
NO. 22274

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

RICHARD ALLEN JOHNSTON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(REPORT NO. F-22784/KN)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Acoba, and Duffy, JJ.;
and Nakayama, J., Dissenting)

Defendant-Appellant Richard Allen Johnston (Defendant) was charged in an October 13, 1997 complaint¹ with the offense of Indecent Exposure, Hawai'i Revised Statutes (HRS) § 707-734(1) (1993), to "T.L.R.G.," a minor. The district court of the third circuit, North and South Kona Division,² (the court) found Defendant guilty, and on January 11, 1999, it sentenced

¹ The complaint alleged that Defendant exposed his genitals "to [Jane] and/or T.L.R.G., a female minor[.]" (Emphasis added.) At trial, Plaintiff-Appellee State of Hawai'i (the prosecution) clarified that "T.L.R.G." is the minor complainant's mother, and is not a minor. The single count was never bifurcated into separate counts. At the close of the prosecution's case, the court granted a defense motion to dismiss the charge as it pertained to "T.L.R.G." The minor is referred to herein as "Jane."

² The Honorable Joseph P. Florendo, Jr. presided over the case.

Defendant, requiring him, inter alia, to register, pursuant to HRS § 846E-1, as a sex offender.³

On appeal Defendant urges as points of error that:

(1) he should have been afforded a jury trial because of the “penalty” of registration he was sentenced to under HRS chapter 846E; (2) he should not be required to register pursuant to HRS chapter 846E as a sex offender; (3) venue for his case was not properly established; (4) he did not act intentionally; and (5) portions of HRS § 846E-1 are unconstitutionally vague and overbroad. We affirm the court’s judgment and sentence in part and vacate it in part.

As to points (1), (2), and (5), we hold as dispositive that Defendant was not subject to registration as a sex offender under HRS chapter 846E. See State v. Chun, 102 Hawai’i 383, 390, 76 P.3d 935, 942 (2003). In Chun, this court held that “indecent exposure, in violation of HRS § 707-734, . . . does not

³ The court’s sentence, contained in the certified calendar, reads:

PROBATION-6 MONTHS; STANDARD TERMS & CONDITIONS; FINE \$100; NO FURTHER LAW VIOLATIONS; UBMIT [sic] TO PSYCHO/PHYSIOLOGICAL ASSESSMENT & TO INCLUDE PLETHYSMOGRAPH AND POLYGRAPH TESTING AT OWN EXPENSE; ENTER/COMPLETE COURT APPROVED SEX OFFENDR [sic] TRETMENT [sic] PROGRAM AT OWN EXPENSE IF RECOMMENDED BY ASSESSMENT; WAIVE ALL CONFIDENTIALITY [sic] BETWEEN PROB OFFICER & ANY SEX OFFENDER TREATMENT PROGRAM; REGISTER WITH THE SEX OFFENDER PROGRAM W/IN 2 DAYS OF SENTENCING AT HI COUNTY POLICE DEPT; REFRAIN FROM CONTACTING/HARASSING/ANNOYING/ALARMING [JANE DOE]; NOT ENTER/FREQUENT ESTABLISHMENTS WHERE UNSUPERVISED MINORS CONGREGATE; MAINTAIN EMPLOYMENT AT PLACE WHERE UNSUPERVISED MINORS DO NOT CONGREGATE; SHALL NOT MAKE OR ATTEMPT TO MAKE ANY CONTACT, DIRECTLY OR INDIRECTLY, W/ ANY MINOR CHILD OR RESIDE IN THE SAME RESIDENCE W/ MINOR CHILDREN W/O THE PERMISSION OF PROB OFFICER.

(Emphasis added.)

constitute an offense that entails 'criminal sexual conduct' and, consequently, that persons convicted of indecent exposure are not 'sex offenders' for purposes of HRS ch. 846E. Accordingly, . . . [Defendant] is not required to register as a 'sex offender' pursuant to HRS ch. 845E." Id. Accordingly, we vacate that portion of the court's judgment and sentence that referred to HRS chapter 845E or that required Defendant to comply therewith.

We do not agree with Defendant's point (3) inasmuch as the prosecution established that the crime was committed in Kona, in the County and State of Hawai'i. We take judicial notice of the facts that Kona is on the island of Hawai'i, that the island of Hawai'i constitutes the third judicial circuit, and that the instant case was tried in the district court of the third circuit, satisfying the requirement that venue for district court criminal trials is in any district of the judicial circuit in which the crime was committed. See State v. Kwak, 80 Hawai'i 297, 300-01, 909 P.2d 1112, 1115-16 (1995); State v. Puaoi, 78 Hawai'i 185, 186, 190, 891 P.2d 272, 273, 277 (1995).

Similarly, we do not find any error with respect to point (4). Defendant's assertion that the court wrongly concluded that he acted intentionally amounts to a claim that the evidence was insufficient to sustain his conviction. We consider a claim of insufficient evidence "in the strongest light for the prosecution" when we "pass[] on the legal sufficiency of such evidence to support a conviction The test on appeal is

. . . whether there was substantial evidence to support the conclusion of the trier of fact.” State v. Martinez, 101 Hawai‘i 332, 338, 68 P.3d 606, 612 (2003) (quoting State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931 (1992)).

“A person acts intentionally with respect to his [or her] conduct when it is his [or her] conscious object to engage in such conduct.” HRS § 702-206 (1993). Defendant attempted to prolong his conversation with Mother and moved his chair into a position that allowed him to display his genitalia to Jane. The evidence adduced would enable a person of reasonable caution to conclude that Defendant’s conduct was intentional.

Defendant also argued that the court’s sua sponte questioning of Jane, i.e., asking Jane, based on her “observation,” whether she believed Defendant acted intentionally or accidentally, was error. Hawai‘i Rules of Evidence (HRE) Rule 701 (1993)⁴ governs the admissibility of lay opinions such as that expressed by Jane.

HRE Rule 701 . . . sets forth a liberal standard for admitting lay opinions into evidence. As long as (1) the witness has personal knowledge of matter that forms the basis of the testimony; (2) the testimony is rationally based on the witness’ perception; and (3) the opinion is “helpful” to the jury (the principal test), the opinion testimony is admissible.

State v. Tucker, 10 Haw. App. 73, 91, 861 P.2d 37, 47 (1993)

⁴ HRE Rule 701 states:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.

(citation omitted). In the instant case, Jane's opinion that Defendant acted intentionally met the three criteria of HRE Rule 701. Moreover, the court was accorded greater discretion in asking Jane questions because it held a jury-waived trial. See Commonwealth v. Amirault, 535 N.E.2d 193, 207 (Mass. 1989) ("A judge is afforded wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses[,]" so long as "[t]he defendant's right to a fair trial and assistance of counsel [are] not compromised.").

Based on the foregoing, we affirm the court's January 11, 1999 judgment and sentence, except that we vacate any reference or requirement therein with respect to HRS chapter 846E.

DATED: Honolulu, Hawai'i, October 30, 2003.

On the briefs:

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defendant-appellant.

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Prosecuting Attorney,
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