

NO. 23472

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
CHRISTOPHER GRINDLING, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 00-01-0159)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Christopher Grindling (Grindling) was charged by complaint on March 2, 2000, with Violation of a Temporary Restraining Order for Protection (TRO), in violation of Hawaii Revised Statutes (HRS) § 586-4 (Supp. 1999)¹. A bench

¹ **§586-4 Temporary restraining order.** (a) Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time such order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
- (3) Telephoning the petitioner;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.

(b) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purpose of preventing acts of abuse or preventing a recurrence of actual domestic abuse, and assuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. Where necessary, the order

trial before Judge Douglas J. Sameshima of the Family Court of

may require either or both of the parties involved to leave the premises during the period of the order, and also may restrain the party or parties to whom it is directed from contacting, threatening, or physically abusing the applicant's family or household members. The order shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
- (3) Telephoning the petitioner;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.

(c) When a temporary restraining order is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and
- (2) For the second and any subsequent conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

(d) Any fines collected pursuant to subsection (c) shall be deposited into the spouse and child abuse special account established under section 601-3.6.

the Second Circuit (the family court) was held on April 26, 2000. Grindling was found guilty as charged; sentenced to thirty days of incarceration with twenty-eight days suspended (and credit given for time served) and one year of probation; fined \$150.00; and ordered to pay a Criminal Injuries Compensation Commission fee of \$50.00 and to participate in the Child and Family Services program. The "Judgment of Probation" was entered on April 27, 2000, and the sentence was stayed pending appeal.

On appeal, Grindling contends the family court committed plain error in convicting him of violating the TRO absent evidence that the TRO was properly issued pursuant to HRS § 586-4. Specifically, Grindling contends the TRO was not properly issued pursuant to HRS § 586-4 because the petitioner in the case, Priscilla Vladmir (Vladmir), testified that she obtained the TRO against Grindling "out of spite" because he had previously called the police and had her arrested for abuse. We disagree with Grindling's contention and affirm the April 27, 2000, judgment.

I. BACKGROUND

At trial, Maui County Police Officer Rocky Silva (Officer Silva) identified Grindling as the defendant and testified that he served a TRO on Grindling on February 16, 2000. Officer Silva served the TRO at 6:09 p.m. at Grindling's residence at 98 Alahahele Place in Kahalui, County of Maui, State

of Hawaii. Officer Silva identified State's Exhibit 1 as the order for protection he served on Grindling and State's Exhibit 2 as the proof of service indicating that the TRO was properly served on Grindling. Following a voir dire regarding admissibility of the two exhibits, they were admitted into evidence. After Officer Silva advised Grindling of the terms and conditions of the TRO, Grindling signed the proof of service with his name and the date and time, and identified the location of the service as "home." Officer Silva explained to Grindling that Vladimir was the Petitioner who sought protection under the TRO and that Grindling was not to have any contact with her. Officer Silva testified regarding the terms and conditions of the TRO that "[w]e read it verbatim off of that paper." He added that "[i]t usually takes me about five minutes to read him what he's not supposed to be doing." Officer Silva testified that he read the following to Grindling:

You, and anyone acting on your behalf, do not threaten, physically abuse the Petitioner, anyone living with the Petitioner. Do not contact, write, telephone, otherwise electronically contact by recorded message, pager, et cetera, the Petitioner, including the Petitioner lives or work. Do not remain - do not visit or remain 100 yards of anyplace where the Petitioner lives. Do not violate it even if the Petitioner tells you or invites you to come over to the place.

Officer Silva testified Grindling told him that he understood the terms of the TRO and then Grindling snatched the TRO out of Officer Silva's hand. Grindling explained to Officer Silva that he had been served with "one of these" before, he knew

"what it's all about," and he knew it was about his girlfriend. Officer Silva testified that "[Grindling] was the one that told me the Petitioner's name as I served it to him." Grindling "at no time" told Officer Silva that he did not understand the terms of the TRO. Officer Silva testified that he would not have left the premises if Grindling did not understand the TRO.

Janesti Castello (Castello) identified Grindling as the defendant and testified that she is sixteen-years old and lives down the street from Grindling, although she does not "really know him that well." Grindling lives approximately four houses away on the other side of the street from her. Castello identified Vladimir as Grindling's girlfriend and stated that she has known Vladimir for less than a year. On February 25, 2000, at about 2:00 p.m., Castello was standing outside her house with Vladimir when she heard Grindling yelling at Vladimir from his parked car. Grindling was calling Vladimir to go with him, calling Vladimir a "[f]uckin' whore" once and a "fuckin' bitch" twice. The first time Castello heard Grindling yelling at Vladimir, he was parked in his car in Castello's driveway about forty-five to fifty feet from Vladimir. Vladimir told Grindling to go away because it was not their property and she did not want him to get in trouble. Grindling didn't listen to Vladimir and kept calling her repeatedly. Castello told Vladimir to go in to

Castello's house and call the police, but Vladimir did not want to.

Castello testified that Grindling moved the car to a parked position in the street (about twenty-five feet away from them) and continued yelling at Vladimir from his car. Castello identified this as "the second time" Grindling yelled at Vladimir, telling her to get in his car. At that point, Castello called the police. When the police arrived, Grindling was still in his car yelling for Vladimir. When Vladimir saw the police arrive, she got in her car and began to leave; Castello's father told Castello to tell Vladimir to stop and talk with the police. Vladimir stopped and talked with the police.

Under cross-examination, Castello testified that she and Vladimir spoke to the police. Castello also testified that on February 25, 2000, Vladimir was living with Grindling.

Maui County Police Department Officer Steven Orikasa (Officer Orikasa) testified that on February 25, 2000, he responded to an abuse call "[t]hat a male was yelling at a female" at 75 Alahahele Street in Kahalui. Upon arrival, Officer Orikasa observed a compact gray vehicle parked on the wrong side of the road. Approaching the gray vehicle in his car, Officer Orikasa identified Vladimir standing next to the driver door about three to four feet from the car. Officer Orikasa recognized Vladimir because he "had a case with her the week prior." Officer

Orikasa identified Grindling sitting in the driver's seat of the vehicle. Officer Orikasa recognized Grindling because he had seen Grindling maybe six or seven times on previous cases. Officer Orikasa observed Grindling facing Vladimir's direction, yelling at her. Vladimir looked at Officer Orikasa and then proceeded to walk back towards the residence at 75 Alahele. Officer Orikasa could not hear Grindling yelling, but believed Grindling was yelling based on his hand motions and facial expressions.

Officer Orikasa testified he told Grindling to park his vehicle. Grindling responded that he wanted to take his car back to his house, but Officer Orikasa refused his request and ordered him to park his vehicle. Again Grindling tried to persuade Officer Orikasa to let him return home, but Officer Orikasa again refused and eventually Grindling complied with the order. Officer Orikasa knew there was a TRO between Vladimir and Grindling, so he called police dispatch to run a check as to whether the TRO was active and to identify its terms. Grindling was not under arrest, handcuffed, or searched prior to the check on the TRO. While Officer Orikasa and Grindling waited for the report back on the TRO, Grindling made a voluntary statement that ever since the TRO was served on him, Vladimir had been living with him and he wanted her to move out. Grindling stated that he had no way of getting her out because if he called the police, he

faced arrest. Grindling also told Vladimir to tell the truth about what happened between them in front of the house. Officer Orikasa asked Grindling to refrain from speaking until it was determined whether the TRO was in effect. After the warning, Grindling again told Vladimir to tell the truth and then stopped talking. Once Officer Orikasa received confirmation that the TRO was in effect, he placed Grindling under arrest for "violation of order of protection."

After the State rested, the defense moved for a judgment of acquittal. The family court denied the motion.

Vladimir testified on behalf of the defense. She identified her address as her father's home. Vladimir identified Grindling as her boyfriend of over a year, but stated that "currently we aren't seeing each other because of the whole restraining order situation." Vladimir admitted she issued the TRO against Grindling on or about February 16, 2000. Vladimir contacted Grindling one or two days after the TRO was entered to ask him to help her with her car. Vladimir remained living with Grindling until February 25 -- the day of his arrest.

Vladimir testified that prior to Grindling's arrest on February 25, she and Grindling argued because Grindling just learned that she had been with an ex-boyfriend a "couple of days before showing up at [Grindling's] house, and he was wondering why I was asking him for help and how I could just do that so

easily." The argument began at Grindling's house and lasted a couple of hours before Vladimir "stormed out of the house" and walked to a neighbor's house. Vladimir testified that at no time during the argument at Grindling's residence did Grindling touch her or become physically or verbally abusive. Grindling did not become upset until Vladimir was leaving.

