

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27594

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
RAVICHANDRAN SHIVARAMAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CRIMINAL NO. 99-0220(2))

MEMORANDUM OPINION

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

Defendant-Appellant Ravichandran Shivaraman

(Shivaraman) appeals from the October 14, 2005 Order Revoking Probation and Resentencing Defendant (Revocation Order).¹ We affirm.

BACKGROUND

On August 14, 2000, Shivaraman pled no contest to a charge of Theft in the First Degree, Hawaii Revised Statutes (HRS) § 708-830.5(1) (1993). In the December 28, 2000 Judgment, the court sentenced Shivaraman to probation for five years. The Terms and Conditions of Probation stated, in part:²

5. You must notify a probation officer promptly if arrested or questioned by a law enforcement officer;

¹ The Honorable Shackley F. Raffetto presided.

² The Special Terms and Conditions of Probation for Defendant-Appellant Ravichandran Shivaraman (Shivaraman) also required Shivaraman to "pay a Crime Victim Compensation fee in the amount of \$100.00 and Probation fee of \$150.00, at the rate of \$200 per month commencing after payment of restitution."

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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SPECIAL TERMS AND CONDITIONS
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- B. You are committed to the custody of the Director of the Department of Public Safety for a period of SEVEN (7) MONTHS of jail confinement, mittimus to issue at 9:00 a.m. on December 29, 2000.

- C. You must pay restitution in the amount of \$67,403.30, at the rate of at least \$1000 per month, commencing THIRTY (30) DAYS after your release from incarceration with future modifications in the payment schedule, as may be dictated by changes in employment or other pertinent personal circumstances, to be made in accordance with the Adult Probation Division's Restitution Computation Formula.

Following completion of his seven-month Hawai'i jail term, Shivaraman was the subject of deportation proceedings and incarcerated at the Federal Detention Center. Although the immigration court and the Board of Immigration Appeals ruled against him, Shivaraman eventually prevailed in Shivaraman v. Ashcroft, 360 F.3d 1142 (C.A.9 2004) and was released on March 15, 2004. Shivaraman secured employment at Mortgage Plus on O'ahu on May 1, 2004. More than a year later, on May 13, 2005, Shivaraman filed a Motion to Modify Probation (Motion to Modify). With his motion, he presented evidence that on May 11, 2005, he mailed from Honolulu to the Second Circuit's "Fiscal Department" the sum of \$3,000. He did not present any evidence that he made any restitution payment prior to May 11, 2005. On May 20, 2005, the State of Hawai'i (the State) filed a Motion For an Order To Show Cause and Issuance of a Warrant of Arrest for Shivaraman's alleged violation of "Special Condition C" (Motion for OSC).

HRS § 706-625 (Supp. 2005) states in part:

Revocation, modification of probation conditions. (1) The court, on application of a probation officer, the prosecuting attorney, the defendant, or on its own motion, after a hearing, may revoke probation except as provided in subsection (7), reduce or enlarge the conditions of a sentence of probation, pursuant to the provisions applicable to the initial setting of the conditions and the provisions of section 706-627.

(2) The prosecuting attorney, the defendant's probation officer, and the defendant shall be notified by the movant in writing of the time, place, and date of any such hearing, and of the grounds upon which action under this section is proposed. The prosecuting attorney, the defendant's probation officer, and the defendant may appear in the hearing to oppose or support the application, and may submit evidence for the court's consideration. The defendant shall have the right to be represented by counsel. For purposes of this section the court shall not be bound by the Hawaii rules of evidence, except for the rules pertaining to privileges.

(3) The court shall revoke probation if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony. The court may revoke the suspension of sentence or probation if the defendant has been convicted of another crime other than a felony.

(4) The court may modify the requirements imposed on the defendant or impose further requirements, if it finds that such action will assist the defendant in leading a law-abiding life.

(5) When the court revokes probation, it may impose on the defendant any sentence that might have been imposed originally for the crime of which the defendant was convicted.

(6) As used in this section, "conviction" means that a judgment has been pronounced upon the verdict.

(7) The court may require a defendant to undergo and complete a substance abuse treatment program when the defendant has committed a violation of the terms and conditions of probation involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, unlawful methamphetamine trafficking as provided in section 712-1240.6, or involving possession or use of drug paraphernalia under section 329-43.5. If the defendant fails to complete the substance abuse treatment program or the court determines that the defendant cannot benefit from any other suitable substance abuse treatment program, the defendant shall be subject to revocation of probation and incarceration.

HRS § 706-644 (Supp. 2005) states in part:

Consequences of nonpayment; imprisonment for contumacious nonpayment; summary collection. (1) When a defendant is sentenced pursuant to section 706-605, granted a conditional discharge pursuant to section 712-1255, or granted a deferred plea pursuant to chapter 853, and the defendant is ordered to pay a fee, fine, or restitution, whether as an independent order, as part of a judgment and sentence, or as a condition of probation or deferred plea, and the defendant defaults in the payment thereof or of any installment, the court, upon the motion of the prosecuting attorney or upon its own motion, may require the defendant to show cause why the defendant's default should not be treated as contumacious and may issue a summons or a warrant of arrest for the defendant's appearance. Unless the defendant shows that the defendant's default was not attributable to an intentional refusal to obey the order of the court, or to a failure on the defendant's part to make a good faith effort to obtain the funds required for the payment, the court shall find that the defendant's default was contumacious and may order the defendant committed until the fee, fine, restitution, or a specified part thereof is paid.

(3) The term of imprisonment for nonpayment of fee, fine, or restitution shall be specified in the order of commitment, and shall not exceed one day for each \$25 of the fee or fine, thirty days if the fee or fine was imposed upon conviction of a violation or a petty misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fee or fine shall be given credit toward payment of the fee or fine for each day of imprisonment, at the rate of \$25 per day.

(4) If it appears that the defendant's default in the payment of a fee, fine, or restitution is not contumacious, the court may make an order allowing the defendant additional time for payment, reducing the amount of each installment, or revoking the fee, fine, or the unpaid portion thereof in whole or in part, or converting the unpaid portion of the fee or fine to community service. A defendant shall not be discharged from an order to pay restitution until the full amount of the restitution has actually been collected or accounted for.

(5) Unless discharged by payment or, in the case of a fee or fine, service of imprisonment pursuant to subsection (3), an order to pay a fee, fine, or restitution, whether as an independent order, as a part of a judgment and sentence, or as a condition of probation or deferred plea pursuant to chapter 853, may be collected in the same manner as a judgment in a civil action. The State or the victim named in the order may collect the restitution, including costs, interest, and attorney's fees, pursuant to section 706-646. The State may collect the fee or fine, including costs, interest, and attorney's fees pursuant to section 706-647.

(6) Attorney's fees, costs, and interest shall not be deemed part of the penalty, and no person shall be imprisoned under this section in default of payment of attorney's fees, costs, and interest.

On June 7, 2005, after a hearing on June 3, 2005 on Shivaraman's Motion to Modify, Judge Reinette Cooper entered the following order: "Special Term and Condition 'C' is modified to allow for restitution payments in the amount of \$250 per month on the condition that Mr. Shivaraman signs a stipulation for order of free standing order of restitution for the balance of his restitution." On June 28, 2005, the following stipulation was approved and ordered by Judge Cooper:

IT IS HEREBY STIPULATED AND AGREED that [Shivaraman] pay restitution to the following entity in the following amount:

1. Lanai City Service
P.O. Box 1119
Lahaina, HI 967-1119

Amount: \$64,153.30

IT IS FURTHER STIPULATED AND AGREED that this restitution order shall be a free standing order of restitution pursuant to Sections 706-605, 706-644, and 706-647 of the Hawaii Revised Statutes.

At an October 6, 2005 evidentiary hearing on the State's Motion for OSC, Neal Ceberanto (Ceberanto), a probation officer on O'ahu, testified that (1) Shivaraman first visited him on June 2, 2004, (2) Ceberanto explained to Shivaraman the details of Shivaraman's duty to pay restitution, and (3) Shivaraman told Ceberanto that Shivaraman had been making restitution payments of \$1,000 per month. Lucas Bruno (Bruno), a probation officer on Maui, testified that on May 10, 2005, the following occurred in the following sequence: (1) the person who was supposed to be receiving restitution called Bruno and said that no restitution had been received; (2) Bruno checked the

inter-island computer database and read that payments were being made; (3) Bruno called Ceberanto; (4) Shivaraman called Bruno, stated that he had some money and could make some payment, and asked whether, if he made this payment, that would be enough to keep going to jail from being the issue; and (5) Bruno and Shivaraman discussed the possibility of Shivaraman contacting the public defender's office. At the conclusion of the hearing, Judge Shackley F. Raffetto orally ruled in part:

All right. Thank you. I have read the pre-sentence report. He just basically ripped off that company and lied about it on a lie detector test. Pretty egregious for an educated person to conduct himself in that manner. Lucky he's still in this country.

So after taking into consideration the testimony, the witnesses' credibility and other matters that I took judicial notice of, the court is going to find that [Shivaraman] did, in fact, violate Special Condition C of his probation provisions by failing to make payments for at least a year when he could have made some payments, and so I am going to revoke his probation and resentence him to a new term of probation for a period of five years on the same terms and conditions as previously ordered.

I am also going to order that he be committed to the custody of the director of the Department of Public Safety for a 10-day period. Mittimus forthwith. Credit for any time he may have served on this OSC [order to show cause], and within 24 hours -- two days after he's released from incarceration he is to contact his probation officer in Second Circuit and provide financial information regarding his current ability to pay, and we will set a return date for recommendation by the probation officer as to the setting of the new amount of restitution which is an issue in this case.

We will give you a date about 30 days after that and then the court will not provide transportation unless an appropriate showing is made.

[COUNSEL FOR SHIVARAMAN]: Regarding the 10-day mittimus, could he report back some other day rather than today?

THE COURT: No, forthwith. Let's give him the date.

THE CLERK: November 22nd, 2005 at eight a.m. for the return date on payment of restitution.

THE COURT: I think that covers it. All other terms and conditions remain in effect.

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On October 14, 2005, Judge Raffetto entered the Revocation Order "finding [Shivaraman] to be in violation of the five (5) year probationary status imposed . . . on December 27, 2000" by having violated "Special Condition C" when he "inexcusably failed to make restitution payments[.]" The Revocation Order also revoked the probation imposed by the December 28, 2000 Judgment and resentenced Shivaraman in part as follows:

[Shivaraman] is hereby placed on probation for five (5) years commencing as of October 6, 2005, with the following terms and conditions:

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2. Comply with the following special conditions:

a. [Shivaraman] is hereby committed to the custody of the Director of the Department of Public Safety for a period of ten (10) days, mittimus to issue forthwith, credit for time served on this Order to Show Cause;

b. Within two days after release, report to probation officer in the Second Circuit to provide financial information;

c. A return date on restitution payment amount is set for November 22, 2005, at 8:00 a.m.; and

d. Court will not expend funds for [Shivaraman's] travel.

On November 14, 2005, Shivaraman filed a notice of appeal.

On December 1, 2005, after a hearing on November 22, 2005, Judge Cooper ordered Shivaraman to "pay restitution of \$100.00 per month commencing on December 1, 2005, as part of his

new terms and conditions of probation."³

The circuit court's decision that [a defendant] failed to comply with a substantial requirement imposed as a condition of the order of probation is a finding of fact. A finding of fact is reviewed under the clearly erroneous standard[.]

The decision that the failure was inexcusable is a conclusion of law. A conclusion of law is reviewed *de novo* under the right/wrong standard. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned.

State v. Reyes, 93 Hawai'i 321, 327, 2 P.3d 725, 731 (App. 2000)

(internal quotation marks, citations, and brackets in original omitted).

