
NO. 22904

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

BIENVENIDO ASPILI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(DC COMPLAINT NO. F-42736)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Bienvenido L. Aspili (Defendant) appeals from the special condition of probation that Defendant register as a sex offender pursuant to the sex offender registration and public notification law, Hawai'i Revised Statutes (HRS) chapter 846E (Supp. 2001) imposed as part of the September 17, 1999 judgment of the district court of the first circuit (the court), the Honorable Tenny Z. Tongg presiding, convicting him of Sexual Assault in the Fourth Degree, HRS § 707-733(1)(a) (1993).

On appeal, Defendant contends that the sex offender registration and public notification requirements of HRS chapter 846E violate the United States and Hawai'i constitutions' provisions relating to (1) procedural due process, (2) ex post

facto laws, (3) cruel and unusual punishment, (4) the right to privacy, and (5) equal protection.

State v. Bani, 97 Hawai'i 285, 36 P.3d 1255 (2001), held that the absence of procedural safeguards in the public notification provisions of HRS chapter 846E violates the procedural due process requirements of article I, section 5 of the Hawai'i Constitution and, accordingly, renders such public notification provisions of the statute unconstitutional, void, and unenforceable. Id. at 287, 36 P.3d at 1257; see also State v. Guidry, No. 22727, slip op. at 2, 26-27 (Haw. Aug. 6, 2004). Accordingly, that portion of Defendant's sentence is vacated.¹ See Bani, 97 Hawai'i at 299, 36 P.3d at 1269 (vacating the portion of the sentence ordering defendant to submit to the notification requirements of HRS chapter 846E).

As to whether the lifetime registration obligations violate Defendant's procedural due process rights, Bani held that the initial registration requirement was valid. 97 Hawai'i at 292, 36 P.3d at 1262. However, Guidry, held that under Article I, section 5 of the Hawai'i Constitution, procedural due process requires that a convicted sex offender may institute a special proceeding to challenge the applicability of continued lifetime registration obligations as applied. Guidry, slip op. at 2, 26-

¹ The application of the public notification requirements of HRS § 846E-3 (Supp. 2003), which was subsequently enacted and provided for a hearing prior to the release of a sex offender's registration information, is not addressed herein.

27. Defendant did not institute such a hearing. The registration requirement of Defendant's probation, in the September 17, 1999 judgment, is therefore affirmed. Inasmuch as the notification and registration provisions violated Defendant's procedural due process rights under the Hawai'i Constitution, Defendant's arguments under the federal constitution need not be discussed.

As to Defendant's second point on appeal, this court has previously held that HRS chapter 846E is not violative of the federal ex post facto clause. Id. at 31. Defendant acknowledges that the Hawai'i Constitution does not contain an ex post facto clause, but maintains the due process clause in article I, section 5 may fairly be construed as containing an ex post facto component. But, Defendant does not indicate how HRS chapter 846E would violate ex post facto law in Hawai'i beyond those factors enumerated under federal law, or that Hawai'i provides greater protection than the United States Constitution in this regard. See id. at 31.

As to his third point on appeal, with respect to the Eighth Amendment prohibition against "cruel and unusual punishment," the Supreme Court stated that because the "Eight Amendment did not contain a proportionality guarantee, 'what was 'cruel and unusual' under the Eight Amendment was to be determined without reference to the particular offense'"

Id. at 31-32 (quoting Harmelin v. Michigan, 501 U.S. 957, 978 (1991)). Defendant argues that "HRS chapter 846E, as applied to [Defendant], is grossly disproportionate to the offenses for which he was convicted[.]" He contends that "the nature or gravity of [Defendant's] . . . offense indicates that it was the least serious felony offense . . . [and] he is publicly branded as 'sex offender' for the rest of his life." "[T]he Supreme Court has held that proportionality is not guaranteed by the Eighth Amendment, [therefore, Defendant's] argument fails." Id. at 32. "Under the federal constitution, the question is not whether the requirements under HRS chapter 846E as applied to [Defendant] are disproportionate to the offense for which he was convicted, but rather, whether the statute itself effects a 'punishment [which] was both (1) severe and (2) unknown to Anglo-American tradition.'" Id. at 32 (quoting Harmelin v. Michigan, 501 U.S. 957, 991 (1991) (emphasis in original)).

Unlike the federal constitution, the "cruel and unusual" punishment provision in the Hawai'i Constitution incorporates a proportionality test; that is, "whether[,] in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community." Id. at 32-33 (quoting State v. Davia, 87 Hawai'i 249, 953 P.2d 1347 (1998) (brackets in original)). But "the

registration requirements are not so punitive in nature as to overcome the legislature's remedial purpose . . . [and] there is ample authority holding that registration is not punitive in nature." Id. at 33. Defendant, therefore, "has failed to demonstrate that the registration requirements under HRS chapter 846E constitute cruel and unusual punishment under the Hawai'i Constitution." Id.

As to his fourth point on appeal, Defendant contends that the "confidentiality aspect of the right to privacy" is infringed by the compilation and public disclosure of personal information, as required by HRS chapter 846E. In this regard, the notification requirements are void and unenforceable as to Defendant. See supra. Accordingly, we need not determine whether, if such provisions did apply, they violated Defendant's right to privacy. See id. at 36. With regard to compilation of information, the initial act of registration "does not implicate any fundamental rights to privacy." Id. at 37 (citing Bani, 97 Hawai'i at 292-93, 36 P.3d at 1263).

As to the lifetime registration requirements, it is difficult to discern Defendant's argument regarding how this would affect one's right to privacy. It is unclear from Defendant's brief as to how assembly of information alone may implicate the right to privacy. Indeed, Defendant's emphasis is

on disclosure of such information, a matter determined by Bani.²

Consequently, Defendant's contentions fails to specify how compilation of the information alone infringes on his privacy rights. Thus we do not consider this claim.³

As to his final point on appeal, because the notification provisions of HRS chapter 846E are void and unenforceable under the Hawai'i Constitution as to Defendant, see Bani, 97 Hawai'i at 287, 36 P.3d at 1257, his equal protection arguments in this regard need not be addressed.

As discussed, the initial act of registration "does not implicate any fundamental rights to privacy." Guidry, slip op. at 37 (citing Bani, 97 Hawai'i at 292, 36 P.3d at 1263).

The registration statute is not invalid for being "grossly overinclusive" or overbroad. Assuming, arguendo, that lifetime registration implicates a fundamental right to privacy,

² Citing Doe v. Poritz, 662 A.2d 367, 411 (1995), Defendant contends that the Poritz court "weighed the offender's privacy interest against the state's interest in public disclosure[]" (emphasis added); that Poritz "found that the degree and scope of disclosure is carefully calibrated to the need created by the risk of reoffense" (emphasis added); that in comparison, HRS chapter 846E "is not 'carefully calibrated' to the risk of recidivism or degree of future dangerousness"; "the Hawai'i statute does not categorize offenders within a three-tiered system of notification based on risk level," (emphasis added); the court must ask "whether the release of such information is supported by a compelling state interest" (emphasis added); and "the State does not have a compelling interest in disclosing information on persons who are not a significant danger to the public" (emphasis added).

³ Defendant also contends that "informational privacy" is violated because "information on Defendant is clearly connected to his sexual relations, i.e., his contact, with the complainant[] . . . [t]hus public disclosure of registration information implicates the informational prong of article I, § 6." (Emphasis added.) As this court stated in Guidry, "[w]e do not agree that [Defendant's] information regarding his sexual assault in the second degree offense should be protected under the right to privacy regarding one's 'sexual relations'." Guidry, slip op. at 34 n.29.

(a) Defendant does not have standing to challenge HRS chapter 846E as unconstitutionally overbroad on the ground that the statute includes the offenses of kidnapping or unlawful imprisonment, inasmuch as Defendant's underlying conviction did not involve such offenses, and (b) the statute was not overbroad as purportedly classifying persons who present no danger to the public as sex offenders, inasmuch as sex offenders may initiate hearings to challenge the lifetime registration requirements on the ground that the offender does not present a threat to the community. See id. at 1-3.

Finally, HRS chapter 846E "rationally furthers a legitimate state interest[,]" id. at 40 (quoting Baehr v. Lewin, 74 Haw. 530, 573, 852 P.2d 44, 64 (1993)), and "any infirmity with respect to the rational basis requirement is obviated by [the] holding that due process requires that a hearing must be provided, at some point, to determine whether lifetime registration is warranted[,]" id. at 41. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that that portion of the court's September 17, 1999 sentence ordering Defendant to submit to the notification requirements of HRS chapter 846E is vacated, and this case remanded on that aspect for proceedings consistent with

this opinion. The registration requirements of HRS chapter 846E, as applied to Defendant, are affirmed.

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

On the briefs:

Deborah L. Kim, Deputy
Public Defender, for
defendant-appellant.

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for plaintiff-appellee.