

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I agree with the majority's interpretation of Hawaii Revised Statutes (HRS) § 291C-21 (2007) and HRS § 291C-23 (2007) and the majority's determination that the District Court's basis for dismissing the Failure to Comply With Lawful Order charge was wrong.

Nevertheless, this court may affirm the District Court on an alternative ground that is apparent from the record, even if it differs from the ground relied upon by the District Court. State v. Fukugawa, 100 Hawai'i 498, 506-07, 60 P.3d 899, 907-08 (2002); Poe v. Hawai'i Labor Relations Board, 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998). Here, the parties do not dispute that the video recording of the incident made by Defendant-Appellee Thomas Anthony Russo (Russo) accurately depicts the encounter between Russo and the police officers. Plaintiff-Appellant State of Hawai'i (State) stipulated to the introduction of the video recording and asserted that the video recording was "the best evidence . . . of what actually occurred that day."

Based on my review of the video recording, I believe that probable cause to support the Failure to Comply With Lawful Order charge was lacking. The video recording shows that Russo did not willfully fail or refuse to comply with the officers' order to stand back or move. Instead, although Russo questioned the officers' authority to order him from the scene, he was complying with the officers' order, retreating and walking backward away from the approaching officers and their area of operation, when the officers arrested him. I conclude that that there was no probable cause to support the charge of Failure to Comply With Lawful Order and that any finding by the District Court that Russo willfully failed or refused to comply with the officers' order was clearly erroneous.

Accordingly, I would affirm the District Court's dismissal of this charge and its Judgment, albeit on a different ground than relied on by the District Court. I therefore respectfully dissent from the majority's decision to vacate the

order of dismissal and Judgment on the Failure to Comply With
Lawful Order charge and to remand this case for further
proceedings.

Craig H. Nakamura

Chief Judge