
NO. 23977

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

ROBERT W. HART, Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-0476)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant State of Hawai'i (the prosecution) appeals from the December 14, 2000 order of the first circuit court¹ (the court) granting the motion of Defendant-Appellee Robert W. Hart (Defendant) to dismiss Count III of the May 9, 2000 complaint charging him with Failure to Notify Change of Address as a Sex Offender, in violation of Hawai'i Revised Statutes (HRS) § 846E-6(a) (Supp. 2001).²

On appeal, the prosecution maintains that the court erred in granting Defendant's motion to dismiss Count III, because HRS chapter 846E does not violate Defendant's right to

¹ The Honorable Reynaldo Graulty presided.

² The May 9, 2000 complaint also charged Defendant with: Count I, Possession of a Prohibited Firearm, in violation of HRS § 134-8(a) (1993), and Count II, Ownership or Possession Prohibited of any Firearm or Ammunition by a Person Convicted of Certain Crimes, in violation of HRS § 134-7(b) and (h) (Supp. 2000).

procedural due process as guaranteed under the United States and Hawai'i Constitutions. In response, Defendant reasserts his position that the statute does, in fact, violate his right to procedural due process and argues alternate grounds for affirmance, contending that HRS chapter 846E violates (1) the constitutional prohibitions against (a) ex post facto laws and (b) cruel and unusual punishment; and (2) the constitutional rights to (a) privacy and (b) equal protection of the law.

As to his procedural due process claim, the notification requirements of HRS chapter 846E are void and unenforceable. State v. Bani, 97 Hawai'i 285, 287, 36 P.3d 1255, 1257 (2001). As to registration requirements, the initial act of registration does not impose on a protected liberty interest. Id. However, the continued lifetime registration requirement "implicates a protected liberty interest under the Hawai'i State Constitution, article I, section V[,] and requires that minimum requirements of due process--notice and the opportunity to be heard--be afforded to convicted sex offenders." State v. Guidry, No. 22727, slip op. at 2 (Haw. Aug. 6, 2004). "Such a proceeding may be instituted by a sex offender in a special proceeding." Id. Hence, Defendant was not entitled to a procedural due process hearing prior to registration. Defendant did not initiate a special proceeding. Thus, the court improperly dismissed Count III. See id. at 25-27.

As to Defendant's point 1(a), inasmuch as registration does not violate the federal constitution's ex post facto clause and Defendant fails to argue how HRS chapter 846E violates the Hawai'i ex post facto statute, Defendant cannot prevail on this argument. Id. at 27-31.

As to Defendant's point 1(b), 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 [the Defendant], is grossly disproportionate to the offenses for which he was convicted[.]" He contends that "the nature or gravity of [Defendant's] 1992 offense indicates that it was the least serious felony offense . . . [and] he is publicly branded as 'sex offender' for the rest of his life." "Because the Supreme Court has held that proportionality is not guaranteed by the Eighth Amendment, [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. (quoting Harmelin, 501 U.S. at 991 (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, 258, 953 P.2d 1347, 1356 (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 Defendant's point 2(a), Defendant "has not been afforded a hearing to determine whether public notification . . . is warranted." Id. at 35-36. Because this violates procedural due process³ under Bani, the public notification provisions are

³ Because the provisions regarding notification are void as stated in Guidry, "we need not determine whether, if such provisions did apply, they violated [Defendant's] right to privacy." Guidry, slip op. at 36.

unenforceable as to Defendant.⁴ As to compilation of information, it is difficult to discern Defendant's argument regarding how this would affect one's right to privacy. Defendant initially argues that "the instant case involves the confidentiality aspect of the right to privacy." He relies on United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989), and Doe v. Poritz, 662 A.2d 367 (N.J. 1995).⁵ Although Defendant states that "[u]nder HRS chapter 846E, a great deal of personal information is compiled into a single, easily accessible form[,] " he supports this proposition on the ground that "a privacy interest is implicated when the government assembles those diverse pieces of information . . . and disseminates that package[,] " Poritz, 662 A.2d at 409

⁴ This court noted in Guidry that

[f]ollowing . . . Bani, HRS § 846E-3, entitled "Access to registration information," was amended to include, inter alia, a hearing to provide a sex offender with the opportunity to present evidence to show that "the offender does not represent a threat to the community and that public release of relevant information is not necessary." HRS § 846E-3(d) (Supp. 2003).