Shivaraman's point on appeal is:

The lower court not only failed in its [Revocation Order] to enter findings of fact (FsOF) and conclusions of law (CsOL) supporting either a factual or a legal conclusion that [Shivaraman's] failure to comply with the restitution terms and conditions of his probation was inexcusable, but its subsequent December 1, 2005, "Order Regarding Restitution Payments," similarly lacking in such [FsOF] and [CsOL], contradicts its [Revocation Order], by actually reducing rather than increasing the monthly amount of restitution that [Shivaraman] himself had earlier agreed to pay and was paying.

Hawai'i Rules of Penal Procedure Rule 44 (2006) states

in part:

SETTLEMENT OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER;
ENTRY OF ORDER.

(a) In the circuit court.

(1) PREPARATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.
Unless otherwise ordered by the court, within 10 days after decision or ruling of the court following a hearing on a motion, the prevailing party shall prepare and deliver to the parties the findings of fact, conclusions of law and order, in accordance with the decision or ruling.

³ We do not answer the question whether, while Shivaraman's appeal was pending and without a temporary remand for such purpose, the circuit court had jurisdiction to amend the monthly amount of restitution payable by Shivaraman. On this question, the following precedent is relevant: State v. Ontiveros, 82 Hawai'i 446, 923 P.2d 388 (1996); State v. Miller, 79 Hawai'i 194, 900 P.2d 770 (1995), State v. Johnston, 63 Hawai'i 9, 619 P.2d 1076 (1980); State v. Tyrrell, 57 Haw. 80, 549 P.2d 745 (1976); and Bell v. United States, 790 A.2d 523 (D.C. App. 2002); Powell v. State, 724 So.2d 1207 (Fla. App. 1998).

(2) SECURING APPROVAL FROM OPPOSING PARTY. The party preparing the findings, conclusions and order shall attempt to secure approval as to form from the opposing party. Upon approval, which shall be made not later than 5 days after delivery, the document shall be returned to the originating party who shall promptly deliver it to the court. If the document is not approved as to form within 5 days after delivery, the originating party shall promptly deliver the proposed findings, conclusions and order to the court along with certificate of service to all parties.

(3) OBJECTION AS TO FORM. If any party objects to the form of the document prepared, that party, within 5 days of delivery, or other such time as authorized by the court, shall serve upon the party who prepared the document and deliver to the court a statement of that party's objections and the reasons therefore or proposed findings, conclusions and order. Failure to file and serve objections or proposed findings, conclusions, or order shall constitute approval as to form of the document prepared.

(4) SETTLEMENT. The court shall timely settle the objections, if any, and issue the findings of fact, conclusions of law, and order as it deems proper.

(5) NO EFFECT ON RIGHT TO APPEAL. Approval as to form shall not affect the right of any party to appeal from the decision or ruling of the court and shall not be deemed as a waiver of disputed findings or conclusions.

(6) ENTRY. The filing of the findings of fact, conclusions of law and order in the office of the clerk shall constitute entry of the order.

Judge Raffetto orally found and concluded that Shivaraman "did, in fact, violate Special Condition C of his probation provisions by failing to make payments for at least a year when he could have made some payments[.]" In the Revocation Order, Judge Raffetto concluded that Shivaraman violated Special Condition C when he inexcusably failed to make restitution payments. If Shivaraman wanted Judge Raffetto to enter additional FsOF and CsOL, he could have asked the appellate court to order Judge Raffetto to do so during a temporary remand. Are additional FsOF and CsOL necessary to decide this appeal? We conclude that the answer is no. The evidence supports the

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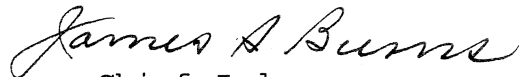
findings, the findings support the conclusion, and the conclusion supports the court's decision.

Accordingly, we affirm the October 14, 2005 Order Revoking Probation and Resentencing Defendant.


DATED: Honolulu, Hawai'i, November 6, 2006.

On the briefs:

Gary Victor Dubin
for Defendant-Appellant.


Chief Judge

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


Associate Judge


Associate Judge