pursuant thereto, and all other laws of the State, the powers of police officers are conferred upon the director, and such of the officers, employees, agents, and representatives of the department as may be designated by the director to exercise such powers, including the power to serve and execute warrants and arrest offenders, and the power to serve notices and orders. For the purposes of this subsection the term "agents and representatives" includes persons performing services at airports under contract with the department.

(Emphases added.) Pursuant to HRS § 261-1 (1993 & Supp. 2000), "[d]epartment" means the department of transportation" and "[d]irector" means the director of transportation."

³ HRS § 707-712(1)(a) provides in relevant part that "[a] person commits the offense of assault in the third degree if the person . . . [i]ntentionally, knowingly, or recklessly causes bodily injury to another person[.]" Although assault in the third degree is, like the offense of assault against a police officer, a misdemeanor ("unless committed in a fight or scuffle entered into by mutual consent, in which case third degree assault is a petty misdemeanor"), it does not carry a mandatory minimum thirty days' incarceration, as does assault against a police officer. See HRS §§ 707-

(continued...)

judgment of conviction of that offense and, accordingly, for resentencing. In light of our disposition, we need not reach Aburabie's remaining points of error.

I. BACKGROUND

Aburabie was accused of assaulting Ronald Kim, an employee of Wackenhut Security, on October 11, 1998, and, thereby, allegedly committing the offense of assault against a police officer. The following facts, adduced during Aburabie's jury trial, are relevant to our disposition of the present matter.

On October 11, 1998, Aburabie was involved in a physical altercation with Ronald Kim at the Honolulu International Airport.⁴ Kim testified that, as a "law enforcement officer" (LEO) employed by Wackenhut Security, his authority included "full police powers at the . . . airport." Kim explained that the airport is "run by . . . the Airport Manager and we're commissioned under the Department of Transportation [(DOT)]. . . . We're commissioned as a law enforcement officer to enforce the laws, the rules and orders of the [S]tate of Hawai'i and the Airport Manager." When on duty, Kim drove a "Wackenhut Security" vehicle, wore a uniform similarly

³(...continued)
712(2), 707-712.5(2).

⁴ Aburabie and the prosecution presented starkly divergent versions of the altercation between Aburabie and Kim. According to Kim and the prosecution's other witnesses, who included Kim's son, Aburabie knocked Kim down (while he was in the process of arresting Aburabie on the charge of "doing business not in a business-like manner"), thereby causing Kim to make contact with the side of Aburabie's van, fall to the pavement, and brush his arm against the van's exhaust pipe, resulting in a swollen knee and a burn to his arm. According to Aburabie and other eyewitnesses called by the defense, Aburabie did not instigate any physical contact with Kim but rather spat in his face because Kim called him a "fucken foreigner, Arabian, middle eastern terrorist"; Kim was the only one to throw punches, and, during one punch, slipped and fell to the ground.

identifying him as a Wackenhut Security employee, and carried a firearm and handcuffs.

The prosecution introduced a photocopy of Kim's "commission card" as evidence.⁵ Kim explained

⁵ Prior to trial, the circuit court expressed, sua sponte, its own concerns regarding how the prosecution was going to prove that Kim was a "police officer." After reading HRS § 261-17, the circuit court remarked:

[S]o they're [(i.e., Wackenhut Security's employees)] really not officers of the [DOT], they -- I don't know if they're employees or agents, but it may be helpful to try to get the contract down here and figure out whether or not the director designated them to exercise these [police] powers, because [HRS § 261-17] mov[es] from public officials, public employees into privatization[,] which I think the legislature clearly may have figured out, but then they become -- they have the arrest powers and they carry guns and all that.

And that can cut both ways here because later on [HRS § 261-17(b)] talks about these folks have gone through an FBI background check, et cetera, et cetera[,] and I certainly wouldn't probably let that in unless there's a stipulation that they have all this authority. Because I think that -- certainly a lay jury, they're going to think why is Wackenhut a police officer.

. . . .
So you're going to think about this, Mr. Spallina [(i.e., the deputy prosecuting attorney)]. And I hate to throw some new wrinkle in here, but how these folks, Officer Kim and Wackenhut, were designated by the director to exercise the powers, or is that going to be an impossible burden for you?

The prosecutor requested time to mull over the court's concern but nonetheless asserted that it was the prosecution's "contention that by just laying the foundational questions through the witness the State [sic] can take judicial notice of the fact that the victim in this case would fall under the statute of assaulting a police officer."

The following day, before trial commenced, the prosecutor brought the issue back to the court's attention. It appears that the prosecutor provided the circuit court with "certified documents of the actual contract with the Department of Transportation and with the airport, specifically Wackenhut Security[.]" However, the purported contract is not a part of the record on appeal and, more importantly, was not introduced as evidence during Aburabie's trial. The prosecution also informed the court that it had photocopies of Kim's commission card, which the prosecution characterized as a "badge." The circuit court ruled as follows:

By operation of law if it's proved up Mr. Kim is a police officer, assuming factually Mr. Spallina can prove up that he's been designated by the director. So what the Court will be doing is allowing you to introduce this badge, counsel, that's your factual matter. And I will take judicial notice of [HRS § 261-17], that the director has the powers to designate him, and we can put that in the record,

(continued...)

that the card "identified [him] as a law enforcement officer, State of Hawaii, Department of Transportation, Airport Division" and, thus, reflected to anyone observing the card that he possessed "police powers." During direct examination, Kim displayed to the jury the photocopy of the card, which was received into evidence, together with the actual card, and asserted that, on the day of the alleged assault, he was wearing the card and that it was plainly visible. However, on cross-examination, Kim conceded that he was wearing an "AOA badge," which was worn not only by Wackenhut LEOs but also by other airport and airline personnel and "allows you in the airport operations area," atop the commission card. According to Aburabie, Kim did not orally identify himself as a police officer during the altercation at issue.

The front of the commission card bore the state seal, a photograph of Kim, and Kim's signature. The front of the card further identified Kim as follows:

STATE OF HAWAII
Department of Transportation
Airports Division
Law Enforcement Officer

The card bore an expiration date of December 18, 2000. The reverse side of the card reflected Kim's date of birth, weight, height, hair and eye color, and sex. The reverse side also explained that the card was

to certify that Ronald M.S. Kim is commissioned, pursuant to Section 261-17, Hawaii Revised Statutes, to enforce the provisions of Chapter 261, H.R.S., all Rules, Regulations

⁵(...continued)

and to designate agents and representatives. And that -- and that under the statute agents, representatives do include persons performing services. But you've got to prove up your designation.

And how you do that, whether you need to bring the director in or simply have introduced this badge and have Mr. Kim say he had it on, it was signed, it seems to me that's sufficient.

and Orders issued pursuant thereto, and all other laws of the State.

In witness whereof, I have hereunto set my hand this 18th day of December 1998.

(Emphases added.) The director of transportation's signature appeared beneath the foregoing and the underscored dates were handwritten.

The circuit court judicially noticed HRS § 261-17, see supra note 2, and the jury was provided a copy, apparently redacted, of the statute during its deliberations.

No other evidence was adduced with respect to Kim's employment by Wackenhut Security, Wackenhut Security's relationship with the DOT, or the director of transportation's designation of Kim as an officer, employee, agent, or representative of the DOT authorized to exercise the powers of police officers. See HRS § 261-17, supra note 2. Consequently, at the close of the prosecution's case-in-chief, Aburabie orally moved for a judgment of acquittal, "based on the fact that the [prosecution] has failed to prove that the complainant Ronald Kim is a police officer within the ambit of [HRS § 707-712.5]." The circuit court denied Aburabie's motion. Aburabie orally renewed his motion at the close of his case, and the circuit court again denied the motion. The circuit court instructed the jury with regard to both the charged offense of assault against a police officer and the included offense of assault in the third degree. The jury returned a verdict finding Aburabie guilty of the charged offense of assault against a police officer.

Subsequently, Aburabie filed a written motion for a judgment of acquittal, reiterating his argument that substantial evidence had not been adduced to support a person of reasonable caution to conclude that Kim was a police officer. The prosecution filed a memorandum in opposition to Aburabie's motion

on April 29, 1999. On June 10, 1999, prior to sentencing Aburabie, the circuit court denied Aburabie's written motion for a judgment of acquittal. The circuit court filed its judgment of conviction and sentence on June 10, 1999. This timely appeal followed.

II. STANDARDS OF REVIEW

A. Motion For Judgment Of Acquittal

When reviewing a . . . motion for judgment of acquittal,

we employ the same standard that a trial court applies to such a motion, namely, whether upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Jhun, 83 Hawai'i 472, 481, 927 P.2d 1355, 1364 (1996) (citations and internal quotation marks omitted).

State v. Jenkins, 93 Hawai'i 87, 99, 997 P.2d 13, 25 (2000)

(quoting State v. Timoteo, 87 Hawai'i 108, 112-113, 952 P.2d 865, 869-70 (1997)).

B. Statutory Interpretation

"[T]he interpretation of a statute . . . is a question of law reviewable de novo." . . . State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930, reconsideration denied, 79 Hawai'i 341, 902 P.2d 976 (1995); State v. Nakata, 76 Hawai'i 360, 365, 878 P.2d 669, 704, reconsideration denied, 76 Hawai'i 453, 879 P.2d 556 (1994), cert. denied, 513 U.S. 1147, 115 S.Ct. 1095, 130 L.Ed.2d 1063 (1995).

Gray v. Administrative Director of the Court, State of Hawaii, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some

brackets added and some in original). See also State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997).

Furthermore, our statutory construction is guided by established rules:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai'i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai'i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai'i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai'i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998)))) (some brackets and ellipses points added and some in original).

Moreover, . . . we have recognized that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." [Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 1752-53, 64 L.Ed.2d 381 (1980).] "This policy of lenity means that the [c]ourt will not interpret a [state] criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended." Simpson v. United States, 435 U.S. 6, 15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978).

State v. Soto, 84 Hawai'i 229, 248-49, 933 P.2d 66, 85-86 (1997) (quoting State v. Kaakimaka, 84 Hawai'i 280, 292, 933 P.2d 617, 629 (1997)) (some brackets added and some in original).

State v. Cabrera, 90 Hawai'i 359, 369, 978 P.2d 797, 807 (1999)

III. DISCUSSION

The offense of assault against a police officer is set forth in HRS § 707-712.5, see supra note 1, and is committed if a person "[i]ntentionally, knowingly, or recklessly causes bodily injury to a police officer who is engaged in the performance of duty." Pursuant to HRS § 702-205 (1993), "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct as . . . [a]re specified by the definition of the offense[.]" Accordingly, whether Kim, the object of the offense in the present matter, was a police officer is an attendant circumstance of the offense of assault against a police officer, which the prosecution was required to prove beyond a reasonable doubt. See HRS § 701-114(1)(a) (1993). However, the prosecution failed to carry its burden in this regard.

HRS § 621-17(a), see supra note 2, "confer[s]" the "powers of police officers . . . upon the director [of transportation], and such officers, employees, agents, and representatives of the [DOT] as may be designated by the director to exercise such powers, including the power to . . . arrest offenders[.]" For the purposes of HRS § 621-17(a), "'agents and representatives' includes persons performing services at airports under contract with the department." Assuming, arguendo, that a private citizen, who is employed by a private company under contract with the DOT to provide law enforcement services at an airport and who has been duly designated by the director of transportation to exercise the "powers of police officers," is a

"police officer" within the meaning of HRS § 707-712.5, see supra note 1, the prosecution adduced no evidence, much less any substantial evidence, establishing the attendant circumstance of the offense, to wit, that Kim was an officer, employee, agent, or representative of the DOT duly designated by the director to exercise the powers of a police officer and, therefore, that Kim was in fact a police officer.

The prosecution adduced no evidence that Wackenhut Security was under contract with the DOT and, thus, did not adduce any evidence that the employees of Wackenhut Security, or any of them, were "officers, employees, agents [or] representatives" of the DOT within the meaning of HRS § 261-17(a), see supra note 2. Nor did the prosecution adduce any evidence that Kim's commission card was in effect on October 11, 1998; in fact, the photocopy of the card, which was received into evidence, clearly stated that Kim's commission as a DOT LEO did not commence until December 18, 1998, over two months after the alleged assault occurred.

Given the state of the record, we must vacate Aburabie's conviction and sentence in the present matter because, even if an individual vested with the "powers of police officers" is a "police officer" within the meaning of HRS § 707-712.5, see supra note 1, the prosecution failed to adduce substantial evidence that could support a person of reasonable caution to conclude that Kim was an "officer[], employee[], agent[], [or] representative[]" of the DOT and was duly designated by the director of transportation to exercise the "powers of police officers" on the day of the alleged assault.

However,

it is well established that if an appellate court deems the evidence insufficient as a matter of law to support a jury's guilty verdict on a [charged] offense but finds the evidence sufficient to support a conviction on a[n] . . . included offense, it may enter a judgment of conviction on th[e] . . . included offense.

State v. Wallace, 80 Hawai'i 382, 414-15, 910 P.2d 695, 727-28 (1996) (quoting State v. Malufau, 80 Hawai'i 126, 135, 906 P.2d 612, 621 (1995) (citations and brackets omitted)).

The charged offense of assault against a police officer requires proof of but a single fact beyond those necessary to establish the offense of assault in the third degree, to wit, that the complainant was a police officer engaged in the performance of duty. Compare HRS § 707-712.5, see supra note 1, with HRS § 707-712(1)(a), see supra note 3. Thus, pursuant to HRS § 701-109(4)(a) (1993) ("[a]n offense is included [in a charged offense] when . . . [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged"), assault in the third degree is an included offense of assault against a police officer. See State v. Kinnane, 79 Hawai'i 46, 51, 897 P.2d 973, 978 (1995) ("Under [HRS § 701-109(4)(a)], an offense is included if it is impossible to commit the greater without also committing the lesser." (Quoting State v. Alston, 75 Haw. 517, 533, 865 P.2d 157, 166 (1994).) (Citation and internal quotation marks omitted.)). We must, then, consider whether the evidence was sufficient to support conviction of the included offense of third degree assault.

Kim testified that he suffered pain as a result of being knocked to the ground by Aburabie. Kim's testimony is sufficient to support conviction of assault in the third degree, inasmuch as that offense requires only that the prosecution prove

beyond a reasonable doubt that Aburabie intentionally, knowingly, or recklessly caused bodily injury, defined, inter alia, as "physical pain," to another person. See HRS §§ 707-712(1)(a), supra note 3, and 707-700, supra note 1. Moreover, the jury, in convicting Aburabie of the charge offense, necessarily found that Aburabie, consistent with Kim's testimony in this regard, intentionally, knowingly, or recklessly caused bodily injury to Kim. Accordingly, we remand the present matter for entry of judgment of conviction and resentencing as to the included offense of assault in the third degree, in violation of HRS § 707-712(1)(a).

IV. CONCLUSION

In light of the foregoing, we vacate the first circuit court's judgment of conviction and sentence, filed on June 10, 1999, and remand the matter to the circuit court for entry of judgment of conviction of assault in the third degree and for resentencing.

DATED: Honolulu, Hawai'i, December 20, 2000.

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