

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29839

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ALVIN J. K. KAPAHUA, JR., Defendant-Appellant

KHAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2010 APR -8 AM 8:06

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 08-1-0366)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Alvin J. K. Kapahua, Jr. (Kawahua) appeals from the Judgment of Conviction and Sentence filed on April 27, 2009 in the Circuit Court of the First Circuit (circuit court).¹

A jury convicted Kawahua of Unlawful Use of Drug Paraphernalia, in violation of Hawaii Revised Statutes (HRS) § 329-43.5(a) (1993), and Driving Without a License, in violation of HRS § 286-102 (2007 Repl.).

On appeal, Kawahua contends (1) the circuit court plainly erred by not providing the jury with a unanimity instruction on the charge of Unlawful Use of Drug Paraphernalia, (2) there was insufficient evidence to convict him of Unlawful Use of Drug Paraphernalia, and (3) the circuit court plainly erred by sentencing him to one year of imprisonment on the Driving Without a License charge.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Kawahua's points of error as follows:

¹ The Honorable Randall K. O. Lee presided.

(1) The circuit court did not plainly err by failing to provide the jury with a unanimity instruction. Kapahua was charged with use or possession with intent to use drug paraphernalia on March 8, 2008. The jury was instructed that the prosecution had to prove beyond a reasonable doubt that on March 8, 2008 Kapahua possessed an object with the intent to use it to ingest, inhale or introduce into the human body a controlled substance and the object was drug paraphernalia. Therefore, the jury could not have convicted Kapahua based on Kapahua's admission to use of drug paraphernalia on March 4, 2008.

(2) Kapahua claims there was insufficient evidence to convict him of Unlawful Use of Drug Paraphernalia because the State failed to prove the intent element of the offense. There was sufficient evidence to convict Kapahua of Unlawful Use of Drug Paraphernalia.

Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, "we have consistently held that proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient. Thus, the mind of an alleged offender maybe read from his acts, conduct and inferences fairly drawn from all the circumstances." *State v. Sadino*, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982) (citations omitted); see also *State v. Simpson*, 64 Haw. 363, 373 n.7, 641 P.2d 320, 326 n.7 (1982).

State v. Mitsuda, 86 Hawai'i 37, 44, 947 P.2d 349, 356 (1997) [.]

State v. Stocker, 90 Hawai'i 85, 92, 976 P.2d 399, 406 (1999) (ellipses and brackets omitted).

(3) The State concedes that the circuit court erred by sentencing Kapahua to one year of imprisonment on Count IV. The State presented no evidence that Kapahua had been previously convicted two or more times of Driving Without a License within the preceding five-year period, which was necessary to sentence Kapahua pursuant to HRS § 286-136(b) (2007 Repl.). Hence, Kapahua was only subject to a maximum of thirty days of imprisonment pursuant to HRS § 286-136(a) (2007 Repl.).

Therefore,

The Judgment of Conviction and Sentence filed on April 27, 2009 in the Circuit Court of the First Circuit is vacated only as to Kapahua's sentence for Count IV, and Kapahua's sentence for Count IV is remanded for re-sentencing pursuant to HRS § 286-136(a). Count III and the remainder of the Judgment of Conviction and Sentence are affirmed.

DATED: Honolulu, Hawai'i, April 8, 2010.

On the briefs:

Taryn R. Tomasa,
Deputy Public Defender,
for Defendant-Appellant.

Delanie D. Prescott-Tate,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge