

NO. 27926

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
ALLAN K. FREITAS, also known as Ears, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(Cr. No. 98-1121)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Foley, and Nakamura, JJ.)

Defendant-Appellant Allan K. Freitas, also known as Ears (Freitas), challenges the Findings of Fact, Conclusions of Law, and Free Standing Order for Restitution (FSO) entered by the Circuit Court of the First Circuit<sup>1</sup> (the circuit court) on April 5, 2006, ordering Freitas to pay restitution in the amount of \$4,088.48, "less any payments already made, at a rate of at least Ten Dollars (\$10.00) per month, commencing immediately." The FSO followed a judgment entered by the circuit court<sup>2</sup> on September 22, 2005, convicting Freitas of Theft in the Third Degree, in violation of Hawaii Revised Statutes §§ 708-832(1)(a) and (2) (1993)<sup>3</sup> and 708-830(7) (1993)<sup>4</sup> and sentencing Freitas to

<sup>1</sup> The Honorable Virginia L. Crandall presided.

<sup>2</sup> The Honorable Faye M. Koyanagi entered the judgment.

<sup>3</sup> At the time that Defendant-Appellant Allan K. Freitas, also known as Ears (Freitas), was indicted on May 21, 1998, Hawaii Revised Statutes (HRS) § 708-832(1)(a) and (2) (1993) provided as follows:

**Theft in the third degree.** (1) A person commits the offense of theft in the third degree if the person commits  
(continued...)

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pay a fine of \$500.00<sup>5</sup> and be incarcerated for one day, with credit for time already served, said term to run concurrently with any other term imposed. The judgment also waived imposition of a \$55.00 crime victim compensation fee "due to inability to pay" and scheduled a restitution hearing for December 12, 2005. At the continued restitution hearing on March 13, 2006, the circuit court found that Freitas "is able to be employed and can make restitution" and imposed "restitution in the amount recommended by Adult Client Services Branch of \$4,088.40 as "a freestanding order." The circuit court did not amend the

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<sup>3</sup>(...continued)  
theft:

(a) Of property or services the value of which exceeds \$100; . . .

. . . .

(2) Theft in the third degree is a misdemeanor.

<sup>4</sup> At the time that Freitas was indicted, HRS § 708-830(7) (1993) provided as follows:

**Theft.** A person commits theft if the person does any of the following:

. . . .

(7) Receiving stolen property. A person intentionally receives, retains, or disposes of the property of another, knowing that it has been stolen, with intent to deprive the owner of the property. It is prima facie evidence that a person knows the property to have been stolen if, being a dealer in property of the sort received, the person acquires the property for a consideration which the person knows is far below its reasonable value.

<sup>5</sup> It appears from the record that Freitas has paid the fine in full.

judgment to impose restitution as part of Freitas's criminal sentence.

Freitas contends that the circuit court erred in entering the FSO because: (1) the circuit court failed to make specific findings as to Freitas's ability to pay restitution before ordering the payment of restitution; (2) the amount of restitution ordered exceeded the total value of the vehicle for which Freitas was convicted of Theft in the Third Degree; and (3) the circuit court lacked authority to enter the FSO at the time Freitas was indicted.

Because we agree with Freitas's last argument, we reverse the FSO. See Hawai'i Rules of Appellate Procedure Rule 35(e).

The record indicates that the underlying case commenced when Freitas was indicted on May 21, 1998 for acts that had occurred on October 10, 1996. At the time Freitas was indicted, no statutory authority existed for the circuit court to enter a free-standing order, enforceable as a civil judgment, requiring a criminal defendant to make restitution to a crime victim. In 1998, the Hawai'i legislature passed a bill to expressly provide such authority, and the bill was enacted into law upon approval of the Governor on July 20, 1998. See 1998 Haw. Sess. L. Act 269, §§ 1 and 9 at 911, 914. However, section 7 of Act 269 specifically provided that "[t]his Act does not affect rights and

duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date[,]" 1998 Haw. Sess. L., § 7 at 914, and the Hawai'i Supreme Court has held that the authority vested in the courts by Act 269 to issue a separate FSO for collection of restitution imposed as a condition of probation does not apply retroactively. State v. Feliciano, 103 Hawai'i 269, 273, 81 P.3d 1184, 1188 (2003). See also State v. Kai, 98 Hawai'i 137, 141, 44 P.3d 288, 292 (App. 2002) (holding that the defendant "incurred penalties" in 1990 and 1995, and therefore, Act 269 did not empower the circuit court to issue an FSO upon resentencing the defendant); State v. Johnson, 92 Hawai'i 36, 44, 986 P.2d 987, 995 (App. 1999) (holding that the circuit court was without authority to enter an FSO against a defendant for outstanding restitution "because the proceedings at issue began on September 15, 1997").

Accordingly, we hereby reverse the Findings of Fact, Conclusions of Law, and Free Standing Order for Restitution, entered by the circuit court on April 5, 2006.

DATED: Honolulu, Hawai'i, May 2, 2007.

On the briefs:

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for defendant-appellant.

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for plaintiff-appellee.

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