

NOT FOR PUBLICATION

NO. 25084

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
DEBORAH SPENCE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIFTH CIRCUIT
KAWAIIHAU DIVISION
(CR. NO. KAC-01-579)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Deborah Spence (Spence) appeals from the Judgment entered by Judge Trudy K. Senda on March 28, 2002, convicting Spence of violating the district court's September 20, 2001 "Order Granting Mutual Restraining Order Against Harassment" (September 20, 2001 Order), Hawaii Revised Statutes (HRS) § 604-10.5(h) (Supp. 2002). The March 28, 2002 Judgment sentenced Spence to home detention and electronic monitoring for six weeks. The court stayed the sentence pending appeal.

The HRS state, in relevant part, as follows:

§586-4 Temporary restraining order. (a) Upon petition to a family court judge, an ex parte 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 shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening, or physically abusing the protected party;

(2) Contacting, threatening, or physically abusing any person residing at the protected party's residence; or

(3) Entering or visiting the protected party's residence.

. . . .

(c) . . . 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 purposes of: preventing acts of abuse or preventing a recurrence of actual domestic abuse; and ensuring 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 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. . . .

. . . .

§604-10.5 Power to enjoin and temporarily restrain harassment. (a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

- (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or
- (2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

. . . .

(e) Upon petition to a district court under this section, the court may temporarily restrain the person or persons named in the petition from harassing the petitioner upon a determination that there is probable cause to believe that a past act or acts of harassment have occurred or that a threat or threats of harassment may be imminent. The court may issue an ex parte temporary restraining order either in writing or orally; provided that oral orders shall be reduced to writing by the close of the next court day following oral issuance.

. . . .

(h) A knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor.

In Rosenfeld v. Spence, Civil No. SP-LK-01-63, the District Court of the Fifth Circuit, Lihue Division, entered the September 20, 2001 Order pursuant to a stipulation between Spence and Ms. Dale Rosenfeld (Rosenfeld). The September 20, 2001 Order states, in relevant part, as follows:

- 3(a). [Spence] and any other person acting on behalf of [Spence] are hereby restrained and enjoined from:
1. contacting, threatening, or physically harassing [Rosenfeld] and/or any person(s) residing at [Rosenfeld's] residence;
 2. telephoning [Rosenfeld];
 3. entering and/or visiting the premises, including yard, and garage of [Rosenfeld's] residence and place of employment.
- 3(b). [Rosenfeld] and any other person acting on behalf of [Rosenfeld] are hereby restrained and enjoined from:
1. contacting, threatening, or physically harassing [Spence] and/or any person(s) residing at [Spence's] residence;
 2. telephoning [Spence];
 3. entering and/or visiting the premises, including yard, and garage of [Spence's] residence and place of employment.
4. Said mutual injunction shall be effective as of Thursday, September 20, 2001, and shall be in full force and effect for a period of 3 years or months from said date unless terminated or modified by appropriate orders by this Court.

The alleged offense occurred at the Kamalani 2001 project, a large scale volunteer improvement project within Lydgate Park in Wailua, Kaua'i. The Kamalani 2001 project included construction of a "bike/wheelchair" bridge 500 yards in length. There were between 200 to 300 volunteers working on the bridge at any given time on an average day. Rosenfeld and Spence were long-time volunteers at the Kamalani 2001 project. On Thursday, November 1, 2001, Rosenfeld arrived at the project at

about 7:00 a.m. When Spence arrived at about 10:30 a.m., Rosenfeld was in the volunteer tent. Rosenfeld testified, in relevant part, as follows:

A. . . . We had people in the parking area, and the area that I specifically was was my base of work was a tent where we were signing volunteers in at the very beginning of the bridge build site.

Q. Now, you've mentioned a tent to sign people in, were there other tents?

A. Yes, there were.

Q. And where were they in relation to each other?

A. The tent that was the volunteer sign-in was just after the parking area. There is a tent a couple of hundred feet away that was an eating area. There was a tent about a hundred feet away that was the serving area for food because we fed all of the volunteers.

There was a tent down closer to the bridge itself that had first aid, and I was in charge of the first aid tent as well.

. . . .

Q. And where was Ms. Spence when you first saw her?

A. She was hiding in the woods near the volunteer tent.

Q. How close to you was Ms. Spence?

A. Probably about a hundred feet away.

Q. And what was she doing?

A. She appeared to be watching me.

Q. What did you do?

A. At that time I called the police.

Q. What did Ms. Spence do after you saw her watching you?

A. She stood and stared at me for awhile and then she went into the food tent, got some food and went back into the woods with the food.

Q. And about how long was she watching you?

A. A good few minutes standing there.

John Lydgate testified, in relevant part, as follows:

Q. Did you see Ms. Spence that day on November 1st?

A. Yes, I did, and she came up in a very nice way and asked me if she could help.

. . . .

Q. Was Dale Rosenfeld around at the --

A. She was in the tent signing up people and I suggested she not go over there.

. . . .

A. The bridge itself is 500 yards, the tent where [Rosenfeld] was was about 300 yards, a good distance. . . .

. . . .

Q. But you did inform Ms. Spence that it would be best if she stayed away from Ms. Rosenfeld?

A. Yes. Well, I did say that she not go down the bridge area. She was not properly attired, she wasn't a carpenter and have her tools, and the work area is a hard hat area.

Q. Right. And she shouldn't also go to the volunteer tent because Ms. Rosenfeld was there?

A. Yes, I did say, yes.

Following closing arguments, the court ruled, in relevant part, as follows:

The court is not indicating that it considers the defendant showing up on the Kamalani Kai bridge project site in and of itself a violation of the order. That is - and if that were just the set of facts with nothing more specific, then the court would have acquitted the defendant. The problem that exists here for the defendant is that, yes, while it's possible that the two of them, Ms. Rosenfeld and the defendant might not have run into each other, the defendant, by Mr. Lydgate's testimony was instructed, number one, don't go by the bridge area because she wasn't equipped with the right shoes and hard hat. But she was also informed, pursuant to Mr. Lydgate's testimony, that he instructed the defendant when she was approximately 300 . . . yards away from the volunteer tent, that she should not go in that area because Ms. Rosenfeld was there. And he was aware of the tension between the defendant and Ms. Rosenfeld. The fact that the defendant then by Ms. Rosenfeld's testimony ends up about a hundred feet away as opposed to 300 yards away from the volunteer tent for at least a few good minutes or a good few minutes, I believe the testimony was, doing nothing, apparently, except for her staring at the defendant [sic], the court feels does constitute a knowing violation of the order and, therefore, the court is going to find that the state has met its burden of proof beyond a reasonable doubt.

Assuming the September 20, 2001 Order was authorized by HRS § 604-10.5, the only two ways Spence possibly violated it was

by (1) "entering and/or visiting the premises, including the yard, . . . of [Rosenfeld's] . . . place of employment[,]" or (2) "physically harassing" Rosenfeld.

Regarding (1), it appears that both Spence and Rosenfeld were long-time volunteers at the Kamalani 2001 project. Assuming the "volunteer tent" and the area immediately surrounding it could reasonably be considered Rosenfeld's "place of employment[,]" the "tent . . . that was the serving area for food" and the area immediately surrounding it were not. Especially in light of Rosenfeld's testimony that "[t]he food serving tent was maybe a hundred feet away from the volunteer tent[,]" Rosenfeld's testimony that Spence "was hiding in the woods near the volunteer tent" "[p]robably a hundred feet away" and then "stood . . . and then went into the food tent, got some food and went back into the woods with the food" is not substantial evidence that Spence entered "the premises, including the yard, . . . of [Rosenfeld's] . . . place of employment."

Regarding (2), Rosenfeld's testimony that Spence was "hiding in the woods near the volunteer tent" "[p]robably about a hundred feet away" "watching" Rosenfeld and "stood and stared at [Rosenfeld] for" "a good few minutes" and "then [Spence] went into the food tent, got some food and went back into the woods with the food" is not substantial evidence that Spence violated the prohibition against "contacting, threatening, or physically harassing" Rosenfeld.

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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 March 28, 2002 Judgment from which this appeal is taken is reversed.

DATED: Honolulu, Hawai'i, July 31, 2003.

On the briefs:

Mitsuhiro Murakawa, Deputy Public Defender, City and County of Honolulu, for Defendant-Appellant.	Chief Judge
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Craig A. De Costa, Deputy Prosecuting Attorney, County of Kauai, for Plaintiff-Appellee.	Associate Judge
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Associate Judge