

DISSENTING OPINION BY ACOBA, J.

I would exercise jurisdiction under either Hawai'i Revised Statutes § 602-5 or HRS § 602-57 to correct the error in this case inasmuch as such error cannot otherwise be corrected. Exercising jurisdiction, I would hold that the free-standing order of restitution be vacated for the reasons set forth below.

I.

On August 24, 1994, Defendant-Appellant Randy Salviejo (Defendant) was indicted for unauthorized control of a propelled vehicle, Hawai'i Revised Statutes (HRS) § 708-836 (1993), fraudulent use of license plate, HRS § 249-11 (Supp. 2000), and driving without a license, HRS § 286-102 (1993).

On November 14, 1994, Defendant pled no contest to the charges. He filed a motion for deferred acceptance of his no contest (DANC) plea on the same day.

On February 6, 1995, the court granted Defendant's motion, deferring acceptance of his plea for a five-year period from that date, subject to the satisfaction of certain terms and conditions. Among the conditions was a restitution requirement that Defendant "[p]ay restitution in the amount of \$8,853 in Count I, amount of payment to be determined by the Adult Probation Division [(APD)], to be completed by the end of the

deferral period[.]” At the time, HRS § 706-644 (1993) provided in relevant part as follows:

**Consequences of nonpayment; imprisonment for contumacious nonpayment; summary collection.** (1) When a defendant sentenced to pay a fine or restitution defaults in the payment thereof or of any installment, the court, upon the motion of the prosecuting attorney or upon its own motion, may require the defendant to show cause why the defendant’s default should not be treated as contumacious and may issue a summons or warrant of arrest for the defendant’s appearance. Unless the defendant shows that the defendant’s default was not attributable to an intentional refusal to obey the order of the court, or to a failure on the defendant’s part to make a good faith effort to obtain the funds required for the payment, the court shall find that the defendant’s default was contumacious and may order the defendant committed until the fine, restitution, or a specified part thereof is paid.

. . . .

(4) If it appears that the defendant’s default in the payment of a fine or restitution is not contumacious, the court may make an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or restitution or the unpaid portion thereof in whole or in part.

(Emphases added.)

On January 25, 2000, Plaintiff-Appellee State of Hawai’i (the prosecution) filed a motion for enforcement of the restitution condition pursuant to HRS § 706-644 (1993 & Supp. 1999), requesting the court to order “Defendant to show cause why [his] default should not be treated as contumacious.”

According to the prosecutor’s declaration, Defendant’s deferral period would expire on February 5, 2000, a balance of \$3,718.00 remained to be paid, and Defendant was willing to continue making payments after his deferral period expired. Other than the payment of this outstanding balance, Defendant would have satisfactorily completed all other conditions. The

prosecution did not move for an expedited hearing, an order tolling the deferral period, or revocation of the DANC order.

At a March 7, 2000 hearing, defense counsel asserted that the deferral period had not been tolled, the period had expired on February 5, 2000, and the prosecution was apparently seeking a prohibited free-standing order of restitution. The prosecution asserted that pursuant to HRS § 706-644 (1993 & Supp. 1999), Defendant should be imprisoned if non-payment was contemptuous or be permitted additional time to pay if his conduct was non-contemptuous. Defense counsel maintained that

[t]he condition that was ordered by the Court is that . . . the amount of payment [was] to be determined by the [APD], . . . [a]n amount of payment was determined by the [APD], and [Defendant] consistently abided by that[,] . . . [making] monthly payments of at least a hundred dollars to his probation officer throughout the deferral period.

Noting that "deferral [appellate] opinions" refer to the inherent power of the court, the court orally ruled that the prosecution's motion tolled the deferral period, and Defendant was required to pay the balance owed:

Pursuant to statute, the Court grants the [prosecution's motion]. It will be a free-standing order, and the State will prepare the modification to his deferral. He'll be required to make payment of restitution in the amount of \$8,353. He has credit for the payments made, and he will make the balance of the payments. And he gets the benefit of the charges being dismissed. The Court will not set aside his deferral . . . .

(Emphasis added.)

On March 17, 2000, the court filed a written order reflecting its ruling in pertinent part as follows:

- 3) The Defendant . . . has made payment totaling four thousand six hundred and thirty-five dollars (\$4,635).
- 4) The Defendant . . . has been making payment of one hundred dollars (\$100) a month.
- 5) The State's Motion to Enforce Full Payment of Restitution was filed on January 25, 2000.
- 6) But for the Defendant['s] . . . failure to complete restitution . . . , the Defendant . . . would have been eligible for discharge . . . and to have the charges against him dismissed on February 5, 2000.

