

NO. 23468

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
PATRICIA D. DESMARAIS, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(CR. NOS. 99-011260 AND 99-011261)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Patricia D. Desmarais (Desmarais) appeals the April 7, 2000 judgment convicting her of two counts of Harassment, Hawaii Revised Statutes (HRS) § 711-1106(1) (a) (Supp. 2000). We affirm.

BACKGROUND

January 9, 1999	As a result of an incident on this date, Desmarais was arrested for two charges of Harassment and posted a \$100 bail bond for each.
January 21, 1999	Desmarais was arraigned. Instead of being charged with Harassment, she was charged "on the 9th of January 1999 with fleeing the scene of an accident which involved damage to vehicles or property and also on the same date with disorderly conduct, two separate times." Desmarais pled not guilty.
February 19, 1999	Desmarais sought a continuance so that she could file a motion to compel discovery. The court granted the motion.
March 19, 1999	At a hearing on Desmarais' pre-trial motions, Plaintiff-Appellee State of Hawai'i (the State) indicated that it wanted to dismiss the fleeing the scene and disorderly conduct

charges and refile the case. Because Desmarais was not present, defense counsel objected and the following was stated:

THE COURT: I think [Desmarais] should be able to address the Court in regard to whether or not the dismissal is going to be with or without prejudice. So the Court is going to set an expedited trial for that purpose.

CLERK: It's only set for April 9th.

THE COURT: April 9th? Okay, then April 9th.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[PROSECUTOR]: Well, Your Honor, since this is a pre-trial motion then can Rule 48 not be tolled during this time?

[DEFENSE COUNSEL]: That's fine, Your Honor.

April 9, 1999           The parties announced a plea agreement. Desmarais agreed to plead no contest to the disorderly conduct charges as violations<sup>1</sup> and the State agreed to drop the fleeing the scene charge. The court accepted Desmarais' no-contest pleas and sentenced her to five hours of community service for each count.

August 16, 1999       The public defender filed a Motion to Withdraw No Contest Plea and Motion to Withdraw as Counsel. In the motion, the public defender explained that "[o]n the advice of a civil attorney, who [Desmarais] has contacted regarding filing a law suit against the police department, [Desmarais] is now alleging that she was not properly informed by the Office of the Public Defender when she entered her plea of no contest."

September 3, 1999     At the hearing on the August 16, 1999 motion, the following was stated:

THE COURT: Okay, you understand, Miss Desmarais, that if the court grants your motion, the court is going to reinstate the original charge which are two counts of harassment and those are petty misdemeanors for which you can go to jail for 30 days on each; you understand that?

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<sup>1</sup> Depending on the facts, disorderly conduct is either a petty misdemeanor or a violation. Hawaii Revised Statutes (HRS) § 711-1101(3) (1993).

THE DEFENDANT: Your Honor, I didn't do anything so I have no fear about that.

THE COURT: Well, if you are convicted, however, you have the--

THE DEFENDANT: But I can't possibly lose so that's okay. I understand, your Honor.

THE COURT: The thing is if the State proves its case and you do get convicted of a harassment, you can serve 30 days in jail--

THE DEFENDANT: I understand.

THE COURT: --on each.

THE DEFENDANT: But if that happened, I'd take it to the Supreme Court. I mean there's just no way it could happen so--

THE COURT: Well, that's fine but the court is just notifying you that that's what will occur if you are convicted.

THE DEFENDANT: I understand, your Honor. I understand.

THE COURT: Alright. Then the court will grant the motion, reinstate the original charges of harassment, violation of sections 711-1106 on both.

October 1, 1999            The State asked the court to dismiss the charges of Disorderly Conduct without prejudice so that it could file the Harassment charges. The court granted the request.

October 18, 1999        The State filed two Complaints. One charged Desmarais with Harassment, HRS § 711-1106(1)(a),<sup>2</sup> of Police Officer Lawrence Santos (Officer Santos). The other

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<sup>2</sup> HRS § 711-1106 (Supp. 2000) states as follows:

**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;

. . . .

