

SUPREME COURT OF HAWAI‘I

State v. Silver

125 Hawai‘i 1, 249 P.3d 1141 (2011) · No. SCWC-29060 · Decided February 2, 2011

SUMMARY

The Supreme Court of Hawai‘i held that insufficient evidence supported Barry Silver’s conviction for sexual assault in the third degree on Count 1, which arose from touching the minor’s buttocks during pool horseplay. The court reversed that conviction and remanded for entry of a judgment of acquittal, while affirming the convictions and sentence on the remaining counts. The opinion also addressed the statutory meaning of “intimate parts” and “sexual contact” under Hawai‘i law.

CASE DETAILS

COURT	Supreme Court of Hawai‘i
WRITING FOR THE COURT	Duffy, J.; Recktenwald, C.J.; Nakayama, J.; Acoba, J.; Del Rosario, Circuit Judge, assigned by reason of vacancy
JURISDICTION	Hawaii
DECIDED	February 2, 2011
DOCKET	SCWC-29060
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Petitioner's application for a writ of certiorari seeking review of the Intermediate Court of Appeals' judgment affirming his convictions for four counts of third-degree sexual assault.
STANDARD OF REVIEW	Statutory interpretation is reviewed de novo. On sufficiency of the evidence, the evidence is viewed in the strongest light for the prosecution, and the question is whether substantial evidence supports every material element of the offense.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Barry Silver v. State of Hawai‘i

TOPICS

- statutory interpretation
- legislative history
- in pari materia
- appellate procedure
- double jeopardy

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether substantial evidence supported Silver's conviction on Count 1, which was based on touching Minor's buttocks during pool horseplay.
2. Whether the buttocks may constitute an intimate part under Hawai'i's third-degree sexual-assault statute and the statutory definition of sexual contact.
3. Whether the statutory scheme provided fair notice that the conduct underlying Counts 3 through 5 was prohibited.
4. Whether reversal of Count 1 for insufficiency of the evidence required entry of a judgment of acquittal under the Double Jeopardy Clauses.

HOLDINGS

1. The buttocks may constitute an intimate part for purposes of HRS section 707-700 when, viewed in context, the touching is of a body part typically associated with sexual relations.
2. Substantial evidence supported Silver's convictions on Counts 3 through 5 because the late-night massages, repeated waking and rubbing, instruction to remain quiet, and slow touching of Minor's buttocks and penis supported an inference of knowing sexual contact with an eleven-year-old child.
3. The evidence was insufficient to support Silver's conviction on Count 1 because touching Minor's buttocks during pool horseplay, in the circumstances shown, did not constitute substantial evidence of sexual contact with an intimate part.
4. Because Count 1 was reversed for insufficiency of the evidence, the circuit court must enter a judgment of acquittal on that count; retrial is barred by the Double Jeopardy Clauses.

KEY QUOTATIONS

"The subsequent massage does not turn Silver's conduct in the pool, which the ICA agrees is otherwise not actionable, Mem. Op. at 29, into a criminal offense." (1149)

"Accordingly, we hold that there was insufficient evidence to support Silver's conviction under Count 1." (1149)

"We, therefore, reverse the judgment of conviction on Count 1 for insufficiency of the evidence, and remand the case to the circuit court with instructions to enter a judgment of acquittal on Count 1 and to modify Silver's sentence accordingly." (1149)

FACTUAL BACKGROUND

Silver was staying with eleven-year-old Minor and Minor's father at a condominium in Maui. Minor testified that Silver touched his buttocks and penis during late-night rubbing or massages on a foldout couch, and that Silver touched or held under his buttocks during horseplay in a swimming pool a day or two earlier. The

supreme court found the nighttime conduct sufficient to support Counts 3 through 5 but found the pool evidence insufficient to establish criminal sexual contact for Count 1.

PROCEDURAL HISTORY

A jury convicted Silver of four counts of third-degree sexual assault after the circuit court granted his motion for judgment of acquittal on a fifth count. The Circuit Court of the Second Circuit entered judgment and imposed concurrent five-year sentences. The Intermediate Court of Appeals affirmed, and the Supreme Court of Hawai'i accepted Silver's application for a writ of certiorari. The supreme court reversed the conviction on Count 1 for insufficient evidence, affirmed the remaining convictions and sentence in all other respects, and remanded for entry of an acquittal on Count 1 and sentence modification.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Enter a judgment of acquittal on Count 1 and modify Silver's sentence accordingly. The judgment of conviction and sentence are affirmed in all other respects.

CASES CITED

- Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000)
- Awakuni v. Awana, 115 Hawai'i 126, 165 P.3d 1027 (2007)
- Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 239 P.3d 1 (2010)
- State v. Batson, 73 Haw. 236, 831 P.2d 924 (1992)
- State v. Matavale, 115 Hawai'i 149, 166 P.3d 322 (2007)
- State v. Kalani, 108 Hawai'i 279, 118 P.3d 1222 (2005)
- People v. Rivera, 138 Misc. 2d 570, 525 N.Y.S.2d 118 (N.Y. Sup. Ct. 1988)
- State v. Rodgers, 68 Haw. 438, 718 P.2d 275 (1986)
- State v. Yoshida, 45 Haw. 50, 361 P.2d 1032 (1961)
- State v. Kalaola, 124 Hawai'i 43, 237 P.3d 1109 (2010)
- State v. Bannister, 60 Haw. 658, 594 P.2d 133 (1979)
- Burks v. United States, 437 U.S. 1, 11 (1978)
- State v. Richie, 88 Hawai'i 19, 960 P.2d 1227 (1998)