NO. 27160

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

LEOPOLDO SCHNEIDEWIND, Defendant-Appellant.

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 04-1-0673)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, and Nakayama, JJ.;
Acoba, J., Dissenting, with whom Duffy, J., joins)

Defendant-appellant Leopoldo Schneidewind (Appellant) appeals from the Family Court of the Second Circuit's February 7, 2005 Judgment of Probation,[1] adjudicating Appellant guilty of two counts of violation of an order for protection (protective order), pursuant to Hawai'i Revised Statutes (HRS) § 586-11 (Supp. 2004),[2] and sentencing him to two years' probation and

[1] The judgment was entered by the Honorable Douglas J. Sameshima, who presided over the trial involving Appellant's violation of a protective order. The protective order had been issued by the family court, the Honorable Ruby A. Hamili, presiding. For purposes of clarity, the phrase "trial court" is used to refer to the court that held trial and rendered judgment on Appellant's charges; the phrase "family court" refers to the court that issued the protective order.

[2] HRS § 586-11 provides in pertinent part:

> **Violation of an order for protection.** (a) Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor.

(Emphasis in original.)

$250.00 in fines.[3] Briefly stated, on July 6, 2004, the family court issued a protective order, prohibiting Appellant and any of his "officers, agents, servants, employees, attorneys, or any persons in active concert or participation with them" (emphasis added) from, inter alia, having any "contact" with Appellant's wife, Vickie Russell, and their minor daughter and from being or passing within 100 yards of Russell's residence or workplace for a period of one year from the date of the order. Appellant was alleged to have violated the protective order on two separate occasions when he caused legal documents to be served upon Russell at her residence by two of Appellant's friends, i.e., his "agents."

On appeal, Appellant contends that the trial court erred in convicting him because the court lacked sufficient evidence to conclude that: (1) the protective order prohibited the service of legal documents by Appellant's agents; and (2) Appellant knowingly or intentionally violated the protective order.

[3] The instant appeal is authorized by HRS § 641-11 (1993) which provides in pertinent part:

> Any party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the supreme court, subject to chapter 602 in the manner and within the time provided by the Hawai'i Rules of Appellate Procedure [(HRAP)]. The sentence of the court in a criminal case shall be the judgment.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that the trial court did not err in convicting Appellant of violating the protective order.

With respect to the first contention, Appellant maintains that "[t]he protective order does not specifically mention the service of legal documents as prohibited conduct." However, should this court conclude that it does, Appellant additionally contends that such conclusion "would violate the Due Process Clause of both the United States Constitution and the Hawai'i Constitution by impermissibly infringing on [Appellant]'s fundamental rights," i.e. to obtain a divorce in order to re-marry. Although Appellant failed to raise a constitutional argument at trial, he urges this court to review the alleged error under the plain error standard and argues that the protective order, if read expansively to prohibit the service of legal documents on Russell, impinges upon his fundamental right to marry.

"Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal." State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) (citing State v. Cummings, 49 Haw. 522, 423 P.2d 438 (1967)). Specifically, this court has held that

> the question of the constitutionality of a statute cannot be raised for the first time on appeal. State v. Tin Yan, 44 Haw. 370, 355 P.2d 25 (1960). However, in cases where we have considered the constitutionality of a statute raised for the first time on appeal, we have done so on the ground that the constitutionality of the statute is of great public import and justice required that we consider the issue. See, e.g., Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973); Smith v. Smith, 56 Haw. 295, 535 P.2d 1109 (1975).

State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992). We do not believe the instant case merits consideration of such constitutional issues. We, therefore, deem Appellant's constitutional arguments waived.[4] HRAP Rule 28(b)(3) ("Points not presented in accordance with this section will be disregarded[.]"). Accordingly, we hold that the trial court did not err in determining that the protective order prohibited the service of legal documents to Russell by Appellant's agents.