Guidry, slip op. at 1-2. We do not address application of the public notification requirements of HRS § 846E-3 (Supp. 2003), which was subsequently enacted.

⁵ It is important to note that Doe v. Poritz, 662 A.2d 367 (N.J. 1995), upon which the Defendant relies for the proposition that compilation of personal information infringes on his privacy rights, in fact held that compilation and dissemination of information did not infringe on the defendant's privacy rights in that case. Poritz does not stand for the proposition that compilation of information infringes on a defendant's right to privacy; rather, Poritz reiterates that "'the compilation of otherwise hard-to-obtain information alter[ed] the privacy interest implicated by disclosure of that information.'" Poritz, 662 A.2d at 410 (quoting United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989)).

(emphasis added), thus referring to the process involved in public disclosure. Therefore, 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. Consequently, Defendant's contentions fail to specify how compilation of the information alone infringes on his privacy rights.⁶

Finally, as to Defendant's point 2(b), "[u]nder both the United States and the Hawai'i constitutions, classifications with respect to a suspect category⁷ or that infringe on fundamental rights are subject to strict scrutiny." Guidry, slip op. at 36 (footnote omitted). Defendant argues that the fundamental right to privacy is implicated, i.e., "[c]ompilation and public disclosure of 'highly personal and intimate' information[.]"

Because the notification provision does not affect Defendant, as stated supra, his equal protection arguments regarding disclosure need not be addressed. With regard to compilation of information, the initial act of registration "does

⁶ Defendant also contends that "informational privacy" is violated inasmuch as "'sexual relation' which are normally entirely private matters, including past history . . . would rather be forgotten." 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.

⁷ Defendant did not argue that his classification as a sex offender constitutes a suspect classification.

not implicate any fundamental rights to privacy.” Id. at 37 (citing Bani, 97 Hawai‘i at 292-93, 36 P.3d at 1263).

Defendant argues that the statute is overbroad because it “includes persons who represent no danger to the public at all -- and the statute applies to persons convicted of crimes that are not necessarily related to sexual conduct, such as kidnapping and unlawful imprisonment.” Assuming arguendo that lifetime registration implicates a fundamental right to privacy, Defendant does not have standing to challenge HRS chapter 846E as unconstitutionally overbroad because Defendant’s underlying sex offense did not involve kidnapping or unlawful imprisonment of a minor.⁸ Id. at 38-39. “This court has said that one who ‘alleges that a statute is unconstitutionally overbroad, other than a statute affecting the freedom of expression, must be directly affected by the claimed overbroad aspects.” Id. at 38 (quoting State v. Tripp, 71 Haw. 479, 483, 795 P.2d 280, 282 (1990)); see also State v. Kaneakua, 61 Haw. 136, 143-44, 597 P.2d 590, 594 (1979) (holding that “one who alleges that a statute is unconstitutionally overbroad must be directly affected by the claimed overbroad aspects of the statute”).

Additionally, under Guidry, sex offenders may initiate hearings to challenge lifetime registration requirements. Guidry, slip op. at 1-3. Such hearings provide a sex offender

⁸ The record indicates that Defendant was convicted of sex assault in the third degree, in Cr. No. 92-0185.

with the opportunity to present evidence that he or she does not present a threat to the community. See id. In light of the hearing requirement, Defendant's overbroad argument is unpersuasive.

Defendant further maintains that "even if HRS chapter 846E is deemed not to implicate a fundamental right, the statute also fails the 'rational basis' test for similar reasons." But, in Guidry, this court held that HRS chapter 846E "rationally furthers a legitimate state interest." Id. (quoting Baehr v. Lewin, 74 Haw. 530, 573, 852 P.2d 44, 64 (1993)).

Defendant lastly argues that "classifying persons who present no future danger to the public as 'sex offenders' is not rationally related to that interest [(protecting the public)]." Pursuant to the holding in Guidry, "any infirmity with respect to the rational basis requirement is obviated by our 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 the December 14, 2000 order from which the appeal is taken, is affirmed as to the public notification requirements pursuant to Bani, but vacated and the

case remanded as to the registration requirement, pursuant to Guidry.

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

On the briefs:

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