

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28707

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
NEMOKAN M. SMITH, Defendant-Appellant

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2008 SEP 25 AM 7:46

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CR. NO. 06494832 (1P106-19581))

SUMMARY DISPOSITION ORDER

(By: Recktenwald, Chief Judge, Nakamura, and Leonard, JJ.)

Defendant-Appellant Nemokan M. Smith (Smith) appeals from the Judgment entered on July 24, 2007^{1/} in the District Court of the First Circuit (district court).^{2/} After a bench trial, Smith was found guilty of disorderly conduct, in violation of Hawaii Revised Statutes (HRS) § 711-1101(1)(a) (1993 & Supp. 2007).^{3/} She was sentenced to pay a \$100 fine and "thirty-dollar court costs."

^{1/} Smith's notice of appeal incorrectly identifies the date of the Judgment as July 20, 2007.

^{2/} The Honorable Faye Koyanagi presided.

^{3/} HRS § 711-1101 (1993 & Supp. 2007) provides in relevant part:

(1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person:

- (a) Engages in fighting or threatening, or in violent or tumultuous behavior[.]

. . . .

(3) Disorderly conduct is a petty misdemeanor if it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

Smith was orally charged with disorderly conduct as a petty misdemeanor for persisting in violating HRS § 711-1101(1)(a) after reasonable warning or request to desist.

On appeal, Smith contends there was insufficient evidence to support her conviction and that the district court violated her right to freedom of speech in convicting her. We conclude that there was insufficient evidence to support Smith's conviction and thus do not address her freedom of speech claim.

I.

Officer Terrence Radford (Officer Radford) and other police officers responded at about 4:10 a.m. to the area fronting Club Tahoe on Dillingham Boulevard. Officer Radford, the prosecution's sole trial witness, stated that Club Tahoe was located in an industrial area with no nearby residences. The clubs in the area had just closed and Officer Radford noticed fifty to a hundred people outside. There were ongoing fights and arguments along the street, which did not involve Smith, and Officer Radford described the scene as "[j]ust a ruckus."

Officer Radford's attention was drawn to Smith, who appeared to be drunk and was randomly screaming and yelling at the police and others. When the police asked Smith to leave, she responded by repeatedly yelling things such as, "Fuck that, I don't have to fucking leave, you guys cannot make me leave, this is a public sidewalk. Fuck that." Officer Radford asked Smith's friends to take Smith home or the police would have to arrest her. A group of Smith's friends attempted to get Smith to go to her car, but they could not because Smith kept kicking, swinging her arms, and screaming. At one point, Smith flopped to the ground, kicking and screaming.

A crowd of people gathered around Smith and observed her antics. Officer Radford described the people's facial expressions as "surprised," with their eyes and mouths wide open. Officer Radford told Smith to stop numerous times and observed Smith's actions for "[s]everal minutes" before placing her under arrest. Officer Radford attempted to get statements from bystanders but was unable to do so.

Smith testified that she was born in the Marshall Islands and had gone to Club Tahoe with a large group of Marshallese friends and relatives. Smith stated that she took offense at the manner in which the police told her and her companions to leave. She testified that all the people in the group around her were her friends and relatives. Her friends were yelling at her "to shut up, don't be stupid, let's get out of here," and Smith yelled back to explain why she did not want to leave.

II.

The district court found Smith guilty based on its determination that she had committed the offense of disorderly conduct by engaging in tumultuous behavior. We conclude that there was insufficient evidence to support Smith's conviction. This court has previously held that "[a]rguments with the police, without more, do not fall within the ambit of the disorderly conduct statute[.]" State v. Leung, 79 Hawai'i 538, 543, 904 P.2d 552, 557 (App. 1995). In addition, the Hawai'i Supreme Court has concluded that "[p]edestrians stopping of their own volition to satisfy their curiosity . . . cannot be said to be physically inconvenienced or alarmed within the meaning of the statute." State v. Faulkner, 64 Haw. 101, 105, 637 P.2d 770, 774 (1981). Based on these precedents, we conclude that there was insufficient evidence to show that Smith engaged in tumultuous behavior with the intent, or in reckless disregard of the risk, that her conduct would physically inconvenience or alarm one or more members of the public.

III.

The July 24, 2007, Judgment of the district court is reversed.

DATED: Honolulu, Hawai'i, September 25, 2008.

On the briefs:

Deborah L. Kim
Deputy Public Defender
for Defendant-Appellant

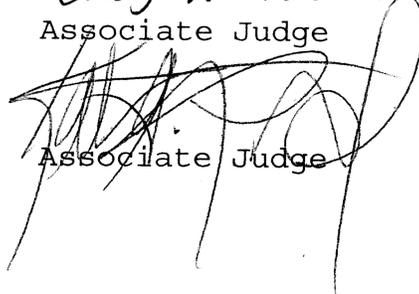
Stephen K. Tsushima
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee



Chief Judge



Associate Judge



Associate Judge