

NOT FOR PUBLICATION

NOS. 25198 AND 25199

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MICHAEL J. KELLY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT,
NORTH AND SOUTH KONA DIVISION
(Citation Nos. 1458383MH and 1493090MH)

MEMORANDUM OPINION

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

Defendant-Appellant Michael J. Kelly (Kelly) appeals from the June 3, 2002 Judgment entered by the District Court of the Third Circuit (the district court),¹ convicting him of, and sentencing him for, Criminal Trespass in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-814 (Supp. 2002).²

Kelly argues that his conviction should be reversed or vacated because: (1) there was insufficient evidence adduced at trial to find him guilty of Criminal Trespass in the Second Degree, and (2) the district court violated his due process

¹ Judge Joseph P. Florendo, Jr. entered the Judgment from which this appeal was taken.

² Hawaii Revised Statutes (HRS) § 708-814 (Supp. 2002) states, in relevant part:

Criminal trespass in the second degree. (1) A person commits the offense of criminal trespass in the second degree if:

- (a) The person knowingly enters or remains unlawfully in or upon premises that are enclosed in a manner designed to exclude intruders or are fenced[.]

rights when it shifted the burden on him to prove that he was on public land.

We vacate the Judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

Following a consolidated bench trial held on June 3, 2002, Kelly was convicted on two Criminal Trespass in the Second Degree charges that stemmed from citations issued by County of Hawai'i police officers on February 7, 2002³ and March 8, 2002. The March 8, 2002 citation, numbered 1458383 MH, charged Kelly with trespassing on March 8, 2002 "in an area open to the public: Kohanaiki (Pine Trees)."

At trial, three witnesses testified for Plaintiff-Appellee State of Hawai'i (the State).

James Sogi (Sogi) testified that he had been appointed by the president of Nansay Hawaii (Nansay) "to prevent trespassing and to prevent sanitation and health problems that result from the trespassing from the long-term and homeless camping problem" on an approximately 400-acre piece of property owned by Nansay, "commonly known as Kohanaiki" (Kohanaiki).

³ The District Court of the Third Circuit (the district court) entered separate judgments for the charges stemming from the February 7, 2002 and March 8, 2002 citations. Defendant-Appellant Michael J. Kelly (Kelly) has appealed only from the Judgment entered on June 3, 2002, convicting and sentencing him for committing Criminal Trespass in the Second Degree on March 8, 2002, as charged in Citation No. 1458383MH.

According to Sogi, Kohanaiki was the makai⁴ portion of an ahupua'a⁵ located in North Kona. Kohanaiki extended inland "from Wawahiwa'a Point down to the Queen Ka'ahumanu Highway."

Kohanaiki's shoreline extended from its "northern boundary at Puhili Point to the southerly boundary of Wawahiwa'a [Point] to the boundary of the Honokohau National Park."

Sogi further testified that in his capacity as Nansay's representative, he had "been making regular sweeps and patrol of the area for the last two and a half years. And [Kelly] has been there pretty much every time[,] " located generally in the same area, "set up with a tent, water, car, dogs[, a] bed and chairs[.]" Sogi mentioned that on September 22, 2000, he issued Kelly a "Trespass Notice[,]" warning Kelly that he was trespassing and would be subject to arrest, contempt of court, or forcible removal if he did not leave the premises and remove all his property within forty-eight hours. Sogi subsequently visited Kohanaiki with police officers on two or three other occasions and found Kelly at the same location. Each time, Kelly was asked to leave and given a written trespass notice, but each time, Kelly refused to leave.

Upon further questioning, Sogi indicated that Kohanaiki was comprised of "all lava fields" and was "only accessible by

⁴ "Makai" is the Hawaiian word for "ocean." Mary K. Pukui & Samuel H. Elbert, Hawaiian Dictionary 225 (1986).

⁵ An "ahupua'a" is a "[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the altar as tax to the chief." Id. at 9.

vehicle on . . . two roads": the road through the Natural Energy Laboratory, which was gated and access blocked from the northern end; and the "Old Jeep Road that leads from Queen Ka'ahumanu Highway" that formerly had a locked chain across it. Sogi acknowledged that the chain and its lock had been broken but said, "We intend to replace that[.]" Sogi also admitted that there were "no signs that state private property."

On cross-examination, Sogi stated that although Kohanaiki was "zoned hotel/resort[,]" there was no hotel on Kohanaiki. Sogi also testified that there were three- or four-foot-tall "stone walls from old times" which delineated the boundaries of Kohanaiki. However, there were no "modern fences."