The Court empowered by [HRS c]hapter 853, as well as the Court's inherent powers regarding Deferred Acceptance of No[lo] Contendere Pleas, See and State v. Brown, 1 Haw. App. 602, 623 P.2d 892 (1981), and in accord with Section 706-644(4), [HRS}, holds that the Defendant . . . shall make restitution as provided . . . .

ACCORDINGLY, IT IS ORDERED that . . . Defendant . . . shall continue to make payment of at least one hundred dollars (\$100) a month until full payment of the ordered restitution is made[, ] . . . by April 30, 2003.[<sup>1</sup>]

(Emphasis added.)

The court did not find that Defendant's failure to make full payment before February 5, 2000 was contumacious.

On March 22, 2000, Defendant filed his notice of appeal from the aforesaid March 17, 2000 order.

In his statement of jurisdiction, Defendant declares that his appeal "is taken pursuant to . . . [HRS] § 641-11" but maintains further that "jurisdiction to entertain [the] appeal

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<sup>1</sup> Defendant notes that the enforcement order did not purport to accept Defendant's no contest plea or to revoke or modify the DANC order. He also points out that the court made no order accepting Defendant's plea or discharging him from the DANC order, despite the expiration of the original DANC period.

[lies in] . . . HRS §§ 602-5 (1993)<sup>[2]</sup> and 602-57 (1993),<sup>[3]</sup> respectively.”

II.

Defendant asserts that the granting of the prosecution’s motion for enforcement was erroneous for four reasons: (1) the court abused its discretion in issuing a FSO pursuant to HRS § 706-644 (Supp. 1999) and its “inherent power”; (2) the court abused its discretion to the extent it purported to extend Defendant’s deferral period beyond that allowable under HRS § 853-1(b) (1993); (3) the court abused its discretion in granting the prosecution’s enforcement motion because Defendant made all payments as directed by his probation officer; and (4) the court committed plain error by entering a restitution order

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<sup>2</sup> HRS § 602-5 states in pertinent part as follows:

**Jurisdiction and powers.** The supreme court shall have jurisdiction and powers as follows:

(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency;

. . . .

(7) To make and award such judgments, decrees, orders and mandates, . . . and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

<sup>3</sup> HRS § 602-57 states that “[t]he intermediate appellate court shall have concurrent jurisdiction with the supreme court on all matters set out in section 602-5(1) through (7), subject to assignment of cases set out in section 602-5(8).

without having first found that Defendant was able to pay the amount ordered. Defendant's first ground is dispositive, hence, the other grounds need not be considered.

III.

Initially, it must be noted that an appeal from a criminal case may be taken under HRS § 641-11 (1993) from a final judgment. According to HRS § 641-11, the "final judgment" in a criminal case is the "sentence." The restitution enforcement order from which Defendant appeals is not a sentence inasmuch as Defendant's plea at the time was deferred. By its terms, it is interlocutory in nature. An interlocutory order is "one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Black's Law Dictionary 815 (6th ed. 1990). Such an order may be certified for appeal, but that did not take place here. However, as Defendant maintains, jurisdiction may be entered in this case in accordance with HRS § 602-5(7), which provides this court to make such judgments and orders necessary for the promotion of justice. See supra note 2. Such jurisdiction is taken to correct errors as

discussed herein.<sup>4</sup>

IV.

The prosecution disagrees with Defendant's contention that the court did not have the authority to issue a free-standing order<sup>5</sup> on the grounds that (1) HRS § 853-1(b) (1993) authorized the court to defer proceedings upon a condition of restitution as a condition to Defendant's DANC, and (2) the court was authorized to extend the time in which Defendant was expected to pay, pursuant to HRS § 706-644 (1993 & Supp. 1999).

The prosecution argues that HRS § 706-644 as amended in 1998 by Act 269 expressly authorized the lower court to extend the term of Defendant's DANC so that he could pay his outstanding restitution. In that regard, it states,

the State expressly moved pursuant to [HRS §] 706-644 (1993 Repl. & 1999 Supp.) which provides in pertinent part as follows:

**§706-644 Consequences of nonpayment; imprisonment for contumacious nonpayment; summary collection.** (1) **When a defendant is** sentenced pursuant to section 706-605, granted a conditional discharge pursuant to section 712-1255, or **granted a deferred plea pursuant to chapter 853, and the defendant is ordered to pay a fine or restitution,** whether as an independent order, as part of a judgment

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<sup>4</sup> Jurisdiction could also have been asserted under HRS 602-4 (1993), which indicates that the supreme court has general superintendence of inferior courts to prevent and correct errors where no other remedy is expressly provided by law.