Vladimir testified that she went to the neighbor's house to call someone to pick her up. Grindling came over to the neighbor's house to try to continue talking with her. The police came to the residence moments after she arrived, and, when she saw the police, she "approached [Grindling] again to let him know the police are coming." Grindling remained in his car as Vladimir approached his driver's side door. Vladimir told Grindling that the police were coming because she wanted him to leave before he got arrested. Vladimir's vehicle was parked at the neighbor's residence and she tried to leave herself after the officers arrived. The officers did not let Vladimir or Grindling leave because "they had wanted to ask [Vladimir] some questions about the situation."

Under cross-examination, Vladimir testified she remembered Grindling calling her a "fucking whore" from his house, and, when she arrived at the neighbor's house, the neighbors had heard it from that distance. When Grindling was yelling at Vladimir to come with him in his car, Vladimir told him

that she was "frustrated and irritated and [she] didn't want to deal with it." Vladimir "didn't want to be around him." Vladimir recalled Grindling "calling me a whore because of me being with my ex-boyfriend and doing the restraining order then showing up at his house and asking him for help." Vladimir testified that on the date of trial the TRO was still in effect. The TRO is a no-contact protective order and flows "[f]rom both sides of the party." At a court hearing to be held a couple of days after this trial, Vladimir intends to amend the TRO to allow contact with Grindling. Vladimir wanted to amend the TRO because she wanted to "undo the damage that [she'd] done. The whole restraining order was in spite." Vladimir testified that Grindling has never hit her, but she has hit Grindling many times, thrown things, and broken things.

On re-direct examination, Vladimir testified that she did not consider being called "a fuckin' whore" verbally abusive nor was she threatened by it. Vladimir had filed the TRO because Grindling had her sent to jail for abuse.

Grindling testified on his own behalf. He testified that the TRO was entered against him on February 16, approximately nine days before his arrest for its violation. Vladimir came to Grindling's house about three days after the TRO was entered because "[s]he wanted some money, she wanted to stay there, she wanted her car fixed, she just wanted me to help her,

you know (inaudible) or whatever." Grindling testified that "[s]he was there 24 hours a day, 7 days - I mean, 60 minutes every hour. She - (inaudible) never leave each other's side."

Grindling testified that he "found out about something that she did during that three days" and asking her about it escalated into an argument. Grindling followed Vladimir when she left his house because he "just wanted her to come home and, you know, I said I - I'm sorry." Grindling testified that he "never threatened her or physically abused her." Grindling "never contacted her by telephone or writing or pager or any of those kind of things." Grindling "never went to her house or her work or any of that." Grindling testified that Vladimir came to his house. Grindling believed he was in compliance with the TRO even though he talked with Vladimir and she was in his house because he did not see where it said that "she can't come to me for help." Grindling's intention was to help Vladimir.

Under cross-examination, Grindling testified that he called Vladimir "a fucking whore." He was hurt when he drove his car down the street to follow Vladimir. Grindling testified that he understood the entire TRO.

II. STANDARD OF REVIEW

A. Plain Error

Hawaii Rules of Penal Procedure Rule 52(b) states "[p]lain errors or defects affecting substantial rights may

be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai i 249, 253, 953 P.2d 1347, 1351 (1998) (internal quotation marks omitted). See also Hawai i Rules of Evidence Rule 103(d) (same).

The appellate court "will apply the plain error standard of review 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. Vanstory, 91 Hawai i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks omitted).

III. DISCUSSION

Grindling contends the trial court committed plain error by convicting him of violating an existing TRO in the absence of evidence that the TRO was validly issued pursuant to HRS § 586-4. Because Grindling never challenged the TRO's validity based on Vladmir's testimony that she obtained it out of "spite" and in retaliation for her arrest on abuse charges, the plain error analysis applies to this court's review. The Hawai i Supreme Court in State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), stated:

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error

rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

Id. at 515, 849 P.2d at 74-75 (citation omitted).

Claiming the evidence establishing all of the material elements was lacking, Grindling contends the State failed to prove the existence of a lawful TRO issued pursuant to HRS § 586-4. Hawaii Revised Statutes § 586-4 provides in relevant part:

§586-4 Temporary restraining order. (a) Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other

(b) . . . The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purpose of preventing acts of abuse or preventing a recurrence of actual domestic abuse, and assuring a period of separation of the parties involved.