The State's next witness was Hawai'i County police officer Rollin Rabara (Officer Rabara), who testified that he had accompanied Sogi to "[t]he beach location called Pine Trees or Kohanaiki" on February 7, 2002, seen Kelly sleeping on the "far south side of the property[,]" and cited Kelly for "Simple Trespass."

The State's final witness, Hawai'i County police officer Clyde Kawauchi (Officer Kawauchi), testified that he had encountered Kelly at "[t]he area known as Pine Trees or Kohanaiki" prior to March 8, 2002. On those prior occasions, Officer Kawauchi stated that Kelly "was issued notices that he was trespassing, and he basically would tell us that he wasn't going to leave." On March 8, 2002, Officer Kawauchi accompanied

Sogi to the "Kohanaiki/Pine Trees area" to do a "sweep." After encountering Kelly, who refused to leave the property, Officer Kawauchi cited Kelly for Criminal Trespass, in violation of HRS § 708-814. On cross-examination of Officer Kawauchi, the following colloquy occurred:

Q Are you familiar with the area Pine Trees where you saw [Kelly]?

A Yes, I am.

Q Is that area -- that area is not totally fenced or enclosed; is that correct?

A No, it's not.

Q It is not fenced?

A Yeah.

Q And there are no signs posted there; is that correct?

A Not that I'm aware of.

Q Not that -- you've never seen any signs?

A There is now signs.

Q But there were not signs previously?

A I don't believe there were signs at that time.

Q You mean there were no signs there on February 7th of 2002?

A Posted signs?

Q Yeah.

A Not to my knowledge or recollection.

Q Okay. And when you were down there on March 8th of 2002, there were no posted signs?

A No.

Q Okay. There are no commercial activities going on on that property now, are there?

A I don't believe so.

Q There aren't, are there?

A Not to my knowledge.

Kelly then took the stand. He testified that the "area that's denoted as Pine Trees is where the surfers go." He was cited in an area that had never been fenced off and was located "about a half-mile down from the surfers beach, south of the surfers beach." On cross-examination, Kelly admitted that he was "within" Kohanaiki when he was cited for trespassing on March 8, 2002. The following colloquy then ensued between the deputy prosecutor and Kelly:

Q And you had in the past been told by the police that you were not supposed to be on that property; isn't that correct?

A I was told I was trespassing. And I responded to the police that I was on public land, that the high-water mark determines the delineation between public land and private property. And my camp has been overrun many times by the ocean.

Q You have been given -- do you recognize that notice there?

A No.

Q He never -- [Sogi] never gave you this?

A No. They're lying. They were lying.

. . . .

Q But you had known from September before that you had been told not to be on the property?

A I believe I'm on public land. And I don't believe they have the right to --

Q You believe you're on public land? Is that true?

A It is my understanding that the high-water mark determines the delineation between public land and private land. My camp has been overrun by the sea quite a number of times; therefore, I insist that I am on public land.

Following closing arguments, the district court orally ruled that the State had proved beyond a reasonable doubt that Kelly committed Criminal Trespass in the Second Degree. The

district court also held that Kelly "ha[d] failed to prove by clear and convincing evidence that he [was] within the public boundary." Before sentencing Kelly, the district court asked Kelly whether he wished to make a statement. The following dialogue then ensued:

[KELLY]: I did not expect that I would have to have witnesses, but I do have witnesses about being overrun by the ocean. And, well, that will come out on appeal.

THE COURT: Let me ask you: What do you mean when you're overrun by the water?

[KELLY]: I dry out and try to find my stuff.

THE COURT: You move up to higher land?

[KELLY]: No. Because then I'll be on private property.

THE COURT: You go back into the submerged area?

[KELLY]: I'm on private property.

THE COURT: Then I don't move? You stay on the water?

[KELLY]: The last time it knocked me off the chair. At nine o'clock at night it overran my camp, spread everything out, carried it off into the woods.

THE COURT: But you didn't go back into the water area, did you? You moved up to higher land?

[KELLY]: I have not moved -- well, I dried everything out.

THE COURT: You moved back up into higher land?

[KELLY]: Yes.

THE COURT: You stayed at the water's edge?

[KELLY]: Yes.

THE COURT: You couldn't have left all of your things in the water when you're in storm surf. The water comes in and surges. There are sets, right? You mean to tell me you stayed in that area during the sets?

[KELLY]: Well, it's occasional that they happen. And it's got to be a southern swell, like when it's high water from the west or northwest.

THE COURT: You can't tell me that you're going to stay in harm's way.

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[KELLY]: I'm telling you exactly that.

THE COURT: You stay there. I don't believe you.

[KELLY]: I'm on public --

THE COURT: I don't believe you. I think you move up into higher ground.

[KELLY]: I have not removed my camp. It remains.

THE COURT: Maybe you misunderstand my questions. On those occasions when storm surf comes and the storms -- you say the surf is going to overrun your campsite, you move away, don't you?

[KELLY]: Well, no. Because it comes in and knocks me around, knocks me, my camp around and --

THE COURT: So you stay there?

[KELLY]: Yes.

THE COURT: Even though the waves are overrunning the campsite?

[KELLY]: It was only at like half a full moon and high tide. And it was just -- that's what it takes, a conjunction of things to

THE COURT: I don't believe that. Any reasonable person would move away from the storm. That's crazy.

[KELLY]: Because I insist that I'm on public land. I move inland, then I'm on private property.

THE COURT: Then you're trespassing.

[KELLY]: So I don't move. Please don't call me a liar. I'm not. I have not moved.

THE COURT: I just don't understand why someone wouldn't leave their campsite when the surf is overrunning. That doesn't make any sense at all. I'd be afraid. I would move. Any reasonable person would move. Maybe you go, move away, and dry off and then go back. I can understand that. But I don't think that you just stay right in the middle of the waves.

[KELLY]: They already receded. They come in, do their damage, and then go away.

THE COURT: When you have a storm-surf period, you don't just have one wave come up.

[KELLY]: No. It was two.

THE COURT: Some occasions you would have more than two. This storm lasts for a period of hours, even days.

[KELLY]: Yes. And it was coming up very close to camp.

THE COURT: I think you're crazy if you just stayed within the reach of the waves.

[KELLY]: I'm a haole. I'm a little bit lolo.^[6]

THE COURT: So I'll find you guilty and place you on probation for one year on the standard terms and conditions of probation.

(Footnote added.)

On June 19, 2002, the district court entered written Findings of Fact; Conclusions of Law; Judgment of Conviction that expressly superseded its "oral findings and conclusions issued at trial on June 3, 2002." The district court found and concluded, in relevant part, as follows:

I. FINDINGS OF FACT

James Sogi, an attorney and representative for Nansay Hawaii is familiar with the Kohanaiki ahupuaa located in North Kona, County and State of Hawai'i. The President of Nansay Hawaii, Philip Ho, designated Sogi to represent the company in its efforts to address trespassing, sanitation and health concerns within the makai portion of Kohanaiki. He is familiar with the area's boundaries and has conducted regular "sweeps" in the area with local law enforcement in an effort to exclude trespassers. The makai portion of the ahupuaa consists of approximately 400 acres. There are ancient stone fences three (3) to four (4) feet tall bordering the property and a gated entry to the property near the Natural Energy Laboratory. In addition, there was a chain across an access road. However the chain and a lock were damaged. No signs were in place to indicate ownership of the property.

Sogi is familiar with [Kelly] because he has encountered Kelly several times in the past (2) years within the property owned by Nansay. On those past occasions he observed Kelly within a "residence or permanent camp" area with a tent, a bed and chairs, dogs, and water. He had asked Kelly to leave the area and served him a trespass notice on September 9, 2000 and February 7, 2002. Kelly refused to leave on each occasion.

On February 7, 2002 Sogi and [Officer Rabara] observed Kelly on the southern end of the Kohanaiki ahupuaa owned by

⁶ "Lōlō" is the Hawaiian word for "[p]aralyzed, numb, feeble-minded, crazy." Id. at 211.

Nansay. At that time Kelly was sleeping. [Officer Rabara] cited Kelly for Criminal Trespass.

On March 8, 2002 [Officer Kawauchi] and Sogi observed Kelly on the property. Upon Kelly's refusal to leave the property, [Officer Kawauchi] cited him for Criminal Trespass.

II. CONCLUSIONS OF LAW

The State charged Kelly with two violations of HRS § 708-814(1)(a). There is no dispute that Kelly was within the Kohanaiki ahupuaa on February 7 and March 8, 2002. Nor is there a question that Kelly acted "knowingly" since he was informed orally and in writing that his presence on the land was not permitted. [Kelly] raises two (2) defenses: First, that the State has failed to prove beyond a reasonable doubt that the property was "enclosed in a manner designed to exclude intruders or are fenced". Second, that Kelly was within public lands and thus not within Nansay's property.

The [c]ourt finds that the State has proven beyond a reasonable doubt that the property was "enclosed in a manner designed to exclude intruders" through Sogi's testimony that the property was bounded by ancient stone walls three (3) to four (4) feet in height and by a gate at the Natural Energy Lab.

Kelly's defense that he was within public lands is supported by his testimony alone. [Kelly] believes he was living on public lands because in the past, his campsite had been inundated by high surf. In County of Hawaii v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63, 55 Haw. 677 [sic] (1973) the Hawaii'i Supreme Court held that "Land below the high water mark . . . is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." (citation and internal quotation marks omitted), cert. denied, 419 U.S. 872, 42 L. Ed. 2d 111, 95 S. Ct. 132 (1974). The [c]ourt also observed that "the precise location of the high water mark on the ground is subject to change and may always be altered by erosion." Thus the high water mark is not where the waves wash upon the shoreline at different times during the year. Rather the high water mark is the property's vegetation line.

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka⁷; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season (citation omitted

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"Mauka" is the Hawaiian word for "inland." Id. at 242.

[sic]), the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves. Id. at 182.

Kelly argues that he was within public lands because on occasion, his campsite had been submerged by high surf. However, even if his campsite was affected by the surge of the surf, that fact does not prove that he was located on public lands during the periods in question. As *Sotomura* decreed, public lands are located below the vegetation line, not within property merely affected by the wash of the waves during stormy periods.

III. Judgment.

The State has proven beyond a reasonable doubt that Kelly knowingly entered or remained in or upon premises which were enclosed in a manner designed to exclude intruders on February 7, 2002 and March 8, 2002. [Kelly] is therefore GUILTY of the [sic] each offense of Criminal Trespass in the Second Degree (Citation Nos. 1458383 & 1493090).

(Footnote added, other footnotes omitted.)

This timely appeal followed.

DISCUSSION

A. Sufficiency of the Evidence

The Hawaii Penal Code provides for varying degrees of the offense of trespass. A person commits the offense of Criminal Trespass in the First Degree, a misdemeanor, if:

- (a) That person knowingly enters or remains unlawfully:
 - (i) In a dwelling; or
 - (ii) In or upon the premises of a hotel or apartment building;
- (b) That person:
 - (i) Knowingly enters or remains unlawfully in or upon premises that are fenced or enclosed in a manner designed to exclude intruders; and
 - (ii) Is in possession of a firearm, as defined in section 134-1, at the time of the intrusion; or
- (c) That person enters or remains unlawfully in or upon the premises of any public school as defined in section 302A-101, or any private school, after reasonable warning or request to leave by school authorities or a police officer; provided however,

such warning or request to leave shall be unnecessary
between 10:00 p.m. and 5:00 a.m.

HRS § 708-813 (Supp. 2002).

Criminal Trespass in the Second Degree, the offense
Kelly was convicted of, is defined in relevant part, as follows:

Criminal trespass in the second degree. (1) A person
commits the offense of criminal trespass in the second
degree if:

(a) The person knowingly enters or remains
unlawfully in or upon premises that are enclosed
in a manner designed to exclude intruders or are
fenced[.]

. . . .

(2) Criminal trespass in the second degree is a
petty misdemeanor.

HRS § 708-814 (Supp. 2002).

Finally, HRS § 708-815 describes the offense of Simple
Trespass as follows:

Simple trespass. (1) A person commits the offense of
simple trespass if the person knowingly enters or remains
unlawfully in or upon premises.

(2) Simple trespass is a violation.

HRS § 708-815 (1993).

Pursuant to HRS § 702-206(2), the word "knowingly" is
defined, in pertinent part, as follows:

- (a) A person acts knowingly with respect to his conduct
when he is aware that his conduct is of that nature.
- (b) A person acts knowingly with respect to attendant
circumstances when he is aware that such circumstances
exist.
- (c) A person acts knowingly with respect to a result of
his conduct when he is aware that it is practically
certain that his conduct will cause such a result.

HRS § 702-206(2) (1993). Pursuant to HRS § 708-800 (1993), the
word "premises" is defined as including "any real property." The

same statutory section defines "enter or remain unlawfully" in pertinent part, as follows:

"Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person. . . . A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner.

Id. (emphasis added.) Pursuant to the foregoing definition, a statutory presumption exists that a person who enters or remains upon unimproved and apparently unused land that is not fenced or enclosed in a manner designed to exclude intruders is licensed and privileged to be on the land.

According to the Commentary on the trespass statutes:

The essence of the offense of criminal trespass is "entering and remaining unlawfully," as defined by § 708-800. It is basic to the offense that the actor have some knowledge that the actor's presence on the premises is not licensed, invited, or privileged.

Under that definition, a person does not transgress when he enters or stays in a place open at the time to the public, unless he is specifically warned not to enter or remain. The fact that some portions of the premises were open to the public, including the defendant, does not mean that he has a privilege with reference to closed-off portions.

The simple offense (i.e., § 708-815) is defined in terms of entering or remaining on premises with knowledge of this fact ("...the person knowingly enters or remains unlawfully in or upon premises"). Simple trespass is a violation.

Two degrees of aggravated trespass are provided by the Code. The most serious aggravation occurs when the trespass is to a dwelling as defined in HRS § 708-800. Section 708-813 (criminal trespass in the first degree), makes this offense a misdemeanor. "The alarm caused to

inhabitants by the entry, and the likelihood of violence which may injure someone, including the intruder, are sufficient to warrant increased penalties." A second, less serious aggravation, occurs when the premises are enclosed or fenced. Under § 708-814 (criminal trespass in the second degree), this kind of trespass is made a petty misdemeanor.

. . . .

Previous Hawaii law imposed a single low-grade misdemeanor sanction for trespass. The offense was not differentiated, as in the Code, and did not account adequately for the varying circumstances in which trespass may arise.

Commentary on §§ 708-813 to 708-815 (1993) (comparing elements of trespass statutes) (footnotes omitted).

Kelly contends that he was improperly convicted of Criminal Trespass in the Second Degree because insufficient evidence was adduced by the State that the premises he was accused of criminally trespassing on was "enclosed in a manner designed to exclude intruders or . . . fenced."

The Hawaii Penal Code does not define what constitutes "premises which are enclosed in a manner designed to exclude intruders or are fenced." The Commentary on the Alabama Criminal Code, which includes a similar classification of trespass offenses as Hawai'i,⁸ observes, in part:

⁸ In Madden v. Deere Credit Servs., Inc., 598 So. 2d 860 (Ala. 1992), the Alabama Supreme Court made the following observation about two trespass statutes included in the Alabama Criminal Code:

Ala. Code 1975, § 13A-7-3(a)[] provides that "[a] person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in a building or upon real property which is **fenced or enclosed in a manner designed to exclude intruders.**" (Emphasis added.) Section 13A-7-4(a) provides that "[a] person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon **premises.**" Id. at 866. (Emphasis added.)

In formulating the offense of criminal trespass, the *Criminal Code recognizes the seriousness of unauthorized intrusions upon premises. . . .*

. . . .

Section 13A-7-3 provides for liability if one knowingly enters or remains unlawfully in a building or on real property which is fenced or enclosed so as to exclude intruders. *Such conduct indicates a deliberate invasion of another's property, and in many cases is the prelude to tortious or more serious criminal conduct. . . .*

The second place protected by § 13A-7-3--fenced or enclosed property--may present occasional difficulty. However, it will always be for the trier of fact to determine whether the fence or other device was "*designed to exclude intruders.*" At one extreme may be an eight foot fence, topped with barbed wire, obviously designed to exclude intruders. On the other hand, shrubbery that is two feet high may not be so designed, e.g., the owner's purpose is decorative rather than protective.

§§ 13A-7-2 through 13A-7-4 Commentary, Ala. Code § 13A-7-4 (1975).

In this case, Sogi testified that there were three- to four-foot-tall "stone fences from ancient times which delineate[d] the boundaries" of Kohanaiki. Sogi also stated that there was a gated entry to Kohanaiki near the Natural Energy Laboratory and a second vehicular access road that was not chain locked at the time Kelly was cited. The district court determined, based on such testimony, that "the State had proven beyond a reasonable doubt that the property was 'enclosed in a manner designed to exclude intruders.'"

In reviewing the legal sufficiency of evidence to support a conviction, we are required to consider the evidence adduced in the trial court in the strongest light for the prosecution. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998). In this regard, the test "is not whether guilt is

established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." Id. (internal quotations and citations omitted).

"Substantial evidence" as to the material elements of a charged offense "is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id. (internal quotation and citation omitted).

In this case, the record is unclear as to where Kelly was cited. Such location is critical since, under HRS § 708-814(1), it is the premises upon which Kelly was cited that must be "enclosed in a manner designed to exclude intruders or [be] fenced." The testimony of the State's witnesses and the maps that the State admitted into evidence indicate that the location where the State claims Kelly was cited was on the southern portion of Kohanaiki, quite a distance away from the gated road near the Natural Energy Laboratory and inland from the ocean. Although there was testimony that the Old Jeep Road provided additional vehicular access to Kohanaiki, there is no indication in the record where such a road was located, nor whether that road, which Sogi admitted was not then chained off to block access to Kohanaiki, was located closer to the site where Kelly was cited. Additionally, the testimony of the police officers and Kelly was that Kelly was cited near the beach, in an

area that was not fenced or enclosed, and which had no posted signs warning the public to keep out of the area.

B. Whether the District Court Unconstitutionally Shifted the Burden of Proof to Kelly on the Issue of the Location of the Camp

In In re Application of Ashford, 50 Haw. 314, 316-17, 440 P.2d 76, 78 (1968), the Hawai'i Supreme Court judicially recognized the ancient Hawaiian tradition, custom, and usage of locating the seashore boundaries dividing private land and public beaches "along the upper reaches of the waves as represented by the edge of vegetation or the line of debris." Subsequently, in County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), the supreme court clarified that the vegetation line, rather than the debris line, is the correct seaward boundary:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

Id. at 182, 517 P.2d at 62 (footnote omitted).

Kelly's primary defense at trial was that he was on public land⁹ and not on privately owned land at the time he was cited for Criminal Trespass in the Second Degree. In support of

⁹ There is no requirement in HRS § 708-814 (Supp. 2002) that Criminal Trespass in the Second Degree occur on privately owned property. A person can be convicted of the offense as long as the person "knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced[,]" and no distinction is made in HRS § 708-814 as to the nature of the ownership of the premises.

this defense, Kelly testified that every few months, his campsite became briefly submerged by a wave or two, thus indicating that he was located below the upper wash of the waves and thus on the public beach.

In addressing Kelly's defense, the district court concluded that the testimony by Kelly that

his campsite was affected by the surge of the surf . . . does not prove that he was located on public lands during the periods in question. As *Sotomura* decreed, public lands are located below the vegetation line, not within property merely affected by the wash of the waves during stormy periods.

The district court erred in its construction of Sotomura. In Sotomura, the supreme court held that the "upper reaches of the wash of the waves" is the seaward boundary between private and public property. Sotomura, 55 Haw. at 182, 517 P.2d at 62. Recognizing that the "upper reaches of the wash of the waves" varies over the course of a year, depending on the seasons, the supreme court established the vegetation line, which marks the year's highest wash of the waves, as the presumptive border between public and private land. Id. at 182, 517 P.2d at 62. Under Sotomura, therefore, if Kelly were camping in a location that was affected by the waves, Kelly must presumptively have been camping on public land below the vegetation line.

The district court concluded that the fact that Kelly's "campsite was affected by the surge of the surf . . . does not prove that [Kelly] was located on public lands during the periods

in question."¹⁰ In so concluding, the district court appears to have treated Kelly's defense as an "affirmative defense"¹¹ and shifted the burden to Kelly to disprove the location that he was accused of criminally trespassing on.

To the extent that the district court's ruling can be construed as relieving the State of its ultimate burden to prove,

¹⁰ Plaintiff-Appellee State of Hawai'i (the State) argues that this conclusion by the district court reflected only the district court's weighing of the credibility of the evidence and the district court's determination that "there [was] no credible evidence that [Kelly] was actually on public land[.]" We disagree. It is the State's burden to prove, beyond a reasonable doubt, each of the elements of the offense charged. The location of Kelly is critical to an adjudication of a second degree trespass charge. The State's argument seeks to hide a shift in the burden of proof under a credibility determination, but this amounts to the State inferring a lack of reasonable doubt by Kelly's alleged failure to demonstrate he was not on the private land he was charged with trespassing. This is impermissible.

¹¹ HRS § 701-115 provides, in relevant part:

Defenses. (1) A defense is a fact or set of facts which negatives penal liability.

(2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:

(a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or

(b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.

(3) A defense is an affirmative defense if:

(a) It is specifically so designated by the Code or another statute; or

(b) If the code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence.

HRS § 701-115 (1993).

beyond a reasonable doubt, the elements of Criminal Trespass in the Second Degree, and to disprove, beyond a reasonable doubt, Kelly's defense, we conclude that the district court erred as a matter of law.

Accordingly, we vacate the June 3, 2002 Judgment, convicting Kelly of Criminal Trespass in the Second Degree, and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, November 7, 2003.

On the briefs:

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