

NOT FOR PUBLICATION

NO. 26060

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
NED NARMORE, Defendant-Appellant

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CR. NOS. 01394220, 01464996, 01464985, 01464969, 01464980)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., and Nakamura, J.;
and Lim, J., Concurring in Part and Dissenting in Part)

After a bench trial before the Honorable Rhonda Nishimura, Defendant-Appellant Ned Narmore (Narmore) was found guilty of two charges of Criminal Use of a Noxious Substance, in violation of HRS § 708-828(1) (1993),^{1/} and three charges of Criminal Property Damage in the Fourth Degree, in violation of Hawaii Revised Statutes (HRS) § 708-823(1) (1993).^{2/} As to each of these offenses, Judge Nishimura sentenced Narmore to a six-month term of probation, to be served concurrently, and to pay a fine of \$200, a probation fee of \$75, and \$25 to the Criminal

^{1/} HRS § 708-828(1) (1993) provides in relevant part that "[a] person commits the offense of criminal use of a noxious substance if the person knowingly deposits on the premises . . . of another, without the other's consent, any stink bomb or device, irritant, or offensive-smelling substance, with the intent to interfere with another's use of the premises"

^{2/} Hawaii Revised Statutes (HRS) § 708-823(1) (1993) provides that "[a] person commits the offense of criminal property damage in the fourth degree if the person intentionally damages the property of another without the other's consent."

Injury Compensation Fund. Judge Nishimura also ordered that Narmore stay away from members of the Alana family, who were victimized by Narmore's offenses.

Two Judgments reflecting Narmore's convictions for Criminal Use of a Noxious Substance were filed on December 18, 2003, and three Judgments reflecting his convictions for Criminal Property Damage in the Fourth Degree were filed on October 8, 2003, all in the District Court of the First Circuit, Wai'anae Division (district court). Narmore appeals from these five Judgments.

On appeal, Narmore claims that: 1) the district court erred in denying his oral motion to suppress videotapes produced by a surveillance camera installed by Sue Alana, Narmore's neighbor; 2) there was insufficient evidence to support his convictions for Criminal Use of a Noxious Substance; and 3) there was insufficient evidence to support his convictions for Criminal Property Damage in the Fourth Degree. After a careful review of the record and the briefs submitted by the parties, we resolve Narmore's claims on appeal as follows.

I.

Narmore lived next to the Alana family (the Alanas), whose members included Sue Alana, her husband, her mother, and her three sons. Sue Alana set up a surveillance camera after noticing urine on her outside furniture and then seeing Narmore

throw urine onto a tarp and freezer outside her house. Sue Alana installed the camera upon the advice of the police and others so that she could provide evidence of Narmore's suspected misconduct. The surveillance camera was focused on a bench on the Alanas' property that had been doused with urine, but the camera also included a view of Narmore's yard. The surveillance camera was connected to a video cassette recorder (VCR).

On December 2, 2002, just prior to the beginning of trial, Narmore orally moved to suppress videotapes made by Sue Alana with the surveillance camera that showed Narmore throwing things onto the Alanas' property. Narmore claimed that the videotapes violated his right to privacy because they depicted him engaging in activities in his own yard. The district court denied the motion on procedural and substantive grounds.

We reject Narmore's claim that the court erred in denying his motion to suppress the videotapes. The surveillance camera was installed in an area where Narmore's property was separated from the Alanas' property by a chain-link fence. Anyone standing on the Alanas' property in that area would have a clear view of the portion of Narmore's property shown by the surveillance camera. Narmore did not have a reasonable expectation of privacy with respect to his acts that were captured on the videotapes because he committed those acts in open view. See, State v. Brighter, 60 Haw. 318, 322, 589 P.2d

527, 530 (1979) (holding that the defendant did not have a reasonable expectation of privacy with respect to marihuana plants growing behind his residence that were visible from the driveway); State v. Augafa, 92 Hawai'i 454, 464-65, 992 P.2d 723, 733-34 (App. 1999). The district court therefore properly denied Narmore's suppression motion on substantive grounds.

In addition, Narmore made his oral motion to suppress evidence more than nine months after he was arraigned.^{3/} Rules 12(b)(3) and 12(c) of the Hawai'i Rules of Penal Procedure (HRPP) require that motions to suppress evidence be made within 21 days after arraignment unless the court otherwise directs. Narmore's motion was untimely and the district court did not err in also denying the motion on procedural grounds. HRPP Rule 12(e) (a party waives his or her right to raise an objection by failing to make it within the required time).

II.

