

NO. 23718

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ANTHONY R. HUNN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CR. NO. 99-408866)

MEMORANDUM OPINION

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

On November 21, 1999, Defendant-Appellant Anthony R. Hunn (Hunn) was arrested for Harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2001). On July 31, 2000, Hunn was orally charged and a bench trial was held before Judge Tenney Z. Tongg of the District of the First Circuit, Honolulu Division (the district court). Hunn was found guilty as charged, fined \$50.00, and ordered to pay a Criminal Injuries Compensation Fund assessment of \$25.00. Judgment was entered on July 31, 2000. On appeal, Hunn contends the district court erred in convicting him of Harassment where the State laid its charge in the disjunctive rather than the conjunctive as required by State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977). We disagree with Hunn's contention and affirm the July 31, 2000, Judgment.

I.

The sole issue on appeal is whether the district court erred in convicting Hunn of Harassment where the State laid out the charge in the disjunctive rather than the conjunctive as required by the Hawai'i Supreme Court in Jendrusch, supra. This is a post-conviction challenge. No objection to the charge was made before the district court.

Whether an indictment sets forth all the essential elements of a charged offense is a question of law, reviewable on appeal under the right/wrong standard. State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995).

In Jendrusch, the Hawai'i Supreme Court, holding that the failure to allege an essential element of an offense made a charge "fatally defective," stated:

The accusation must sufficiently allege all of the essential elements of the offense charged. This requirement obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint, and the omission of an essential element of the crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process. This requirement may not be waived or dispensed with, and the defect is ground for reversal, even when raised for the first time on appeal.

58 Haw. at 281, 567 P.2d at 1244 (citations omitted).

In State v. Motta, 66 Haw. 89, 657 P.2d 1019 (1983), the Hawai'i Supreme Court adopted the "liberal construction

standard" for post-conviction challenges. Id. at 91, 657 P.2d at 1020. Under this standard, the Motta court stated that it would "not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." Id. Therefore, the appellate court must "liberally construe the indictment in favor of validity and uphold it, unless there is some showing of substantial prejudice to [defendant], such as that the indictment is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." Id. at 93, 657 P.2d at 1021-22 (internal quotation marks, citation, and ellipsis omitted).

In the present case, Hunn was charged as follows:

[DEPUTY PROSECUTING ATTORNEY]: You're charged with on or about November 21st, 1999, in the City and County of Honolulu, State of Hawaii, with the intent to harass, annoy, or alarm another person, you did strike, shove, kick or otherwise touch another person in an offensive manner or subject another person to an offense [sic] physical contact, thereby committing the offense of Harassment in violation of Section 711-1106(1)(a) of the Hawaii Revised Statutes. Do you understand [sic] this charge?

MR. HUNN: I didn't kick anybody.

THE COURT: How do you wish to plead to the charge?

[DEPUTY PUBLIC DEFENDER]: Do you understand the charge?

MR. HUNN: Yes, I understand it.

THE COURT: How do you wish to plead to the charge?

[DEPUTY PUBLIC DEFENDER]: Not guilty.

Hawaii Revised Statutes § 711-1106(1) (a) provides as follows:

§711-1106 Harassment. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

In the present case, the oral charge tracked the language of the statute, with the exception of the word "offense" before the words "physical contact" instead of the correct word "offensive." The oral charge cannot be said to be "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." Motta, 66 Haw. at 93-94, 657 P.2d at 1021-22. Further, Hunn fails to show how prejudice resulting from the oral charge influenced his conviction.

Where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient.

Jendrusch, 58 Haw. at 283, 567 P.2d at 1245. Following the Hawai'i Supreme Court's "liberal construction standard" for post-conviction challenges as articulated in Motta, we will "not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." 66 Haw. at 91, 657 P.2d at 1020.

II.

Accordingly, we affirm the July 31, 2000, Judgment of the district court.

DATED: Honolulu, Hawai'i, February 7, 2002.

On the briefs:

Cindy A.L. Goodness,
Deputy Public Defender,
for defendant-appellant.

Acting Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge