

NO. 27176

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ROBIN CANTIBEROS, Defendant-Appellant

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APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(Case No. H-94679/KN)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

Defendant-Appellant Robin Cantiberos (Cantiberos) appeals from the January 28, 2005 judgment entered by the District Court of the Third Circuit (district court),¹ finding him guilty of the offense of Criminal Contempt of Court in violation of Hawaii Revised Statutes (HRS) § 710-1077 (1993).

We note, *sua sponte*, that contrary to Hawaii Rules of Penal Procedure Rule 5(b)(1),² the record does not contain a

¹ The Honorable Victor M. Cox, per diem judge, presided.

² Hawaii Rules of Penal Procedure Rule 5(b)(1) provides,

(b) Offenses Other Than Felony.

(1) ARRAIGNMENT. In the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed or the oral charge stated, a copy of such charge and any affidavits in support thereof, and a copy of the appropriate order, if any, shall be furnished to the defendant and proceedings shall be had in accordance with this section (b). Arraignment shall be in open court and shall consist of the reading of the complaint or the statement of the oral charge to the defendant, or stating the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the reading of the complaint or the statement of the oral charge at arraignment provided that an oral charge shall be stated at the commencement of trial or prior to entry of a guilty or no contest plea. In addition to the requirements of Rule 10(e), the court shall in appropriate cases inform the defendant of the right to jury trial in the circuit court or that the defendant may elect to be tried without a jury in the district court.

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written charge nor do the transcripts of the arraignment and plea or trial reflect an oral reading of the charge. In State v. Jendrusch, 58 Haw. 279, 280-81, 567 P.2d 1242, 1244 (1977), the Hawai'i Supreme Court reviewed the sufficiency of a complaint filed with the district court and concluded,

By any fair construction the complaint is constitutionally insufficient and therefore fatally defective. Not only does it fail to state an offense, but it also fails to meet the requirement that an accused must be informed of the "nature and the cause of the accusation" against him. *Territory v. Yoshimura*, 35 Haw. 324 (1940).

The accusation must sufficiently allege all of the essential elements of the offense charged. *Territory v. Henriques*, 21 Haw. 50 (1912); *Dolack v. United States*, 376 F.2d 756 (9th Cir. 1967); cf. HRS § 702-205. This requirement obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint, and the omission of an essential element of the crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, *United States v. Beard*, 414 F.2d 1014 (3rd Cir. 1969); *Carlson v. United States*, 296 F.2d 909 (9th Cir. 1961), for that would constitute a denial of due process. *Thompson v. Louisville*, 362 U.S. 199 (1960). This requirement may not be waived or dispensed with, *United States v. Tornabene*, 222 F.2d 875 (3rd Cir. 1955), and the defect is ground for reversal, even when raised for the first time on appeal. *United States v. Beard*, supra; *Carlson v. United States*, supra. See also *United States v. Clark*, 412 F.2d 885 (5th Cir. 1969). "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." H.R.Cr.P. Rule 12 (1960).

(Footnote omitted.)

It follows that the failure to charge Cantiberos at all is, likewise, a denial of due process requiring reversal. State v. Elliott, 77 Hawai'i 309, 313, 884 P.2d 372, 376 (1994) (defective oral charge requires reversal of the charged offense); State v. Yonaha, 68 Haw. 586, 723 P.2d 185 (1986) (same).

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Therefore,

IT IS HEREBY ORDERED that the January 28, 2005 judgment entered by the District Court of the Third Circuit is reversed.

DATED: Honolulu, Hawai'i, August 31, 2007.

On the briefs:

Michele M. Muraoka,
Deputy Public Defender,
for Defendant-Appellant.



Chief Judge

Frederick D. Giannini,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Plaintiff-Appellee.



Associate Judge



Associate Judge