

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 26749

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

HAROLD TOMLIN HODGES, Defendant-Appellant

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C. L. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 04-1-0064(1))

SUMMARY DISPOSITION ORDER

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

The appellant Harold Tomlin Hodges appeals from the July 7, 2004 judgment of the circuit court of the second circuit, the Honorable Joel E. August presiding, convicting him of and sentencing him for the following offenses: 1) promoting a controlled substance in, on, or near schools, school vehicles, or public parks (Count I), in violation of Hawaii Revised Statutes (HRS) § 712-1249.6(1)(b) (Supp. 2003); 2) prohibited acts related to drug paraphernalia (Count II), in violation of HRS § 239-43.5(a) (1993); and 3) promoting a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993).

On appeal, Hodges argues that the circuit court erred by 1) instructing the jury that the criminal state of mind required for a finding of guilt under HRS § 712-1249.6 was "reckless disregard," when the statute clearly states that the Defendant must act "knowingly," and 2) finding that he knowingly distributed or possessed with intent to distribute a controlled substance, in any amount, within 750 feet of real property comprising a public or private elementary or secondary school. Hodges argues that there was insufficient evidence to support his

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conviction for the offense of promoting a controlled substance near a school, as charged in Count I. Hodges does not challenge his convictions on Counts II and III.

The State of Hawai'i (hereinafter, "the prosecution") concedes that the circuit court committed plain error by 1) erroneously instructing the jury that the requisite state of mind for the attendant circumstance for promoting a controlled substance near a school was either "knowing" or "reckless," and 2) by denying Hodges's motion for judgment of acquittal because there was insufficient evidence to support a conviction for the charge.

We conclude that the prosecution's confession of error is supported by the record and is well-founded in law. See State v. Wasson, 76 Hawai'i 415, 418, 879 P.2d 520, 523 (1994); Territory v. Kogami, 37 Haw. 174, 175 (1945). Therefore,

IT IS HEREBY ORDERED that the circuit court's judgment of conviction in Count I for promoting a controlled substance near a school in violation of HRS § 712-1249.6 is reversed. The circuit court's judgment with respect to Counts II and III is affirmed.

DATED: Honolulu, Hawai'i, May 27, 2005.

On the briefs:

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Harold Tomlin Hodges

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