

DISSENT BY ACOBA, J.

I would accept certiorari.

In this case the court likely accepted the correct statement of the law of Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) that the relevant issue was whether the conduct of Petitioner/Defendant-Appellant Donald J. Iseke (Petitioner) amounted to "contact" with the complaining witness (CW) as prohibited by the injunction, as opposed to "harassment" as defined under HRS § 604-10.5(a). As Petitioner points out, "[i]n a nearly 9-page closing argument, defense counsel argued Iseke's conduct did not meet the definition of harassment [in] HRS § 604-10.5(h) [sic]." (Emphasis added.) Under HRS § 604-10.5(a), "[h]arassment" means:

(1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or

(2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(Emphases added.) However, as correctly pointed out by Respondent at trial, "harassment" provides the basis for granting a restraining order, not for determining whether one has been violated. See HRS § 604-10.5(a) and (h). HRS § 604-10.5(h) provides that "[a] knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor." The correct standard for determining a violation is determined by what is prohibited by the injunction

-- in this case, "contact" with the CW. "Contact" in the injunction "include[d], but [was] not limited to communication by 'telephone, mail, fascimile, pager, electronic mail, internet, etc.'" Mem. at 10.

Defense counsel made arguments to the effect that Petitioner's conduct did not "seriously alarm" the CW and "stated [that] the 'elements' of the offense were a 'course of conduct,' . . . and 'conduct that seriously alarms[.]'" Manifestly, defense counsel was arguing against harassment, the incorrect standard, rather than against "contact," as Respondent pointed out in its rebuttal argument. Therefore, Petitioner was deprived of a defense on the issue of whether he actually made "contact" with the CW, as specifically prohibited by the injunction.

The discussion by the Intermediate Court of Appeals (ICA) as follows, then, is unavailing.

[C]ounsel did reach the issue of contact and state of mind in closing argument. Trial counsel argued that [Petitioner] lacked the requisite intent to make contact because he exited the courtroom at the instruction of his other counsel to look for a witness, and eye contact was inadvertently made with [CW] because [CW] was sitting in front of the courtroom doors . . . The fact that further arguments could have been made to further explain [Petitioner's] gestures, posturing, body language, and facial expressions does not amount to ineffective assistance of counsel in this case. Counsel's closing argument on the issue of harassment did not deprive [Petitioner] of a potentially meritorious defense.

State v. Iseke, No. 27807 mem. at 11 (App. Aug. 29, 2008) (mem.) (emphases added).

Contrary to the ICA's recitation, defense counsel never submitted argument as to whether Petitioner's conduct fit the

definition of "contact" in the injunction. The injunction indicates that "contact" as defined is meant to cover communication. Defense counsel never argued as much.

Consequently, defense counsel attempted to rebut a higher burden of proof that Respondent was not required to meet and neglected to argue the standard that was applicable.

As to ineffective assistance of counsel, this court has said that

the burden of establishing ineffective assistance of counsel [is] on the defendant, requiring him to prove [] that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and [] that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense To satisfy this second prong, [the defendant] need only show a possible impairment of a potentially meritorious defense, not probable impairment or actual prejudice.

Wilton v. State, 116 Hawai'i 106, 110-11, 170 P.3d 357, 361-62

(2007) (citations omitted) (emphases added). Defense counsel's failure to argue the issue of contact is a "specific error[] or omission[] reflecting counsel's lack of skill, judgment or diligence," and, by contending that counsel failed to argue the correct standard, Petitioner has shown a "possible impairment of a potentially meritorious defense," id. (emphases added), i.e., that his conduct was not an intentional communication with CW. The ICA gravely erred, therefore, in concluding that "[c]ounsel[] . . . did not deprive [Petitioner] of a potentially meritorious defense." Mem. at 11.

Not only was there grave error, but the ICA contradicts its own precedent, having employed opposing rationale in similar

cases. An argument to the ICA based on insufficient contact was successful on appeal on nearly identical facts in State v. Liles, No. 26150, 2006 WL 1805881 (App. June 30, 2006). In that case, the ICA reasoned:

When person A has been ordered by a court not to contact person B and person A and person B are within a courtroom and leaving it immediately after participating in a court hearing involving both of them, does person A violate the court order by looking at person B in a manner that person B describes as offensive? We conclude that the answer is no. Liles had a right to be where he was and, absent a court order specifically ordering otherwise, to look at Greenawalt. Such "contact" not being prohibited, the fact that it was done in a manner offensive to Greenawalt did not cause it to be prohibited.

Id. at *2 (emphases added). In another case, the ICA concluded:

The Merriam-Webster's Collegiate Dictionary (10th ed. 2000) defines "contact" as "an establishing of communication with someone or an observing and receiving of a significant signal from a person or object." Id. at 248 (emphasis added). It defines "communication" as "a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior." Id. at 232. In light of these definitions, Stanley's yelling and "giving the finger" clearly constitute an "establish[ment] of communication" by Stanley with Ziegler and, thus, constitute "contact." Stanley's "peeling out" and "shooting gravel" onto Ziegler's truck, although more oblique, could also be construed as a form of communication.

State v. Stanley, 110 Hawai'i 116, 124, 129 P.3d 1144, 1152 (App. 2005). The ICA failed, in the instant case, to adhere to the rationale underlying Stanley with respect to the necessity of "establishing [or rebutting] communication," id., based on the facts and circumstances pertaining to alleged communication.

In sum, these cases indicate that "communication" is the touchstone for "contact" under the injunction's language, and hence, Petitioner was deprived of effective assistance of counsel based on his counsel's failure to make any argument on that point. Cf. People v. Evans, 710 P.2d 1167, 1168 (Colo. App.

1985) (holding that closing argument is "one of the most consequential parts of the trial").

A handwritten signature in black ink, appearing to read "James R. Stewart". The signature is written in a cursive style with a large initial 'J' and a stylized 'S' at the end.