

NO. 27827

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JAZMYNE-KELLY K. SAKURADA, Defendant-AppellantAPPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CRIMINAL NO. 05450025)SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Jazmyne-Kelly Kawailani Sakurada (**Sakurada**) appeals from the Judgment and/or Order convicting and sentencing her for the offense of Street Solicitation of Prostitution in violation of Hawaii Revised Statutes (**HRS**) § 712-1207 (Supp. 2005), entered on February 16, 2006 by the District Court of the First Circuit (**District Court**).¹

On the day of trial, Sakurada was orally charged with the offense of Prostitution in violation of HRS § 712-1200(1) (1993), but was instead convicted of Street Solicitation of Prostitution under HRS § 712-1207 (**Street Solicitation**).² She contends on appeal that her conviction must be reversed due to a defective charge and that she may not be retried for either charge pursuant to the Double Jeopardy Clause.

"Whether an indictment or complaint sets forth all the essential elements of a charged offense . . . is a question of law, which we review under the de novo, or right/wrong,

¹ The Honorable Lono J. Lee presided.

² Sakurada had previously been charged with Street Solicitation, and pre-trial filings also reflected the Street Solicitation charge, but when the charge was read at the onset of trial, the prosecution charged her with Prostitution instead. It appears to be uncontested that the charge of Prostitution was a mistake and that neither of the parties nor the judge realized it at the time. The defendant pled not guilty.

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standard." State v. Jess, 117 Hawai'i 381, 391, 184 P.3d 133, 143 (2008) (internal quotation marks and brackets omitted) (quoting State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996)). Under the right/wrong standard, the appellate court "examines the facts and answers the question without being required to give any weight to the trial court's answer to it." State v. Joseph, 109 Hawai'i 482, 493, 128 P.3d 795, 806 (2006) (internal quotation marks omitted) (quoting State v. Keliheleua, 105 Hawai'i 174, 179, 95 P.3d 605, 610 (2004)). Post-conviction challenges to indictments, oral charges, or complaints are liberally construed in favor of validity. State v. Elliott, 77 Hawai'i 309, 311, 884 P.2d 372, 374 (1994). Under the "liberal construction standard" for post-conviction challenges, Hawai'i appellate courts "will not reverse a conviction based upon a defective oral charge unless the defendant can show prejudice or that the oral charge cannot within reason be construed to charge a crime." Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (brackets omitted); see also State v. Ruggiero, 114 Hawai'i 227, 239, 160 P.3d 703, 715 (2007).

Upon careful review of the record, the applicable statutes and case law, and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Sakurada's points of error as follows:

The oral charge was defective because it charged Sakurada with the offense of Prostitution and not Street Solicitation. The oral charge described the element of engaging in sexual conduct with another person for a fee, as required for the offense of Prostitution under HRS § 712-1200(1)³, but it did

³ In pertinent part, HRS § 712-1200 (1993) states:

(1) A person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee.

(continued...)

not state an essential element of Street Solicitation under HRS § 712-1207(2)⁴, specifically, the geographical area of the alleged solicitation, which was Downtown Honolulu.

While the State agrees that the District Court erred in convicting Sakurada of the offense of Street Solicitation because she was not charged with that offense, the State and Sakurada disagree as to the remedy. The State urges this court to remand this case to the District Court for an entry of judgment of Prostitution because the oral charge on February 15, 2006 can be construed to charge the lesser-included offense of Prostitution. Sakurada argues that the proper remedy is to reverse and vacate⁵ the judgment of conviction and sentence for Street Solicitation under HRS § 712-1207. Sakurada further requests that this court find that jeopardy attached to both HRS §§ 712-1200(1) and 712-1207, prohibiting retrial and resentencing on either offense.

The State argues, Sakurada acknowledges, and we agree that the offense of Prostitution is a lesser-included offense of Street Solicitation. However, Sakurada argues that she may not now be convicted and sentenced under HRS § 712-1200(1) because her rights would be substantially affected. Specifically, she points out that she would suffer prejudice because she would not have the option of a deferred acceptance of a guilty (DAG) plea,

³(...continued)

(2) As used in subsection (1), "sexual conduct" means "sexual penetration," "deviate sexual intercourse," or "sexual contact," as those terms are defined in section 707-700.

⁴ HRS § 712-1207(2) (Supp. 2005) states:

(2) It shall be unlawful for any person within the boundaries of other areas in this State designated by county ordinance pursuant to subsection (3), and while on any public property, to offer or agree to engage in sexual conduct with another person in return for a fee.

⁵ We note that, under Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(e), the word "reverse" ends litigation on the merits and the phrase "vacate and remand" indicates that the litigation continues in the court below in accordance with the appellate court's instruction.

and she may not now be sentenced for the lesser-included offense because she has already served the sentence for the greater offense.

Sakurada notes that the punishments under HRS §§ 712-1200(1)⁶ and 712-1207⁷ differ. For instance, a conviction for

⁶ HRS § 712-1200(4) (Supp. 2005) states:

(4) A person convicted of committing the offense of prostitution shall be sentenced as follows:

- (a) For the first offense, when the court has not deferred further proceedings pursuant to chapter 853, a mandatory fine of \$500 and the person may be sentenced to a term of imprisonment of not more than thirty days or probation; provided that in the event the convicted person defaults in payment of the \$500 fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1).
- (b) For any subsequent offense, a mandatory fine of \$500 and a term of imprisonment of thirty days or probation, without possibility of deferral of further proceedings pursuant to chapter 853 and without possibility of suspension of sentence.
- (c) For the purpose of this subsection, if the court has deferred further proceedings pursuant to chapter 853, and notwithstanding any provision of chapter 853 to the contrary, the defendant shall not be eligible to apply for expungement pursuant to section 831-3.2 until four years following discharge. A plea previously entered by a defendant under section 853-1 for a violation of this section shall be considered a prior offense. When the court has ordered a sentence of probation, the court may impose as a condition of probation that the defendant complete a course of prostitution intervention classes; provided that the court may only impose such condition for one term of probation.

⁷ HRS § 712-1207(4) and (5) states:

(4) Notwithstanding any law to the contrary, any person violating this section shall be guilty of a petty misdemeanor and shall be sentenced to a mandatory term of thirty days imprisonment. The term of imprisonment shall be imposed immediately, regardless of whether the defendant appeals the conviction, except as provided in subsection (5).

(5) As an option to the mandatory term of thirty days imprisonment, if the court finds the option is warranted based upon the defendant's record, the court may place the defendant on probation for a period not to exceed six

(continued...)

Street Solicitation requires a mandatory thirty days of imprisonment, to be imposed immediately. HRS § 712-1207(4). As an option to the mandatory term, HRS § 712-1207(5) allows a six-month probation period subject to geographic restrictions. While HRS § 712-1207(5) allows the imposition of geographic restrictions as punishment for Street Solicitation, HRS § 712-1200 does not allow a similar condition as punishment for the offense of Prostitution. HRS § 712-1200 imposes a mandatory minimum fine of \$500, while HRS § 712-1207 does not. See supra HRS §§ 712-1200(4)(a) and 712-1207(4)-(5). The punishment for the first offense of Prostitution may also include imprisonment of not more than thirty days *or* probation. HRS § 712-1200(4)(a). For subsequent offenses of Prostitution, HRS § 712-1200(4)(b) imposes a mandatory fine of \$500 *and* a mandatory term of imprisonment of thirty days or probation. Finally, and arguably most importantly, HRS § 712-1200(4) allows a defendant to apply for a DAG plea under HRS Chapter 853 for a first offense.

In this case, Sakurada's conviction was for a first-time offense. Under HRS § 853-1 (1993 and Supp. 2005), a court may defer further proceedings without accepting a plea of *nolo contendere* or entering a judgment of guilt. HRS § 853-1(a). If the defendant completes the period designated by the court and he or she is in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against him or her. HRS § 853-1(c). The discharge of

⁷(...continued)

months, subject to the mandatory condition that the defendant observe geographic restrictions that prohibit the defendant from entering or remaining on public property, in Waikiki and other areas in the State designated by county ordinance during the hours from 6 p.m. to 6 a.m. Upon any violation of the geographic restrictions by the defendant, the court, after hearing, shall revoke the defendant's probation and immediately impose the mandatory thirty-day term of imprisonment. Nothing contained in this subsection shall be construed as prohibiting the imposition of stricter geographic restrictions under section 706-624(2)(h).

the defendant and dismissal of the charge against the defendant shall be without adjudication of guilt, and is not a conviction. HRS § 853-1(d). Also, upon discharge of the defendant and dismissal of the charge against the defendant, the defendant is eligible to apply for expungement four years following the discharge. HRS § 712-1200(4)(c). While a person charged under HRS § 712-1200 is eligible for a deferral under the DAG plea statute, a person charged under HRS § 712-1207 is not. Although the fine under HRS § 712-1200 is larger, a defendant may choose not to contest this charge as it is deferrable, unlike HRS § 712-1207.

By the time of this appeal, Sakurada had completed a six-month conditional probation under HRS § 712-1207. Sakurada's plea may well have been different had she (and her counsel) understood that she was being charged with the offense of Prostitution.

In light of all of the facts and circumstances of this case, we hold that the appropriate remedy is to reverse Sakurada's conviction and sentence for Street Solicitation. Therefore, we need not address the other issue raised by Sakurada on this appeal.

For the foregoing reasons, the District Court's
February 16, 2006 Judgment and/or Order is reversed.

DATED: Honolulu, Hawai'i, July 30, 2008.

On the briefs:

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Corinne KA Watanabe

Presiding Judge

Clamuel R. Foley

Associate Judge

[Signature]
Associate Judge