(2) Harassment is a petty misdemeanor.

charged Desmarais with Harassment, HRS § 711-1106(1)(a), of Police Officer Stuart Yano (Officer Yano).

November 18, 1999 Desmarais was arraigned and pled not guilty. Trial was scheduled for December 17, 1999.

December 17, 1999 Desmarais asked for a continuance and the trial was rescheduled for February 18, 2000.

February 9, 2000 Desmarais moved for a dismissal of the charges on the basis of the time limit specified in Hawai'i Rules of Penal Procedure (HRPP) Rule 48.

February 18, 2000 Prior to trial on this date, the court denied the February 9, 2000 motion. At the trial, after all of the evidence was presented, defense counsel renewed his motion for judgment of acquittal and stated that he would "also like to incorporate de minimis argument especially as to Officer Santos because he said he himself he did not feel any pain and that, in fact, if he had felt pain, he would have arrested her for assault." The Court implicitly denied the motions when it found Desmarais guilty of the charges.

April 7, 2000 The Court sentenced Desmarias to probation for six months and twenty hours of community service.

#### DISCUSSION

##### 1.

Desmarais contends that the court was wrong when it denied her Rule 48 motion to dismiss. We disagree.

It is clear that there are more than enough excludable periods of time to support the conclusion that HRPP Rule 48's "6 months" time limit has not been exceeded in this case. In her reply brief, Desmarais argues that our focus should be solely on

the arrest on two charges of Harassment on April 9, 1999, and the trial on two charges of Harassment on February 18, 2000. In her view, the State having admitted that the charges of Disorderly Conduct were a mistake, "the entire prosecution for disorderly conduct should be treated as a 'nullity.'" "Since the delays arose because of the prosecutor's mistakes, the State should bear the onus. The burden should not fall on the defendant." In other words, Desmarais contends that all of the excludable periods of time pertaining to the mistakenly filed Disorderly Conduct charges should not be excluded when deciding whether the HRPP Rule 48 time limit was exceeded with respect to the Harassment charges. We disagree.

HRPP Rule 48 (2000) states, in relevant part, as follows:

(b) **By Court.** . . . [T]he court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:

(1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made[.]

Although Desmarais was arrested for two charges of Harassment, she was mistakenly charged with two counts of Disorderly Conduct. Subsequently, the two counts of Disorderly Conduct were dismissed without prejudice and Desmarais was charged with two counts of Harassment. The Disorderly Conduct charges and the Harassment charges are "based on the same conduct" and "aris[e] from the same criminal episode[.]"

Therefore, when computing the "6 months" for HRPP Rule 48 purposes, the plus days are all of the days from the day of the initial arrest to the day the trial was commenced and the minus days are all the excludable days within that period.

2.

Desmarias contends that the court was wrong when it denied her motion for judgment of acquittal. We disagree.

The question is "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, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

State v. Clark, 83 Hawai'i 289, 303, 926 P.2d 194, 208 (1996).

The answer is yes.

As noted previously, HRS § 711-1106(1)(a) (Supp. 2000) states as follows: "A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person: . . . [s]trikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]"

The Commentary on HRS § 711-1106 states, in relevant part, as follows:

Harassment, a petty misdemeanor, is a form of disorderly conduct aimed at a single person, rather than at the public. The intent to harass, annoy, or alarm another person must be proved.

Subsection (1)(a) is a restatement of the common-law crime of battery, which was committed by any slight touching of another person in a manner which is known to be offensive to that person. Such contacts are prohibited, if done with requisite intent, in order to preserve the peace.

The following precedent instructs how the intent to harass, annoy, or alarm may be proved: "While a defendant's state of mind can rarely be proved by direct evidence, 'the mind of an alleged offender may be read from his [or her] acts [or] conduct and [the] inferences fairly drawn from all [of the] circumstances.'" State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 537 (1982)." State v. Leung, 79 Hawai'i 538, 544, 904 P.2d 552, 558 (1995).

Officer Santos testified, in relevant part, as follows:

**Q** And what did you say to this defendant as you first approached the defendant?

**A** That I was investigating the accident and asked for her driver's license and vehicle paperwork at which time she began to yell, refused to provide anything, said I was harassing her and wanted me to call my sergeant, at which time I radioed him.

**Q** And what was the tone of your voice when you were asking for these documents?

**A** Just like this.

**Q** How far away were you from the defendant when you were asking for these documents?

**A** I'd say maybe two to three to four feet.

**Q** Now, when you asked for these documents, did you touch the defendant in any way?

**A** Oh, no, sir.

**Q** Then what happened?

**A** She went to her house, brought out a cordless phone, began speaking with somebody, and by her conversation, I knew it was police dispatch because dispatch had radioed me back saying that they had a female caller on the phone and that I was there. Again, I asked her for her paperwork and driver's license, she

again refused. She uttered the words fuck this, I'm leaving, got back into her car, started the engine, at which time I went to the driver's door, I opened the door and said, you know, you're not gonna go, ordered her out of the car, again asked her for her driver's license, paperwork and she refused.

**Q** Let me stop you there. Up until this point, did you touch the defendant in any way?

**A** Not at this point.

**Q** What was the tone of her voice?

**A** Still argumentative, yelling, saying I was harassing her, just uncooperative.

**Q** Were any other officers assisting you with this defendant?

**A** Not at this point.

**Q** How much time passed from the time you first arrived up until the time you opened the door of her car?

**A** I'd say between five to ten minutes.

**Q** Could you describe her demeanor during this whole time?

**A** Uncooperative, argumentative, disrespectful, disrespectful rather. All I wanted to do was get her information, document the traffic accident and we would leave.

**Q** Could you describe your demeanor up until this point?

**A** I was trying to coax her as much as I can to get the information so we could leave.

**Q** Then what happened next if anything?

. . . .

**A** Yes, I informed her after she refused for like the third to fourth time to provide any information that she was being placed under arrest for fleeing the scene of a traffic accident. She related, oh, you're not, took a step back, with her left foot kicked my left knee which caused me to take a step back, at which time she was restrained and handcuffed.

**Q** Could you describe how she was restrained and handcuffed?

**A** Well, her left hand swinging, at which time that's the first one I cuffed, but her right hand, she would not take away from her chest and stomach, at which time I was assisted by Officer Yano. We were able to handcuff her behind her back. We used two handcuffs because just for the females, sometimes the hands can't go behind their back, so we just use a double handcuff



where your wrists aren't as close together as a double handcuff would be.

Officer Yano testified, in relevant part, as follows:

**Q** Then what happened?

**A** Basically, she had been arrested for harassment on Officer Santos and she was about to be transported into the vehicle, or taken to the vehicle to be transported to the station, and I explained to her that I was gonna remove one of the handcuffs so that we could just cuff her with one cuff, one handcuff instead of using two. So, she understood that. I then removed the handcuff on her left arm and again she said why do I need to be handcuffed and she resisted and wouldn't put her hand behind her back.

**Q** So, after she resisted, how did you respond?

**A** I was able to gain control of her arm, and we then subsequently handcuffed with one handcuff.

**Q** And how did you gain control of her?

**A** Basically just grabbed her open arm and pulled it back.

**Q** Now, were any other officers assisting you?

**A** Sergeant Park was there and I believe Officer Fujioka was there.

**Q** Then what happened if anything?

**A** As she was being handcuffed with the single handcuff, I felt her kick me with her left foot to my left knee.

**Q** Now, where were you in relation to the defendant when she kicked you in your left knee with her left foot?

**A** I was standing directly behind her.

**Q** Could you describe the kick to your left knee?

**A** Basically, she just lifted up her left foot and kicked back at me towards my knee.

**Q** Do you know what she was wearing at the time?

**A** Footwear or?

**Q** Yeah, footwear?

**A** I believe like athletic shoes, tennis shoes.

**Q** Where did she make contact in your left knee?

**A** I'd say just about the knee area or just below it.

**Q** And how did you feel this kick, could you describe it?

**A** I felt pain, some pressure to the area.

. . . .

**Q** Were you injured in any way, your left knee?

**A** I just felt pain to the area, but did not require any medical attention.

**Q** Was it bruised at all?

**A** Not that I could recall the next day.

Desmarias contends that

Even seen in the light most favorable to the State, the evidence shows that Desmarais was merely reacting to the pain caused by her handcuffing and having her arm pulled back. It was not done with the deliberate intent to annoy, harass, or alarm Officer Yano.

Given the context, a person of reasonable caution would be unable to support the conclusion that Desmarias intended to harass, annoy or alarm the police. At most, the evidence might support a charge of resisting arrest.<sup>3</sup> However, there was insufficient evidence to support a charge of harassment.

(Footnote added.) Viewing the evidence in the light most favorable to the prosecution, we conclude that this argument has no merit.

Alternatively, Desmarias contends that

[s]ince harassment is a form of disorderly conduct, the Equal Protection Clause requires that the same limitations regarding disorderly conduct against a police officer should also apply to harassment against a police officer. "A person may not be arrested for disorderly conduct as a result of activity which annoys only the police, . . . ." Commentary on Sec. 711-1101 (1993 Repl.)

. . . .

. . . Under both [State v. Leung, 79 Haw. 538, 544-45, 904 P.2d 552, 559 (App. 1995)] and [State v. Faulkner, 64 Haw. 101, 105, 637 P.2d 770, 774 (1981)], it is clear that the Court anticipated that, when police officers are involved, harassment requires a showing of persistently outrageous and abusive conduct

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<sup>3</sup> Resisting Arrest is a misdemeanor. HRS § 710-1026(2) (1993).

that unreasonably interferes with a police officer's performance of his duties.

This is a reasonable limitation given the volatility of any situation where the police confront and arrest a suspect. It should be expected that not all arrestees will submit willingly. Some will struggle. However, it should be treated as harassment only where it gets out of hand whereby the suspect actually interferes with the police officer's performance of his duties. Otherwise, the police can exploit an explosive situation and heap on additional charges in addition to the original charge.

In other words, Desmarais contends a person who is being arrested may kick the arresting officer and the kick "should be treated as harassment only where it gets out of hand whereby the suspect actually interferes with the police officer's performance of his duties." We disagree.

In Leung, the question was whether the defendant acted with intent to cause physical inconvenience or alarm by a member or members of the public (not including the police), or recklessly created a risk thereof. 79 Hawai'i at 542, 904 P.2d at 556. In the instant case, the question was whether, with intent to annoy Officers Santos and Yano, Desmarias kicked both of them in an offensive manner. The court's yes answer is supported by substantial evidence

3.

Desmarias contends that the court abused its discretion under HRS § 702-236 (1993) when it denied her motion seeking dismissal of the charges because they involved *de minimis* infractions.

More specifically, she contends that

[e]ven if Santos' and Yano's version of events is accepted, the slight kicks that they described were too trivial to warrant the condemnation of conviction. The entire context of Desmarias' arrest presents such extenuating circumstances that it cannot be reasonable [sic] regarded as being envisaged by the legislature when they forbade the offense.

In other words, Desmarias contends that, as a matter of law, the charges were *de minimis*<sup>4</sup> and the court was required to dismiss them. We disagree. The court does not abuse its discretion when it decides that the defendant's kicking of a police officer while the police officer is the process of handcuffing the defendant or adjusting the handcuffs on the defendant is not *de minimis*.

#### CONCLUSION

Accordingly, we affirm the April 7, 2000 judgment convicting Defendant-Appellant Patricia D. Desmarias of two counts of Harassment, HRS § 711-1106(1) (a) (Supp. 2000).

DATED: Honolulu, Hawai'i, September 11, 2001.

On the briefs:

Dwight C. H. Lum  
for Defendant-Appellant.                      Chief Judge

Mangmang Qiu Brown,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,              Associate Judge  
for Plaintiff-Appellee.

Associate Judge

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<sup>4</sup> HRS § 702-236 (1993) specifies when the court may dismiss a *de minimis* prosecution.