Narmore's claim that there was insufficient evidence to support his two convictions for Criminal Use of a Noxious Substance is without merit. These convictions were based on

^{3/} The district court calendar showed that on March 1, 2002, Defendant-Appellant Ned Narmore (Narmore) was orally arraigned on both charges for Criminal Use of a Noxious Substance and on two of the three charges for Criminal Property Damage in the Fourth Degree on which he was later convicted. The calendar further showed that Narmore was present in court and pleaded not guilty to the remaining Criminal Property Damage in the Fourth Degree charge on November 2, 2001, indicating that he was arraigned on that charge on that date. Narmore did not orally move to suppress the videotapes until December 2, 2002.

incidents that occurred on September 25, 2001 and September 26, 2001. The videotapes pertaining to those incidents, which were admitted in evidence, captured Narmore in the act of throwing liquids and other objects onto the Alanas' property. Sue Alana testified that she looked in the areas where Narmore could be seen throwing things on the videotapes. On September 25, 2001, Sue Alana found urine on her bench and dog feces, a used diaper, and urine in her yard. On September 26, 2001, Sue Alana found urine on the pool table in her patio area, urine on her bench, and urine on the cement in her yard. Contrary to Narmore's contentions, Sue Alana was capable of identifying the liquid she found as urine without having the liquid subjected to a laboratory analysis; Narmore's intent to interfere with the Alanas' use of their premises could be inferred from Narmore's conduct; and urine is sufficiently offensive-smelling to permit the district court to find that Narmore's conduct interfered with the Alanas' use of their premises. Narmore's convictions for Criminal Use of a Noxious Substance were supported by substantial evidence.

III.

Narmore's three charges for Criminal Property Damage in the Fourth Degree were based on allegations that Narmore threw rocks onto the Alanas' property, which caused damage in separate incidents occurring on September 19, 2001, September 20, 2001,

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and October 9, 2001. Narmore's rock-throwing allegedly tore the Alanas' tarp on September 19, 2001, scratched the paint of the truck belonging to Sue Alana's husband on September 20, 2001, and cracked the windshield of Sue Alana's car on October 9, 2001.

We reject Narmore's claim that there was insufficient evidence to support his convictions on the September 19, 2001 and October 9, 2001 charges. The videotape, admitted in evidence, of Narmore throwing an object in the direction of the tarp, the accompanying thud heard on the videotape, and Sue Alana's testimony that she subsequently discovered a tear in the tarp were sufficient to support the conviction on the September 19, 2001 charge. One of Sue Alana's sons, who was 16 years old, testified that he saw Narmore throw a rock that cracked the windshield of Sue Alana's car. This testimony was sufficient to support Narmore's conviction on the October 9, 2001 charge.

On the other hand, we agree with Narmore that there was insufficient evidence to support his conviction on the September 20, 2001 charge. Sue Alana testified that on September 20, 2001, she found a rock in the bed of her husband's truck and saw that the paint of her husband's truck had been scratched and chipped off. Portions of a videotape pertaining to the alleged September 20, 2001 incident were played during the trial. As the State of Hawai'i (the State) concedes, however,

this particular videotape was not admitted in evidence.^{4/} After watching a portion of the September 20, 2001 videotape, Narmore testified that the videotape shows him throwing an object. He further testified that the videotape shows him throwing the object in the direction of the road, which was "not even close" to where the Alanas parked their truck. The State did not rebut Narmore's testimony regarding the direction of his throw. We conclude that there was insufficient evidence to link Narmore to the damage done to the truck, and therefore reverse his conviction on the September 20, 2001 charge for Criminal Property Damage in the Fourth Degree.

IV.

In conclusion, we affirm the district court's December 18, 2003 Judgments. We also affirm the district court's October 8, 2003 Judgments which pertain to the September 19, 2001 and October 9, 2001 charges, but reverse the October 8, 2003 Judgment which relates to the September 20, 2001 charge. We note that none of the five Judgments filed in the district court show that Narmore was found guilty after a trial. We order the

^{4/} Sue Alana's testimony concerning the September 20, 2001 incident appeared so disjointed that this court suspected that a portion of her testimony had not been transcribed. We therefore ordered the parties to advise the court whether a portion of Sue Alana's testimony was missing from the transcript submitted on appeal. Both parties, however, responded that the transcript submitted was complete.

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district court to file Amended Judgments showing that Narmore was found guilty after trial.

DATED: Honolulu, Hawai'i, May 6, 2005.

On the briefs:

Catherine H. Remigio
Deputy Public Defender,
for Defendant-Appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Corinne KA Watanabe
Acting Chief Judge

Ces H. Nelson
Associate Judge