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NOS. 27461 and 27462

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NO. 27461

STATE OF HAWAII, Plaintiff,
v.
ARNALDO R. ANCHETA, Defendant
(FC-CRIMINAL NO. 04-1-1787)

AND

NO. 27462

STATE OF HAWAII, Plaintiff-Appellee,
v.
ARNALDO PINION ANCHETA,
also known as Arnaldo R. Ancheta,
Defendant-Appellant

(FC-CRIMINAL NO. 05-1-1388)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Arnaldo Pinion Ancheta, also known as Arnaldo R. Ancheta (Arnaldo), appeals from the August 15, 2005 Judgment entered in the Family Court of the First Circuit.¹

In the Philippines, Arnaldo and Cristina C. Ancheta (Cristina) were married on April 7, 1999 and Cristina gave birth to a daughter (Daughter) on April 11, 2001.

In FC-CR No. 04-1-1787, a complaint was filed against Arnaldo charging that in Honolulu, on July 1, 2004, he physically

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assaulted Cristina and committed the offense of Abuse of Family or Household Member.

Arnaldo alleges that when he filed for divorce and sought custody of Daughter, Cristina sent Daughter back to the Philippines and, in doing so, she committed kidnaping. Cristina sent Daughter to the Philippines in August of 2004. To induce her to testify in this case, the State granted her transactional immunity.²

On August 23, 2004, in FC-DA No. 04-1-1418, Judge Nancy Ryan entered an Order For Protection that prohibited Arnaldo from "contacting" or "telephoning, writing or otherwise electronically communicating" with Cristina, and specified:

The parties cannot together agree to change any part of this order without a prior court order. [Cristina] cannot alone change or decide not to enforce this Order without a prior court order. [Cristina] is prohibited by [Hawaii Revised Statutes (HRS)] Section 702-222 from intentionally soliciting or aiding [Arnaldo] in violating this Order by failing to report a violation, by initiating contact, by allowing contact or by coming withing [sic] the prohibited distances of [Arnaldo] (unless otherwise provided for by this Order).

Any participation by [Cristina] to solicit or aid [Arnaldo's] violation of this Order is not a defense to any criminal prosecution against any party for a violation of this Order.

The terms and conditions of this order were read to Arnaldo in court and he was provided with a copy of the order.

² At the pre-trial hearing on the State's motions in limine, counsel for Defendant-Appellant Arnaldo Pinion Ancheta, also known as Arnaldo R. Ancheta (Arnaldo) stated in part:

Then . . . after my client told [Cristina C. Ancheta (Cristina)] that . . . he was going to divorce her because she didn't want to live with him, then before he could serve the divorce papers and the paternity papers on her, she sent her child back to the Philippines where the child was taken outside of the jurisdiction without the permission of the Family Court committing an offense, a felony offense of kidnaping [sic] for which the State, in order to induce her to testify to get her testimony, has given her immunity.

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On February 9, 2005, Cristina gave birth to a son (Son).

On March 1, 2005, in FC-DA No. 04-1-1418, Cristina filed a motion to dissolve the Order For Protection. At the March 21, 2005 hearing on the motion, Cristina changed her mind and withdrew her motion.

On March 25, 2005, on the voice-mail of Cristina's cellular telephone, Arnaldo asked Cristina "can you talk to me a little bit?" On April 25, 2005, in FC-CR No. 05-1-1388, a complaint charged Arnaldo with having violated the Order For Protection.³ Count 1 charged him with having done so on March 25, 2005. Count 2 charged him with having done so on April 2, 2005.

On June 6, 2005, the court entered an Order Granting Defendant's Oral Motion to Consolidate Cases for Trial.

On July 8, 2005, at the request of the State, the court entered an order stating that

³ Hawaii Revised Statutes (HRS) § 586-11 (Supp. 2005) states in part:

Violation of an order for protection. (a) Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

(1) For a first conviction for violation of the order for protection:

(A) That is in the nature of non-domestic abuse, the person may be sentenced to a jail sentence of forty-eight hours and be fined not more than \$150; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine[.]

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[Cristina] is afforded a grant of transactional immunity pursuant to Section 621C-4⁴ of the Hawaii Revised Statutes with regards to incidents that occurred on July 1, 2004, (FC-Cr. No. 04-1-1787) and March 25, 2005, and April 2, 2005, (FC-Cr. No. 05-1-1388) involving [Arnaldo][.]

(Footnote added.)

On August 9, 2005, at the pre-trial suppression hearing, counsel for Arnaldo alleged that Cristina married him to get herself into the United States and manufactured the charges so that she could remain in the United States. Specifically, "everything she has done and said to him, including the parentage of the children, she has lied about."

[COUNSEL FOR ARNALDO]: In this case she has a motive to lie. She concocted a scheme to get to this country. The jury can certainly infer that[.] I don't have to show that by direct evidence. I can show that by state of mind from which they can infer that everything that she's saying and doing here is part of a motive on her part to create a situation that enables her to stay in this country. That is our defense. It is not merely this is going to come down to a case of what she said and what he said, two witnesses testifying. In that situation I am entitled to go into her motive for lying.

THE COURT: You're going to cross-examine her on the question of her motive for coming into this country?

. . . .

THE COURT: And if she admits to it, fine. And if she doesn't admit to it, that's the end of it?

[COUNSEL FOR ARNALDO]: I'm going to ask her if, when she came to this country, she refused to live with her husband.

THE COURT: All right. And she's going to say Yes or --

⁴ HRS § 621C-4 (1993) states as follows:

Transactional immunity. If a person is ordered to testify or produce a record, document, or other object under this chapter and the order specifies that the person is granted transactional immunity pursuant to this section, such person shall not be prosecuted or punished in any criminal action or proceeding for or on account of any act, transaction, matter, or thing concerning which the person is so ordered to testify or produce a record, document, or other object, except that the person may be prosecuted for perjury, for giving a false statement, or for an offense involving a failure to comply with the order.

[COUNSEL FOR ARNALDO]: She's going to say yes to that.⁵

THE COURT: All right. That's not character evidence. I will allow that.

. . . .

THE COURT: But with regard to the fact that she had this motive from the beginning and all the other things that you might have argued to the court, I'm going to find that that's character evidence. In other words, you are welcome to cross-examine the witness as to what her intent was and we will leave it to her to answer yes or no.

. . . .

[COUNSEL FOR ARNALDO]:

. . . . But in order to understand our version of what [Arnaldo] is going to say, that she was the aggressor, that she was the person who precipitated that incident, you have to hear what led up to that to make it credible because it is within a context where she was looking for a way out of this relationship. That is our theory of this case.

Then . . . after [Arnaldo] told her that . . . he was going to divorce her because she didn't want to live with him, then before he could serve the divorce papers and the paternity papers on her, she sent [Daughter] back to the Philippines where [Daughter] was taken outside of the jurisdiction without the permission of the Family Court committing an offense, a felony offense of kidnapping [sic] for which the State, in order to induce her to testify to get her testimony, has given her immunity.

⁵ Cristina did not say yes. She testified in part:

Q [BY COUNSEL FOR ARNALDO]: So you willingly went with your husband to live in his house in Waialua? Is that what you're telling the jury?

A Yes, sir.

. . . .

Q Now defense counsel asked . . . what happened when you first came to the United States. Uh, could you . . . tell the jury again what your understanding was of how the living arrangements were going to be when you came to the U.S.

A Before I came we have conversations from the telephone telling me that he's gonna rent a place where we both live and that he's telling me also that we're not going to live under his sister's house.

Q And were you happy with that arrangement?

A Yes, sir.

Q When you came to the United States and you found out that . . . that wasn't true, that you would be living . . . in your husband's family compound; for lack of a better word, how did that make you feel?

A I feel disappointed. . . .

A (. . .) I did not expect him to take me there where they live because that's not what he told me.

. . . [A]ll of a sudden then she has a second child. She needs my client again.

Then [Cristina] begins to pursue [Arnaldo] and says she wants to withdraw the temporary restraining order, she's changed her mind, she wants to reconcile with him. She goes to see him at his workplace. She constantly is calling and she's pursuing him, and then again she changes her mind. All of that goes to her credibility and her reliability in the nature of this relationship.

. . . .

THE COURT: The offer made by [counsel for Arnaldo] was that there was some persistence on the part of [Cristina] to contact [Arnaldo]. The court has indicated that that's a proper subject for the jury to evaluate when determining the credibility of [Cristina] when she alleged . . . that it was [Arnaldo] who violated the restraining order.

. . . .

[COUNSEL FOR ARNALDO]: . . . I would like to complete my offer of proof so we're clear:

. . . .

[COUNSEL FOR ARNALDO]:

But after that child was born in early February [Cristina] then made repeated efforts to try and contact [Arnaldo] through my law office and through him directly and other members of his family and pursued him aggressively telling him and telling my staff, . . . , that she was anxious to reconcile with him, that she wanted to withdraw the restraining order, she didn't feel that any restraining order was necessary, and she wanted to talk to him and whereupon she was told that she would have to take steps to withdraw the restraining order before he would have any contact with her.

She then filed a request to withdraw the restraining order, personally took it out to serve it on him at his job site and made numerous continued efforts to contact him during that time frame leading up the [sic] phone calls which she alleges occurred in March where he was merely responding to her efforts to get in touch with him which occurred during that time period.

That is the evidence that we seek to offer which the court has largely precluded. And, so the record is clear, we will not pursue those matters except as to the limited issues which the court has allowed us to pursue in front of the jury.

(Footnote added.)

At the trial, upon examination by his counsel, Arnaldo testified in part:

Q Did you ever make any effort to telephone her?

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A No. She was the one who called me.

Q Okay. Now on March - up to March 25th did you have a phone number where you could call her?

A Um, she left a number to my lead man, but it took me one week before I called her because she was always calling.

.

Q [COUNSEL FOR ARNALDO]: [Arnaldo], when you called [Cristina] on March 25, 2005, did you think it was okay to call her?

A She came to give me a paper. She showed me a paper, and she told me that the restraining order has already been cancelled and told me that it's already okay to call.

[COUNSEL FOR THE STATE]: Objection, Your Honor. Move to strike.

THE COURT: Well, the court is going to grant the motion to strike as nonresponsive. Shall we try again.

.

Q [COUNSEL FOR ARNALDO]: [Arnaldo], when you called [Cristina] on the 25th of March, did you believe that it was permissible for you to do so? And I want you to just simply answer yes or no.

A Yes.

In part, the court instructed the jury:

There are three material elements of the offense of the Violation of an Order for Protection each of which the prosecution must prove beyond a reasonable doubt. These three elements are:

.

3. That on or about March 25, 2005, in the City and County of Honolulu, State of Hawaii, the defendant engaged in conduct which was prohibited by the order for protection.

The prosecution must prove beyond a reasonable doubt that the defendant acted intentionally or knowingly as to each element of the offense.

In his closing argument, counsel for Arnaldo argued in

part:

With respect to the phone calls, certainly we have admitted without any question whatsoever that that is Arnaldo's voice on the tape recording. You heard what he said. All he said was we have to talk. And he explained to you that the reason and the state of mind that he had when he made that phone call was that he was responding to her persistent efforts to get in touch with him. That's what he said.