With regard to Appellant's second contention, we recognize that, pursuant to HRS § 586-11, "a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor." Thus, the elements, see HRS § 702-205 (1993) (setting forth the elements of an offense to include conduct, attendant circumstances, and results of conduct), of the crime of violation of a protective order include: (1) conduct, i.e., the conduct prohibited by the protective order, which, in this case, was Appellant's causing legal documents to be served upon Russell; (2) attendant

[4] Moreover, Appellant had the option of seeking a modification from the court of the terms of the protective order to allow him to proceed with the divorce proceedings without violating the order. See HRS § 586-9 (Supp. 2005). He did not.

circumstance, i.e., the existence of an order restraining the person charged with the violation; and (3) result, i.e., violation of the protective order.

Here, Appellant admits that (1) he was aware of the existence of the protective order and (2) he knew it prohibited all contact with his wife and daughter. In addition, he does not dispute that he knew the order was binding on his agents, but simply claims that he does not remember seeing that language in the protective order. Therefore, by directing his friends to serve legal documents upon Russell at her residence, Appellant knew, or should have known, that they would be coming within 100 yards of Russell's residence and that such conduct was in violation of the protective order.

Appellant maintains that he believed the service of legal documents by his agents was not prohibited under the protective order. Specifically, Appellant relied upon the advice of his divorce attorney, Gerald Johnson, who told him that service of the documents could be done by any person, including his friends, and that such service would not be a violation of the protective order. Johnson, in turn, had relied on the opinions of two different prosecutors and on his own experience in a case involving a non-family abuse restraining order in providing the aforementioned advice to Appellant. Johnson, however, admitted that he jumped to the conclusion that the prosecutors' opinions represented "office policy" with respect to

violations of protective orders. Whether Appellant's belief negates the knowing element of HRS § 586-11 turns on the distinction between a mistake-of-fact and a mistake-of-law defense.[5] See HRS § 702-204 (1993) ("a person is not guilty of

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[5] HRS § 702-218 (1993) provides that,

> [i]n any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
>
> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

(Emphasis added.) The commentary to the above provision notes that the section

> deals with ignorance or mistake of fact or law, but is not intended to deal with the limited problem of the defense afforded a person who engaged in conduct **under the mistaken belief that the conduct itself was not legally prohibited**. That problem is dealt with exclusively by § 702-220.

(Emphases added.) The legislature, in enacting HRS § 702-218, eliminated all references to the mistake of law. See Sen. Sp. Comm. Rep. No. 6, in 1972 Senate Journal, at 684; Hse. Sp. Comm. Rep. No. 2, in 1972 House Journal, at 1065. As such, HRS § 702-218 applies solely to a mistake of fact defense. On the other hand, HRS § 702-220 (1993) provides a limited mistake of law defense:

> In any prosecution, it shall be an affirmative defense that the defendant engaged in the conduct or caused the result alleged under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
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> (1) A statute or other enactment;
> (2) A judicial decision, opinion, or judgment;
> (3) An administrative order or administrative grant of permission; or
> (4) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense.

(Emphasis added.)

an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense" (emphases added)).

As previously indicated, Appellant does not seriously dispute that he was aware of the existence of the protection order, the restrictions imposed upon him pursuant to the order, i.e., prohibiting any and all contact with his wife and daughter, or the binding effect of the order upon his agents. Notwithstanding the aforementioned knowledge, Appellant believed that serving legal documents was not violative of the protective order, i.e., that causing the service of divorce papers was legal. Clearly, Appellant's mistaken belief relates to an interpretation of the law, i.e., whether the service of legal documents qualifies as "contact" within the protective order to render the conduct prohibited. See, e.g., State v. Viglielmo, 105 Hawai'i 197, 205 n.7, 95 P.3d 952, 960 n.7 (2004) (noting that the defendant's "claim that she lacked the requisite state of mind is, in essence, a mistake of law claim -- i.e., [the defendant] could not violate [the offense of trespass in the second degree pursuant to] HRS § 708-814(1)(b) [(1993 & Supp. 2003),] because she believed she had a constitutional right of free speech to protest on the Ala Moana premises"); but see State v. Cavness, 80 Hawai'i 460, 911 P.2d 95 (App. 1996).

In Cavness, the defendant, inter alia, was the owner of a certain real property that was eventually sold by the City and

County of Honolulu to third parties (the current owners) at a sheriff's sale to satisfy real property tax liens on the property. Id. at 462, 911 P.2d at 97. The current owners, thereafter, made arrangements to demolish a building located on the property on a specified date, at which time the defendant entered the property to prevent the demolition. Id. The defendant was charged with criminal trespass in the second degree, in violation of HRS § 708-814(1)(b) (1985). Id. At trial, the defendant testified that he was preventing the demolition because he believed that the property was his -- "not only [his] residence, but [his] place of business." Id. at 463, 911 P.2d at 98. However, the trial court denied his request to introduce evidence of the basis of his belief that he had a right to be on the premises. Id. Following his conviction, the defendant appealed, arguing, among other things, that the trial court erred in excluding evidence relevant to his state of mind. Id. The Intermediate Court of Appeals (ICA) vacated the conviction, holding that the defendant "would have a viable mistake of fact defense if it were established that he negligently believed that he had a right to be on the premises." Id. at 465, 911 P.2d at 100. Indeed, the question regarding ownership of the subject premises in Cavness was a factual one -- i.e., whether the defendant mistakenly believed he was still the owner at the time of the demolition. See also State v. Palisbo, 93 Hawai'i 344, 355, 3 P.3d 510, 521 (App. 2000) (noting that the

defendant, who was convicted of unauthorized control of a propelled vehicle, would have a mistake of fact defense if he was under "a mistaken belief that the owner himself had authorized [the d]efendant's use of the vehicle). However, under the facts of the instant case, Appellant did not have any mistaken belief as to the facts; rather, the purported mistake centers on Appellant's belief that the protective order did not encompass the service of legal documents, which is a mistake of law.

Appellant, however, can only benefit from the mistake of law defense if he satisfies the conditions of HRS § 702-220. Initially, we note that Appellant never explicitly informed the trial court of a mistake of law defense and never cited to any statutory authority or case law to support such a defense. On this fact alone, the issue would have been waived. See Hawai'i Rules of Penal Procedure Rule 12(f) (2005) ("Failure by a party to raise defenses or objections . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."). Nonetheless, to the extent that the trial court may have implicitly considered the defense, we hold that Appellant's reliance on Johnson's "statement of the law" clearly falls outside of those circumstances enumerated in subsections (1) through (4) of HRS § 702-220, quoted supra note 5. See also HRS § 702-220 cmt. (although HRS § 702-220 provides a limited defense in certain situations, "[i]t must, in most instances, be held that such a mistaken belief will afford no excuse because

recognition of this defense would allow each individual to define the limits of application if a penal statute by claiming that, because of the individual's ignorance or mistake, the proscription of the statute is not applicable to the individual"); see also State v. Dudoit, 90 Hawai'i 262, 272, 978 P.2d 700, 710 (1999) (citing HRS § 702-220 commentary and Cavness' concurring and dissenting opinion for the proposition that "ignorance of the law excuses nobody" (internal quotation marks and citation omitted)). Accordingly, to the extent that the trial court may have implicitly rejected Appellant's mistake of law defense, we hold that the trial court did not err. Moreover, with respect to Appellant's contention that the trial court failed to consider a mistake of fact defense, we hold that the trial court did not so err inasmuch as no such defense was presented nor available to Appellant under these facts.

Accordingly, based on the foregoing, we conclude there was sufficient evidence establishing that Appellant knew of the existence of the protective order and the restrictions contained therein, including its application to him and his agents. We also conclude, based upon the evidence presented, that the defenses of mistake of law and fact are unavailable to Appellant. Consequently, we hold that the trial court did not err in finding Appellant guilty of two counts of violation of the protective order. Therefore,

IT IS HEREBY ORDERED that the trial court's February 7, 2005 judgment is affirmed.

DATED: Honolulu, Hawai'i, October 4, 2006.

On the briefs:

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for defendant-appellant

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
for plaintiff-appellee