

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27872

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
LUKE CARVALHO, Defendant-Appellant

NORMA I. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(Cr. No. 05-1-0339(1))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Luke J. Carvalho (Carvalho) appeals from the February 8, 2006 judgment of the Circuit Court of the Second Circuit (circuit court)<sup>1</sup> finding him guilty of the offense of Escape in the Second Degree as defined in Hawaii Revised Statutes § 710-1021 (1993).

After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we conclude:

1. The circuit court's "choice of evils" jury instruction was erroneous and there is a reasonable possibility that the erroneous jury instruction may have contributed to Carvalho's conviction. The parties agree that the "choice of evils" instruction was erroneous under State v. Maumalanga, 90 Hawai'i 58, 976 P.2d 372 (1999). Based on the evidence presented at trial however, we cannot say that the error was harmless. A reasonable possibility exists that Carvalho was convicted because

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<sup>1</sup> The Honorable Joel E. August presided.

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jurors believed that Carvalho's conduct could not be justified if (1) Carvalho did not reasonably believe that there was "no legal alternative" available to protect himself other than running away, or if (2) Carvalho's conduct was not "reasonably designed to actually prevent the threat of greater harm" to him from Officer Bonilla's alleged abuse. State v. Jardine, 101 Hawai'i 3, 8, 61 P.3d 514, 519 (App. 2002). Therefore, the erroneous instruction was not harmless beyond a reasonable doubt and Carvalho's conviction must be set aside.

2. Given our disposition on this point, there is no need to reach Carvalho's second point of error.

Therefore,

IT IS HEREBY ORDERED that the February 8, 2006 judgment of conviction of the Circuit Court of the Second Circuit is vacated and the case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, June 6, 2007.

On the briefs:

Joyce K. Matsumori-Hoshijo,  
for Defendant-Appellant.



Chief Judge

Peter A. Hanano,  
First Deputy Prosecuting  
Attorney,  
County of Maui,  
for Plaintiff-Appellee.



Associate Judge



Associate Judge