

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 27424

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JOHN P. DUNBAR, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CRIMINAL NO. 04-1-0450(1))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant John P. Dunbar (Dunbar) appeals from the Judgment entered on June 29, 2005 in the Circuit Court of the Second Circuit by Judge Joel E. August. Dunbar was found guilty of Attempted Escape in the Second Degree, Hawaii Revised Statutes (HRS) §§ 710-1021(1), § 705-500, and 701-109(4)(b) (1993), and sentenced to probation for five years subject to sundry conditions including the following:

- F. You must pay a fine in the amount of \$500.00 to the Clerk of the Court.
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- I. You must obtain and maintain mental health treatment or services, including anger management treatment or services, domestic violence intervention, medication and/or tests if ordered, as directed by your probation officer, until clinically discharged with the concurrence of your probation officer. You shall be responsible for payment for such treatment.

On August 5, 2004, Dunbar was arrested by the police for disorderly conduct. On September 20, 2004, Dunbar was indicted for Harassment, HRS § 711-1106(1)(b) (Supp. 2005),

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Escape in the Second Degree, HRS § 710-1021(1) (1993), and Resisting Arrest, HRS § 710-1026(1) (Supp. 2005).

The bench trial occurred on February 28, 2005 and March 1, 2005. After the presentation of the State's case, Dunbar moved for a judgment of acquittal. The court granted the motion regarding the charges of Harassment and Resisting Arrest and denied it regarding the charge of Escape in the Second Degree. Thereafter, Dunbar presented evidence and never renewed his motion for a judgment of acquittal. At the conclusion of the trial, the court found Dunbar guilty of Attempted Escape in the Second Degree.

On April 8, 2005, the court entered Amended Findings of Fact, Conclusions of Law, and Verdict (FsOF, CsOL, and Verdict). The CsOL state in part:

1. . . . [B]ecause the crime of disorderly conduct under Hawai'i law requires behavior directed toward a member of the public, and because police officers are not considered "members of the public," Officer Johnson did not have probable cause to arrest [Dunbar] for that offense

. . . .

4. Officer Johnson testified that when [Dunbar] was taunting him at close range [Dunbar's] hands were at his side and that he, Officer Johnson, was not angry. Seen in the light most favorable to the State, there is insufficient evidence to indicate that such conduct was so outrageous that it exacerbated a risk that a properly trained officer exercising reasonably professional standards would be provoked into a violent response. Furthermore, [Dunbar's] verbally challenging or daring Officer Johnson to arrest him for continuing to order the police off his property could not be considered "fighting words" or a personal attack on the officer. Based upon the evidence, this Court concludes that there was no probable cause to charge [Dunbar] with Harassment as to Officer Johnson. . . .

. . . .

8. [Dunbar's] actions during the course of his initial arrest clearly constituted mere non-submission and there was no

evidence to warrant a properly trained officer to believe that he had probable cause to arrest and charge [Dunbar] with resisting arrest under HRS § 710-1026.

9. Even though [Dunbar's] arrest for disorderly conduct, harassment, or resisting arrest may have been unlawful, that circumstance does not provide a defense to the charge of Escape in the Second Degree. [Dunbar], at the time he ran from the officers, had been placed under arrest under color of law and was therefore in "custody" as that term is used in HRS § 710-1021

. . . .

. . . .

12. . . . [T]he State has proven beyond a reasonable doubt that [Dunbar] knew or was aware that he was under arrest and in custody at the time he stood up from the ground and started running. The State has also proven beyond a reasonable doubt that [Dunbar's] rapid flight in a direction away from the officers was a substantial step in a course of conduct intended to culminate in his escape from custody.

On June 29, 2005, the court denied Dunbar's March 11, 2005 motion for a new trial. On July 25, 2005, Dunbar filed a notice of appeal.

Dunbar does not challenge any FsOF. He challenges only CsOL nos. 9 and 12. In the Opening Brief, Dunbar contends:

1. As there was no probable cause to arrest Dunbar for harassment and resisting arrest, plain error occurred in finding Dunbar guilty of attempted escape; the evidence of the escape charge was fruits [sic] of the poisonous tree and should have been suppressed/dismissed with the other 2 counts, harassment and resisting arrest. . . .

2. The trial court erred in denying judgment of acquittal as to all 3 counts, . . . The harassment and resisting arrest counts were dismissed while the escape in the second degree was not dismissed, but should have as the statutes are to be consistently construed between escape and resisting arrest. . . .

. . . .

3. The Court erred in denying the Motion for new trial and in ruling that Dunbar attempted to escape. . . .

4. The trial court abused its discretion in assuming the role of prosecutor in this case in finding Dunbar guilty of attempted escape in the second degree when the State never thought to charge attempted escape in the second degree in the indictment. . . .

5. The Court erred in ordering mental health counseling as a condition of probation as the record was silent as to its need.

In the Reply Brief, Dunbar contends:

The ultimate question in Dunbar's case that the fruit of the poisonous tree doctrine poses is, regarding the prior illegality, would the police nevertheless have discovered the evidence? On the record before this Honorable Court, the answer is clearly that, absent the arrest, the police would not have been able to charge Dunbar with escape or attempted escape. Therefore the escape charge should have been dismissed when the underlying offenses of harassment and resisting arrest were dismissed. . . .

. . . .

. . . But in Dunbar's case there was no probable cause to arrest, an illegal arrest, and an illegal custody. An illegal custody cannot be converted to a legal custody to charge escape. Technically Dunbar was never even in custody because there was no legal arrest!

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 applying the law relevant to the issues raised and arguments presented, we hold:

1. The offense of Escape in the Second Degree requires that the escape be made from police custody. There is no requirement that the police custody be lawful police custody.
2. In light of HRS § 701-109(4)(b), the charge of Escape in the Second Degree includes the charge of Attempted Escape in the Second Degree.
3. The Court did not order mental health counseling as a condition of probation. It validly ordered "mental health treatment or services, . . . as directed by [Dunbar's] probation officer."

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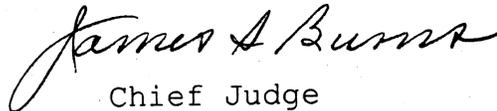
Therefore, IT IS HEREBY ORDERED that the Judgment entered on June 29, 2005 is affirmed.

DATED: Honolulu, Hawai'i, September 21, 2006.

On the briefs:

Shawn A. Luiz
for Defendant-Appellant.

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge