

*** NOT FOR PUBLICATION ***

NO. 23112

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

FLAVIAN FUJIMOTO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 99-0732)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Flavian Fujimoto (Fujimoto) appeals from the December 22, 1999 judgment of the family court of the second circuit, the Honorable Eric G. Romanchak presiding, convicting him of and sentencing him for violation of a temporary restraining order (TRO) for protection, in violation of Hawai'i Revised Statutes (HRS) § 586-4 (Supp. 1999).¹ On appeal,

¹ HRS § 586-4 provided:

(a) Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time such order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
- (3) Telephoning the petitioner;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.

(continued...)

¹(...continued)

(b) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purpose of preventing acts of abuse or preventing a recurrence of actual domestic abuse, and assuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. Where necessary, the order may require either or both of the parties involved to leave the premises during the period of the order, and also may restrain the party or parties to whom it is directed from contacting, threatening, or physically abusing the applicant's family or household members. The order shall not only be binding upon the parties to the action, but also upon their officers, agent, servants, employees, attorneys, or any other persons in active concert or participation with them. The order shall enjoin the respondent or person to be restrained from performing any combination of the following act:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
- (3) Telephoning the petitioner;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.

(c) When a temporary restraining order is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and
- (2) For the second and any subsequent conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that

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Fujimoto argues that: (1) HRS §§ 586-4 and 586-5 (Supp. 2003)² infringed upon his fundamental right to privacy, in violation of

¹(...continued)

the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

(d) Any fines collected pursuant to subsection (c) shall be deposited into the spouse and child abuse special account established under section 601-3.6.

In 2000, the legislature amended HRS § 586-4. 2000 Haw. Sess. Laws Act 186, § 4. Inasmuch as the subject incident occurred on October 24, 1999, the amended version of the statute is not implicated in the present matter.

² HRS § 586-5 provides:

(a) A temporary restraining order granted pursuant to this chapter shall remain in effect at the discretion of the court, for a period not to exceed ninety days from the date the order is granted.

(b) On the earliest date that the business of the court will permit, but no later than fifteen days from the date the temporary restraining order is granted, the court, after giving due notice to all parties, shall hold a hearing on the application requiring cause to be shown why the order should not continue. In the event that service has not been effect, the court may set a new date for the hearing; provided that the date shall not exceed ninety days from the date the temporary restraining order was granted. All parties shall be present at the hearing and may be represented by counsel.

The protective order may include all orders stated in the temporary restraining order and may provide further relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention.

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article I, section 6 of the Hawai'i Constitution,³ inasmuch as these statutory provisions permit courts to issue TROs that exclude respondents from their homes; (2) the family court committed plain error in convicting him under HRS § 586-4 because there was no evidence to establish that he intentionally or knowingly violated the TRO; (3) HRS § 586-4(c)'s sentencing provisions run afoul of the eighth amendment to the United States Constitution⁴ and article I, section 12 of the Hawai'i Constitution,⁵ inasmuch as these provisions impose mandatory minimum jail terms for TRO violations whereas no mandatory minimum jail sentence is imposed for violations of protective orders; and (4) the family court erred in sentencing Fujimoto beyond the mandatory minimum sentence of forty-eight hours for a first time offense under HRS § 586-4.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the issues raised and arguments advanced, we hold that: (1) the family court did not commit plain error in convicting Fujimoto of violation of a TRO, inasmuch as the record contains sufficient evidence to establish that Fujimoto knowingly and intentionally violated the amended TRO, see State v. Richie, 88 Hawai'i 19, 960 P.2d 1227

³ Article I, section 6 of the Hawai'i Constitution provides in relevant part that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

⁴ The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁵ Article 1, section 12 of the Hawai'i Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

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(1998); (2) the family court's imposition of a thirty day sentence under HRS § 586-4(c), with twenty-eight days suspended and credit for two hours served, did not constitute cruel and unusual punishment, in violation of article I, section 12 of the Hawai'i Constitution and the eight amendment of the United States Constitution, inasmuch as (a) the nature of Fujimoto's offense warranted the imposition of a strict penalty, (b) a person convicted of the more serious offense of violating an order of protection under HRS § 586-11 may be punished by up to one year imprisonment, (c) statutory schemes from other jurisdictions provide that a TRO violation is a misdemeanor, punishable by up to one year imprisonment, (d) Fujimoto's sentence fell within the proscribed statutory provisions, see HRS § 586-4 and HRS § 706-663, (e) Fujimoto's sentence does not "shock the conscience" of reasonable persons, and (f) Fujimoto's sentence does not outrage the moral sense of the community, see State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000); State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990); State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979); and (3) the family court did not abuse its discretion in sentencing Fujimoto to a thirty day sentence, with twenty-eight days suspended and credit for two hours served, inasmuch as the family court had authority to sentence Fujimoto to a term of imprisonment not to exceed one year, see HRS § 586-4; HRS § 706-663, and the record demonstrates that (a) Fujimoto was aware of the amended TRO, (b) Fujimoto intentionally went to petitioner's house on October 24, 1999 at 5:00 in the morning, and (c) petitioner was unaware that Fujimoto was on her property, see State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990); State v.

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Johnson, 68 Haw. 292, 711 P.2d 1295 (1985); State v. Teves, 4 Haw.App. 566, 670 P.2d 834 (1983). In addition, because Fujimoto failed to argue in family court that HRS § 586-4 infringed upon his fundamental right to privacy, such argument is deemed waived, and Fujimoto is precluded from raising this issue for the first time on appeal, see Association of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 58 P.3d 608 (2002); Molinar v. Schweizer, 95 Hawai'i 331, 22 P.3d 978 (2001); Hill v. Inouye, 90 Hawai'i 76, 976 P.2d 390 (1998); Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 948 P.2d 1055 (1992); State v. Ildefonso, 72 Haw. 573, 827 P.2d 648 (1992). Therefore,

IT IS HEREBY ORDERED that the family court's December 22, 1999 judgment, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, January 30, 2004.

On the briefs:

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for defendant-appellant
Flavian Fujimoto

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State of Hawai'i