<sup>5</sup> The prosecution maintains the court's oral ruling as to a "free standing" order was superseded by the written order which does not refer to "free standing order." The distinction is immaterial inasmuch as the court referred to HRS § 706-644(4) in its written order.

and sentence, or as a condition of probation or deferred plea, **and the defendant defaults in the payment thereof or of any installment, the court,** upon the motion of the prosecuting attorney or upon its own motion, **may require the defendant to show cause why the defendant's default should not be treated as contumacious** and may issue a summons or a warrant of arrest for the defendant's appearance. Unless the defendant shows that the defendant's default was not attributable to an intentional refusal to obey the order of a the court, or to a failure on the defendant's part to make a good faith effort to obtain the funds required for the payment, the court shall find that the defendant's default was contumacious and may order the defendant committed until the fine, restitution or a specified part thereof is paid.

. . . .  
(4) If it appears that the defendant's default in the payment of a fine or restitution is not contumacious, **the court may make an order allowing the defendant additional time for payment,** reducing the amount of each installment, or revoking the fine or the unpaid portion thereof in whole or in part, or converting the unpaid portion of the fine to community service. **A defendant shall not be discharged from an order to pay restitution until the full amount of the restitution has actually been collected or accounted for.**

(5) Unless discharged by payment or, in the case of a fine, service imprisonment pursuant to subsection (3), **an order to pay a fine or restitution,** whether as an independent order, as a part of a judgment and sentence, or **as a condition of probation or deferred plea pursuant to chapter 853,** may be collected in the same manner as a judgment in a civil action. The State or the victim named in the order may collect the restitution, including costs, interest, and attorney's fees, pursuant to section 706-646. The State may collect the fine, including costs, interest, and attorney's fees pursuant to section 706-647.

(Boldfaced emphases in original.) (Underscored emphasis added.)

Although HRS § 706-644 (1) and (5) authorize the court to order a condition to a deferred plea pursuant to chapter 853, such a provision did not exist at the time of Defendant's case. Rather, the 1993 version of HRS § 706-644 applied. But HRS § 706-644 (Supp. 1993) did not authorize the imposition of a FSO as a condition of a deferred plea under HRS chapter 853. See supra



page 2. Moreover, because Defendant's acceptance of his DANC plea was deferred, he was not "sentenced" as required under HRS § 706-644 (1993). See State v. Kealaiki, 95 Hawai'i 309, 312, 22 P.3d 588, 591 (2001) (an order granting a DANC plea cannot be considered a conviction or a sentence). Additionally, the 1998 version of HRS § 706-64 is not applicable to Defendant because it "does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date [July 20, 1998]." 1998 Haw. Sess. L. Act 269 § 7.

In the instant case, Defendant was indicted on August 24, 1994. On February 6, 1995, the court entered the DANC order. The proceedings in this case thus began before the 1998 amendment to HRS § 706-644(5) became effective on July 20, 1998. The prosecution moved for enforcement of full payment on January 25, 2000. Because the 1998 amendments to HRS § 706-644 are not retroactively applied, the sentencing court could not impose a FSO as authorized under the post-1998 version of HRS § 706-644 as requested by the prosecution. See State v. Kai, 98 Hawaii 137, 141, 44 P.3d 289, 291 (App. 2002) (stating that "Act 269 by its own express language did not affect penalties that were incurred before the Act's effective date (July 20, 1998)" and, thus, "did not apply retroactively to extend [the defendant's] obligation to pay restitution beyond [the] period of probation"). See State v. Werner, 93 Hawaii 290, 295, 1 P.3d 760, 765 (App. 2000) (holding

that Act 269 does not apply to defendant's case because the defendant's case began on July 1, 1997, before its effective date of July 20, 1998); see also State v. Johnson, 92 Hawaii 36, 44, 986 P.2d 987. 995 (1999) (holding that "HRS § 706-644 as amended in 1998, does not apply to this case because the proceedings at issue began on September 15, 1997"). Therefore, the sentencing court had no authority to impose a FSO pursuant to the 1998 amendments to HRS § 706-644.

Because the court was not authorized to impose a FSO, it was not authorized to extend the deferral period for that purpose under HRS chapter 853 or any "inherent power."<sup>6</sup> Accordingly, I would vacate the court's March 17, 2000 order and remand the case for disposition in accordance with this opinion.

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<sup>6</sup> Brown, cited by the court in its order, did not discuss any inherent power to impose a FSO but only the inherent power to grant a deferred plea. This court has held, however, in a plurality opinion, that inherent power to grant a DAG or DANC plea has been superceded by HRS chapter 853. State v. Sakamoto, 101 Hawai'i 409, 414, 70 P.3d 635, 640 (2003).