

NO. 28294

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

IN THE INTEREST OF NC, a Minor

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-J NO. 0063855)

K. HANAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

(By: Nakamura, Presiding Judge, Fujise and Leonard, JJ.)

Minor-Appellant (**NC**) appeals from the Decree Re: PINS filed on September 26, 2006 (**Decree**), and the Findings of Fact, Conclusions of Law and Order Denying Motion for Reconsideration filed December 19, 2006 (**Reconsideration Order**) in the Family Court of the Third Circuit (**Family Court**).^{1/} Notices of appeal were filed by both NC and his parents (**Parents**).

I. BACKGROUND

NC was born in June of 1994. In the fall of 2003, another minor (**CW**) alleged that sometime between January of 2003 and October 2003, sexual contact occurred between NC and CW, who was born in April of 1996. CW told his father about sexual contact with NC and NC's older brother (**Brother**). Detective Aimee Wana (**Det. Wana**) of the Hawai'i County Police Department (**HCP**) conducted an investigation of the allegations. NC was eight, and later nine, years old at the time of the alleged sexual contact with CW, who was seven-years old.

On October 8, 2003, pursuant to the investigation, Det. Wana observed an interview of CW conducted by Dr. Terry Fujioka of the Children's Justice Center. During the interview, CW reportedly described in detail incidents of "touching of private parts" that took place with NC and Brother on several occasions,

^{1/} The Honorable Aley K. Auna, Jr., presided.

but he could not give an exact number of times. CW also reported engaging in acts of fellatio and anal penetration with Brother, but not with NC. CW did not allege that force or coercion was involved in any of the incidents he described.

On October 22, 2003, NC was taken into custody by Det. Wana at the request of Child Protective Services (CPS) officials and placed under the protective custody of CPS. CPS subsequently agreed to return NC to the custody of his mother on October 31, 2003. NC was required to continue treatment sessions with Dr. Peter In (Dr. In), which were begun while he was in the protective custody of CPS.

On August 4, 2004, a Petition under HRS Chapter 571 (Petition) was filed by the Deputy Prosecuting Attorney of the County of Hawai'i (State) in the Family Court. The Petition alleged that NC committed four counts of Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(b).^{2/} NC was alleged to have violated the law as follows:

Count I (H-65210/KN)

Sometime between June 1, 2003 and October 23, 2003, the exact date being unknown, in Kona, County and State of Hawai'i, [NC] knowingly subjected to sexual contact [CW], a person who was less than fourteen years old, or caused [CW] to have sexual contact with [sic] thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(b), Hawaii Revised Statutes, as amended.

^{2/} HRS § 707-732(1)(b) provides:

§707-732 Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

- (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;

Although HRS § 707-732 has been the subject of various legislative actions since the dates NC allegedly committed the offenses, none of these actions amended HRS § 707-732(1)(b).

Count II (H-71518/KN)

Sometime between June 1, 2003 and October 23, 2003, the exact date being unknown, in Kona, County and State of Hawai'i, [NC] knowingly subjected to sexual contact [CW], a person who was less than fourteen years old, or caused [CW] to have sexual contact with him thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(b), Hawaii Revised Statutes, as amended.

Count III (H-71519/KN)

Sometime between August, 2003 and September, 23, 2003, the exact date being unknown, in Kona, County and State of Hawai'i, [NC] knowingly subjected to sexual contact [CW], a person who was less than fourteen years old, or caused [CW] to have sexual contact with him, thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(b), Hawaii Revised Statutes, as amended.

Count IV (H-71520/KN)

Sometime between August, 2003 and September, 2003, the exact date being unknown, in Kona, County and State of Hawai'i, [NC] knowingly subjected to sexual contact [CW], a person who was less than fourteen years old, or caused [CW] to have sexual contact with him, by knowingly subjecting [CW] to fellatio, thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(b), Hawaii Revised Statutes, as amended.