Grindling contends that, based on Vladmir's testimony at trial that she filed for the TRO "out of spite" and in retaliation for her arrest on abuse charges, the TRO was invalid because there was no actual abuse and therefore no probable cause. Grindling relies on Coyle v. Compton, 85 Hawaii 197, 940 P.2d 404 (App. 1997), where this court stated that "the purpose of the restraining order is to prevent acts of abuse, or a recurrence of actual domestic abuse, and assure a period of

separation of the parties involved." Id. at 205, 940 P.2d at 412 (internal quotation marks and brackets omitted).

In its discussion of a TRO, the State correctly points out that:

Unlike a final or permanent injunction, a temporary or interlocutory injunction is preliminary to a hearing on the merits. The object of a temporary injunction, which may be viewed as an execution before judgment, is not to determine any contested right but simply to prevent a threatened wrong or injury to property or rights until the issues and equities can be determined after a full examination and hearing.

42 Am. Jur. 2d Injunctions § 8 (2000) (footnotes omitted).

In issuing the TRO, the family court relied on Vladimir's February 16, 2000, "Ex Parte Petition for an HRS 586 Temporary Restraining Order" and her included statement, made under penalty of perjury, that the following acts of abuse occurred:

5. The most recent acts of domestic abuse or threats of domestic abuse against me are: 02-12-00 We were arguing because he kept accusing me of hiding a guy in my closet. This argument went on for a couple[] of hours so I left to go up to my parents house. I called Chris back just so he wouldn't worry and get angry. It was his birthday and I told him all I wanted to do was rest and cook him dinner. He told me to come back home, so I did. As I pulled up, Chris was sitting on the grass waiting for me. As we walked up the stairs into the house, I felt that something wasn't right. He suddenly grabbed me by my arms and threw me in the house and closed the door. I noticed that the stove was totally moved up against the other door, blocking it so I wouldn't be able to get out of the house if I needed to. Chris then told me, "you're not going anywhere." I ran to the bedroom and tried to climb out from the window because I was scared. Chris came and pulled me down to the bed, hovered over me and held me down by both of my wrists. He started to call me names. He told me, "you think you can over power me?" Somehow I got out. I ran back towards the front door to unlock it. I didn't have enough time to open the door, so I ran back into the bedroom, jumped out through the window onto the balcony, I ran down

the stairs and tried to run away from him. He got a hold of me and tried to drag me back to his house. The neighbor[]s were outside watching all of this, and Chris made it like I was crazy. He kept saying, "why are you acting crazy? Look at you you're bleeding, let me help you." He tried to drag me back into the house, and as he did that I skidded on my feet. I sat outside of his house crying. I stood up slowly and then ran all the way to Aloha Shell station, and he ran after me. I got there and locked myself in the bathroom. He sat outside and kept on telling me to come out. There was another door in the bathroom so I pushed it open until I could stick my head out and ask for help. I was able to get out of the bathroom through that door, and I talked to the attendants there. They called the police for me.

. . . .

6. In the past the Respondent has committed the following acts of domestic abuse or threats of domestic abuse against me and other people: He is constantly accusing me of fooling around. He has held me down and tried to check my body to see if I was with anyone. He sits in bushes outside of my house and watches every move I make. He tells me every single thing that I have done though out the day, he has grabbed my face and told me I smell like cum, he recently has told me he is nothing with out me and he might as well kill himself. He has made comments about the two of us dieing together to end all of our miseris[.] Another incident I tried to jump out of the car and he pulled my hair. He has also held me in a head lock[.]

The TRO served on Grindling on February 16, 2000, provided notice that a hearing would be held on February 29, 2000, to determine whether the injunction should continue. That hearing would provide an opportunity to cross-examine Vladimir to determine whether the statements made in her petition were truthful. Additionally, Vladimir never testified at trial that the alleged abuse charges were false, but merely that she was motivated to expose the abuse out of "spite" and in retaliation.

Based on the signed statement contained in the ex parte petition that Vladimir signed under penalty of perjury, the family court properly relied on probable cause in preventing "acts of abuse, or a recurrence of actual domestic abuse," by issuing the TRO pursuant to HRS § 586-4. Coyle, 85 Hawai i at 205, 940 P.2d at 412. Therefore, the family court did not plainly err by convicting Grindling of violating the TRO.

IV. CONCLUSION

Accordingly, we affirm the April 27, 2000, "Judgment of Probation" of the family court.

DATED: Honolulu, Hawai i, July 31, 2001.

On the briefs:

Georgia K. McMillen
for defendant-appellant.

Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge