

NO. 23711

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ROBERT JAMES STREET, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR 00-01-0235)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Robert James Street (Street) appeals from the family court of the second circuit's July 27, 2000 judgment of conviction and sentence for violation of an order for protection, Hawai'i Revised Statutes (HRS) § 586-11. Street was sentenced to \$250.00 fine and a \$50.00 Criminal Injuries Compensation fee. Street timely filed a notice of appeal on August 26, 2000. On appeal, Street argues that the family court, the Honorable Yoshio Shigezawa presiding, erred by (1) finding that Street violated the Amended Protective Order (APO) where there was no evidence that he actually contacted his minor child or that Street had taken a substantial step in an attempt to do so, (2) failing to dismiss the charge against Street as de minimis, and (3) improperly sentencing Street as a repeat offender without evidence of a prior conviction.

Upon carefully reviewing the record and the briefs submitted by both parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

With respect to Street's first point of error, Street has successfully challenged the family court's finding that he violated an APO by directly contacting the minor through a third party. There was no evidence adduced at trial that any contact occurred between Street and the minor or that the minor indirectly received the message from Street. Having reviewed the record, we hold that the family court erred in finding that Street violated the APO by contacting the minor through a third party when the evidence adduced shows that the minor did not receive any message from or contact by Street. However, we affirm Street's conviction on alternative grounds.

In State v. Taniguchi, this court stated, "we have consistently held that where the decision below is correct it must be affirmed by the appellate court even though the lower tribunal gave the wrong reason for its action." State v. Taniguchi, 72 Hawai'i 235, 240, 815 P.2d 24, 26 (1991) (citations omitted). Here, Street violated the order for protection when he directed a third party, Rhonda Kurohara, to relay a message to the minor. He was aware of the no contact prohibition with respect to his minor children and chose to ignore it in order to relay his message. His use of a third party to contact the minor is a violation of the protective order and, thus, we affirm.

Street's argument that the charge against him should have been dismissed as de minimis fails. The authority to dismiss a charge as de minimis under HRS § 702-236 rests in the sound discretion of the trial court. State v. Ornellas, 79

Hawai'i 418, 423, 903 P.2d 723, 728 (App.), cert. denied, 80 Hawai'i 187, 90 P.2d 773 (1995) (citation omitted). The trial court has broad discretion in determining whether an offense is de minimis and we will not disturb that determination absent an abuse of discretion. Id. The trial judge found sufficient evidence to determine that Street directed a third party to relay a message to the minor in violation of a protective order. We find no abuse of discretion.

As to the final point of error, both Street and the prosecution concede that Street's sentence as a repeat offender is illegal, and the record and applicable law demonstrate that the family court erred. Therefore,

IT IS HEREBY ORDERED that the family court's July 27, 2000 judgment on conviction is affirmed, the sentence is vacated, and the case is remanded for re-sentencing consistent with this order.

DATED: Honolulu, Hawai'i, May 10, 2002.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender
for defendant-appellant

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
for plaintiff-appellee