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NO. 24097

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ALAN YUEN, Defendant-Appellant

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 00-1-0368)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.<sup>1</sup>)

Defendant-Appellant Alan Yuen (Defendant) appeals from the January 22, 2001 judgment of the Circuit Court of the First Circuit (the court),<sup>2</sup> convicting him of sexual assault in the fourth degree, pursuant to Hawai'i Revised Statutes (HRS) § 707-733(1)(a) (1993).<sup>3</sup> Defendant was sentenced to one year probation and was ordered to register as a sex offender pursuant to HRS

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<sup>1</sup> Associate Justice Ramil, who heard expedited oral argument in this case on September 4, 2002, retired from the bench on December 30, 2002. See Hawai'i Revised Statutes § 602-10 (1993) (providing, in relevant part, that "[a]fter oral argument of a case, if a vacancy arises . . . , the case may be decided by or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.").

<sup>2</sup> The Honorable Russell Blair presided over this matter.

<sup>3</sup> HRS § 707-733(1)(a) states:

(1) A person commits the offense of sexual assault in the fourth degree if:

(a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion[.]

chapter 846E (Supp. 2001).<sup>4</sup> Upon carefully reviewing the record and the briefs submitted by both parties and having given due consideration to the arguments advanced and the issues raised, we affirm Defendant's conviction of sexual assault in the fourth degree, but vacate the judgment with respect to the notification provision of HRS chapter 846E (Supp. 2001), and remand the case for further proceedings consistent with State v. Bani, 97 Hawai'i 285, 36 P.3d 1255 (2001).

On appeal, Defendant contends (1) that in allowing the testimony of witness Gail Yafuso (Yafuso), the court violated Hawai'i Rules of Evidence (HRE) Rules 403 (1993),<sup>5</sup> 404(a) (Supp. 1994),<sup>6</sup> and 608 (1993),<sup>7</sup> and (2) HRS chapter 846E violates both

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<sup>4</sup> The court's obligation to sentence Defendant to adhere to the requirements of HRS chapter 846E is not addressed, inasmuch as this issue was not raised by the parties. Moreover, because State v. Guidry, No. 22727, slip op. (Haw. Aug. 6, 2004), affords a defendant a hearing at the defendant's request, whether the duty to register stems from the court's sentence or HRS chapter 846E is not material in this case, inasmuch as HRS chapter 846E requires it.

<sup>5</sup> HRE Rule 403 states:

**Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>6</sup> HRE Rule 404(a) provides, in pertinent part, as follows:

**Character evidence not admissible to prove conduct; exceptions; other crime.** (a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- . . . .
- (2) Character of a victim. Evidence of a pertinent trait of character of the victim of the crime

(continued...)

the United States and Hawai'i Constitutions in that they conflict with: (a) procedural due process; (b) the cruel and unusual punishment clauses; (c) the right to privacy; and (d) the equal protection clauses.

Because defense counsel failed to object to Yafuso's specific testimony at trial, any alleged error with respect to Yafuso's testimony raised for the first time on appeal is reviewed for plain error "to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998). We hold that the court did not err by allowing Plaintiff-Appellee State of Hawai'i (the prosecution) to elicit testimony from Yafuso regarding the complainant's competency, professionalism, and "laid-back" nature. Generally, "[e]vidence of a person's character or a trait of a person's character is not admissible for the purpose

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<sup>6</sup>(...continued)

offered by an accused, or by the prosecution to rebut the same . . . .

<sup>7</sup> HRE Rule 608 provides, in pertinent part:

**Evidence of character and conduct of witness.**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) The evidence may refer only to character for truthfulness or untruthfulness, and
- (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

of proving action in conformity therewith . . . except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same[.]” HRE Rule 404(a)(2). Yafuso’s testimony did not fall into the category of impermissible character evidence as defined under HRE Rule 404(a)(2). The testimony regarding the complaining witness’s competence, professionalism, and “laid-back” personality was relevant to the determination of whether the tone of her conversation with Yafuso was out of the ordinary, to illustrate how Yafuso knew the complaining witness, and to explain how Yafuso was able to discern whether the complaining witness was upset or not.

The evidence also does not fall under the limitations of HRE Rule 608. Rule 608 concerns the use of character evidence for the purpose of impeachment or rehabilitation after impeachment. This rule is not applicable because Yafuso’s testimony was not proffered to rehabilitate the complaining witness’s credibility, nor did it go to her character for truthfulness. The evidence was offered to compare the complaining witness’s usual tone of voice to her tone of voice in the telephone call and was not offered to bolster the complaining witness’s credibility.

The evidence did not violate HRE Rule 403. “The determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the trial court’s exercise of its

discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect.” Kealoha v. County of Hawaii, 74 Haw. 308, 315, 844 P.2d 670, 674 (1993) (internal quotation marks and brackets omitted). A reasonable judge could conclude, as the court did in this case, that Yafuso’s testimony was probative of a comparison between the complaining witness’s usual tone of voice with the tone she used in the telephone call to Yafuso. The prejudicial effect to Defendant was not so obvious that the trial court’s failure to exclude the evidence constituted an abuse of discretion, especially in the absence of an objection from defense counsel alerting the judge to the alleged error. Thus, plain error did not occur.

Regarding Defendant’s constitutional challenge to HRS chapter 846E, we hold, consistent with Bani, that the absence of procedural safeguards in the public notification provision of HRS chapter 846E (Supp. 2001) violates the due process requirements of article I, section 5 of the Hawai‘i Constitution, and accordingly renders that public notification provision void and unenforceable.

As to his second argument, this court has held that the due process clause of the Hawai‘i Constitution bars application of the public notification provisions of HRS chapter 846E to Defendant. Thus, notification requirements as applied to

Defendant must be vacated. See Bani, 97 Hawai'i at 287, 36 P.3d at 1257.

In State v. Guidry, No. 22727, slip op. at 2 (Haw. Aug. 6, 2004), the continuing lifetime registration requirement was held to violate procedural due process unless "notice and the opportunity to be heard" was afforded a convicted offender, inasmuch as lifetime registration "implicates a protected liberty interest[.]" Thus, a defendant may seek a hearing which "may be instituted by a sex offender in a special proceeding[]" at any time. Id. at 2-3. Under Bani, the initial registration requirement was valid as to Defendant. Defendant did not file a special proceeding as to continuing registration requirements. Thus, the registration requirement validly applies to Defendant.

Inasmuch as this court has held that 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 addressed.

As to cruel and unusual punishment, Defendant argues that "HRS chapter 846E, as applied to [the Defendant], is grossly disproportionate to the offenses for which he was convicted[.]" However, the Supreme Court has indicated that the "Eight Amendment did not contain a proportionality guarantee . . . '[u]nder the federal constitution[; rather,] the question is . . . whether the statute itself effects a "punishment [which] was both (1) severe and (2) unknown to Anglo-American

tradition.””” Guidry, slip op. at 31-32 (quoting Harmelin v. Michigan, 501 U.S. 957, 978, 991 (1991) (emphasis in original)) (brackets omitted).

The “cruel and unusual” punishment provision in the Hawai‘i Constitution incorporates a proportionality test. Id. at 32-33. 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 (emphasis added). 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 the right to privacy, first, Defendant “has not been afforded a hearing to determine whether public notification . . . is warranted.” Id. at 35-36. Because this violates procedural due process under Bani, the public notification provisions of HRS chapter 846E (Supp. 2001) are unenforceable as to Defendant.<sup>8</sup> See supra. Inasmuch as “the provisions are void as to [Defendant], we need not determine whether, if such

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<sup>8</sup> 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. Application of the public notification requirements of HRS § 846E-3 (Supp. 2003), which were subsequently enacted, is not addressed.

provisions did apply, they violated [Defendant's] right to privacy." Id. at 36.

As to compilation of information, it is difficult to discern Defendant's argument regarding how compilation 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.<sup>9</sup> Consequently, Defendant's contentions fails to specify how compilation of the information alone infringes on his privacy rights. Thus we do not consider this aspect of the claim.<sup>10</sup>

As to equal protection, the notification provision does not affect Defendant, as stated supra, hence his equal protection

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<sup>9</sup> 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).

These objectives are either related to notification or to hearing requirements having to do with procedural due process rather than the right to privacy. It is important to note that any violations of Defendant's right to privacy "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." Guidry, slip op. at 41.

<sup>10</sup> 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.



arguments regarding disclosure need not be discussed. With regard to compilation of information, 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).

Assuming arguendo that lifetime registration implicates a fundamental right to privacy, Defendant does not have standing to challenge HRS chapter 846E as unconstitutionally overbroad to the extent that Defendant’s underlying sex offense did not involve kidnapping or unlawful imprisonment of a minor. Id. at 38-39. Additionally, under Guidry, sex offenders may initiate hearings to challenge lifetime registration requirements. Id. at 1-3. Such hearings provide a sex offender 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.

As to the statute being under inclusive, this court has reasoned that “if the law presumably hits evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.” Id. at 40 (quoting State v. Freitas, 61 Haw. 262, 273-74, 602 P.2d 923 (1979)). Hence, there was no violation of the equal protection clause simply because the legislature focused on sex offenders. Id.

HRS chapter 846E "rationally furthers a legitimate state interest," id. (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 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,

IT IS HEREBY ORDERED that the court's January 22, 2001 judgment convicting Defendant of violating HRS § 707-733(1)(a) is affirmed, except that the notification requirement of HRS chapter 846E (Supp. 2001) as to Defendant is vacated and this case is remanded for proceedings consistent with Bani.

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

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