A "stipulated evidence" trial was held between August 26, 2005 and October 4, 2005. Police reports and the report of Dr. In were stipulated into evidence. At the October 4, 2005 hearing, the Family Court announced that the State had met its burden of showing that NC was a "person in need of supervision" (PINS) and therefore came under the supervision of the Family Court.

A disposition hearing was held on September 26, 2006 and the Family Court entered the Decree on the same day. The Decree ordered that NC be placed under the protective supervision of the Family Court, with special conditions, until further order of the court.

Parents filed a motion for reconsideration on October 11, 2006. On October 24, 2006, the Family Court announced it would deny Parents' motion for reconsideration and on December

19, 2006, the Family Court filed the Reconsideration Order. Parents and NC timely filed notices of appeal on November 8 and 17, 2006, respectively.

II. POINTS OF ERROR ON APPEAL

In his points of error, NC contends that the Family Court erred when:

1. the court failed to establish that NC knowingly, intelligently, and voluntarily waived his constitutional rights to proceed to trial;

2. the court ruled that, in sexual assault cases involving two minors under the age of fourteen, either of them may be prosecuted as they are neither victims nor a protected class;

3. the court ruled that HRS § 571-11(2) "does not make noncriminal behavior criminal by increasing the minor's age;"

4. the court ruled that HRS § 707-732(1)(b) as applied to minors under the age of fourteen does not violate the due process and equal protection clauses of the constitution; and

5. the court ruled that prosecuting minors less than fourteen-years old under HRS § 707-732(1)(b) did not produce an absurd and unjust result and that the statute does not require the perpetrator to be an adult.

Parents' points of error overlap with NC's fourth and fifth points of error. In addition, Parents contend that the Family Court erred in finding that Parents were not interested parties, did not have standing, and therefore were not entitled to cross-examine the makers of written reports. Parents' contentions herein are virtually identical to their contention in In re TC, __ Haw. __, __ P.3d __ (No. 28295) (App. June 24, 2009).

III. Applicable Standards of Review

The issue of standing is reviewed *de novo* on appeal. Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, 113 Hawai'i 77, 148 P.3d 1179 (2006). In deciding the issue, this court must consider whether a party's personal stake in the litigation is significant and whether recognition of standing will serve the needs of justice. See, e.g., Kaho'ohanohano v. State, 114 Hawai'i 302, 318, 162, P.3d 696, 712 (2007).

An appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) (quoting State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998)). The appellate court's "power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." Nichols, 111 Hawai'i at 335, 141 P.3d at 982 (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)). "Normally, an issue not preserved at trial is deemed to be waived. But where plain errors were committed and substantial rights were affected thereby, the errors may be noticed although they were not brought to the attention of the trial court." State v. Fagaragan, 115 Hawai'i 364, 367-68, 167 P.3d 739, 742-43 (2007) (internal quotation marks, citations, and brackets omitted).

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Fields, 115 Hawai'i 503, 511,

168 P.3d 955, 963 (2007) (internal quotation marks, citation, and ellipsis omitted).

Statutory interpretation is "a question of law reviewable *de novo*." State v. Levi, 102 Hawai'i 282, 285, 75 P.3d 1173, 1176 (2003) (quoting State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996)). This court is guided by established rules of statutory construction:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Peterson v. Hawaii Elec. Light Co., Inc., 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997), superseded on other grounds (format altered, citations and quotation marks omitted).

"A trial court's conclusions of law are reviewed *de novo* under the right/wrong standard." State v. Adler, 108 Hawai'i 169, 174, 118 P.3d 652, 657 (2005).

IV. DISCUSSION

A. NC's Request that this Court Recognize Plain Error

We decline to recognize plain error regarding NC's waiver of his "constitutional rights" associated with the trial by stipulated evidence in this case. In his points of error, NC does not identify which particular constitutional rights he now seeks to assert, nor does he identify which constitution and/or constitutional provisions provide for such rights. NC makes no argument and cites no legal authority in support of the requested relief. Under these circumstances, we decline to recognize plain error. See also Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived.").

B. NC's Challenges to the Application of § 707-732(1)(b) in this Case

NC argues that he cannot be brought before the Family Court as a PINS for a violation of HRS § 707-732(1)(b) because the statutory prohibitions, which bar knowingly subjecting a person who is less than fourteen-years old to sexual contact or causing such a person to have sexual contact with the person, were not intended to be applied to minors under the age of fourteen. For the reasons discussed in In re TC (No. 28295), we reject this argument. Similarly, we conclude that NC is not entitled to relief based on the grounds of equal protection, due process, selective prosecution, the right to privacy, or public policy, for the reasons discussed in In re TC (No. 28295).

Although not raised in the Family Court or in NC's points of error, NC also argues that where, as in this case, the Family Court has already assumed supervisory jurisdiction over a family in a CPS case based on the same conduct, there is no need or justification to duplicate that exercise of jurisdiction in a subsequent PINS proceeding. We decline to recognize plain error on this issue. See HRAP Rule 28(b)(4).

C. Parents' Issues on Appeal

As noted above, Parents raise the same issues that they raised in In re TC concerning their standing in juvenile proceedings and their right to examine the makers of written reports pursuant to HRS § 571-41(d). Parents' arguments are identical as well. Although this proceeding was conducted pursuant to HRS § 571-11(2), rather than HRS § 571-11(1), we conclude that Parents have standing throughout NC's juvenile proceedings conducted pursuant to HRS § 571-11(2) for essentially the same reasons set forth in In re TC. Parents in juvenile proceedings conducted pursuant to HRS § 571-11(2): (1) are deemed parties (Hawai'i Family Court Rules (**HF**CR) Rule 121); (2) have the right to compulsory process for the attendance of

witnesses (HFCR Rule 138); (3) should be present at the commencement of hearings (HFCR Rule 152); (4) may have interests in the proceedings which appear to conflict with that of the child (HFCR Rule 153); (5) may be represented by counsel in all proceedings (HFCR Rule 155); (6) are issued a summons at the institution of proceedings (HRS § 571-23); (7) may request the presence of other persons at proceedings (HRS § 571-41(b)); (8) shall be notified of the right to remain silent (HRS § 571-41(b)); (9) have a right to appeal (HRS § 571-41(e)); (10) are subject to the loss of legal custody of the child for a period of three years, which is subject to renewal (HRS § 571-48(2) &(3)); (11) are subject to "appropriate orders" and may face contempt proceedings for failure to comply with such orders (HRS § 571-48(7)); (12) may be ordered to make restitution for loss or damage resulting from the child's action (HRS § 571-48(13)); and (13) have a substantive, fundamental liberty interest in the companionship, care, custody, and management of their children. See, e.g., Doe v. Doe, 116 Hawai'i 323, 334-35, 172 P.3d 1067, 1078-79 (2007); In re Doe, 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002); Doe v. Doe, 120 Hawai'i 149, 168, 202 P.3d 610, 629 (App. 2009).

Except as to the related issue of standing to make such a request, Parents failed to present any argument supporting the contention that the Family Court erred in denying the examination of the makers of reports pursuant to HRS § 571-41(d). Therefore, this issue is deemed waived. HRAP Rule 28(b)(7).

V. CONCLUSION

For the foregoing reasons, we affirm the Family Court's September 26, 2006 Decree in this case.

DATED: Honolulu, Hawai'i, June 26, 2009.

On the briefs:

Julie Kai Barreto
for Minor-Appellant

Christopher J. Roehrig
for Parents-Appellants

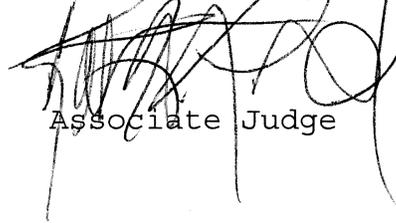
Linda L. Walton
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Presiding Judge



Associate Judge



Associate Judge