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Now you can conclude from that, I submit, that his intent, his state of mind was not to violate the order but to respond simply to a call in which there was something related to her about the baby - something to him about the baby being sick and about persistent efforts on her part to try and reach him. If you don't think that was his state of mind, and if you think the prosecutor beyond a reasonable doubt has proven that he intentionally and knowingly violated the order at that point --

.
. . . [I]f you think the prosecutor has proved beyond a reasonable doubt that my client intentionally or knowingly violated the court order when he made that phone call, then he's guilty.

On August 12, 2005, after a trial, a jury decided that Arnaldo was not guilty of the alleged July 1, 2004 and April 2, 2005 offenses, and that he was guilty of the alleged March 25, 2005 offense. The court sentenced Arnaldo to imprisonment for two days with credit for time served.

Arnaldo filed a notice of appeal on August 24, 2005. This case was assigned to this court on June 20, 2006.

Arnaldo presents three points on appeal: (1) The court reversibly erred (a) when it prohibited him from impeaching Cristina by presenting evidence that Cristina had been granted immunity, and (b) when the Court affirmed its prohibition after Cristina, upon examination by counsel for Arnaldo, unequivocally denied being promised anything in return for her testimony at trial;⁶

⁶ At the trial, Cristina testified in part:

Q Has anybody made any promises to you in return for your testimony here today?

A No, sir.

Q Nobody's promised you anything?

A No, sir.

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(2) The court reversibly erred when it prohibited him from impeaching Cristina by presenting any evidence that, in the divorce case, he was disputing Cristina's allegation that he was the biological father of Daughter and Son; and

(3) The court reversibly erred when it prohibited him from presenting evidence of Cristina's actions and statements, prior to his telephone call to her on March 25, 2005, that led him to believe that she had withdrawn the Order For Protection.

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 court's pre-trial suppression order prohibiting Arnaldo from impeaching Cristina by presenting evidence that Cristina had been granted immunity was reversible error.

2. The court's pre-trial suppression order prohibiting Arnaldo from impeaching Cristina by presenting any evidence that, in the divorce case, he was disputing Cristina's allegation that he was the biological father of Daughter and Son was not error.

3. The following pre-trial suppression order by the court was not error:

[T]hat [Cristina] had this motive from the beginning and all the other things that you might have argued to the court, I'm going to find that that's character evidence. In other words, you are welcome to cross-examine the witness as to what her intent was and we will leave it to her to answer yes or no.

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4. The court's pre-trial suppression order prohibiting evidence that, on March 1, 2005, Cristina filed a motion to dissolve the Order For Protection and, at the March 21, 2005 hearing on the motion, Cristina changed her mind and withdrew her motion was not error.

5. Pre-trial, the court indicated that it would permit evidence "that there was some persistence on the part of [Cristina] to contact [Arnaldo]." At the trial, the following was stated:

Q [COUNSEL FOR ARNALDO]: [Arnaldo], when you called [Cristina] on March 25, 2005, did you think it was okay to call her?

A She came to give me a paper. She showed me a paper, and she told me that the restraining order has already been cancelled and told me that it's already okay to call.

[COUNSEL FOR THE STATE]: Objection, Your Honor. Move to strike.

THE COURT: Well, the court is going to grant the motion to strike as nonresponsive. Shall we try again.

Q [COUNSEL FOR ARNALDO]: [Arnaldo], when you called [Cristina] on the 25th of March, did you believe that it was permissible for you to do so? And I want you to just simply answer yes or no.

A Yes.

These rulings were not erroneous. However, although sundry inaudibles prevent the transcript from being clear, it appears that the court subsequently did prohibit Arnaldo, in response to a properly worded question, from testifying why, when he called Cristina on March 25, 2005, he thought it was okay to call her. This prohibition was reversible error.

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Therefore, IT IS HEREBY ORDERED that the August 15, 2005 Judgment is vacated and this case is remanded for a new trial on Count 1 in FC-CR No. 05-1-1388.

DATED: Honolulu, Hawai'i, September 26, 2006.

On the briefs:

Eric A. Seitz and
Lawrence I. Kawasaki
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge