

DISSENTING OPINION BY GINOZA, J.

In my view, the District Court of the First Circuit (**district court**) properly granted Defendants-Appellees Matthew Sean Sasai (**Sasai**) and Brent N. Tanaka's (**Tanaka**) motions to dismiss based on the principles adopted by the Hawai'i Supreme Court in State v. Modica, 58 Haw. 249, 567 P.2d 420 (1977). Therefore, I respectfully dissent.

In Modica, the Hawai'i Supreme Court expressed that the defendant's constitutional rights in that case would be violated "if a violation of the misdemeanor statute (HRS [§] 134-6) would invariably and necessarily constitute a violation of the felony provision (HRS [§] 134-9)." 58 Haw. at 250, 567 P.2d at 421 (citation omitted); see also State v. Friedman, 93 Hawai'i 63, 75, 996 P.2d 268, 280 (2000). The supreme court further explained that:

where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws.

Modica, 58 Haw. at 251, 567 P.2d at 422 (emphasis added) (citations omitted). There, the court held that because carrying a pistol or revolver on the person was an essential element under the felony offense (HRS § 134-9), but was not a requirement under the misdemeanor offense (HRS § 134-6), the defendant's constitutional rights to due process and equal protection of the laws were not violated. Id.

The Modica opinion concluded by noting:

Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion.

Id. (citations omitted).

Here, the State of Hawai'i (**State**) contends, *inter alia*, that the circuit court erred in its conclusions of law 17 through 19, which essentially hold that because a defendant committing the same act can be charged under either HRS § 712-1200(1)(a) or (1)(b), and subsection (1)(b) has a harsher

punishment given that a defendant is not eligible for a deferral of guilty or no contest plea (**DAG**) pursuant to HRS § 853-4(a)(13)(V) (2014), proceeding against a defendant under the harsher alternative violates due process and equal protection rights as raised in Modica.

At the time relevant to this case, HRS § 712-1200(1) (2014) provided:

§712-1200 Prostitution. (1) A person commits the offense of prostitution if the person:

- (a) Engages in, or agrees or offers to engage in, sexual conduct with another person for a fee; or
- (b) Pays, agrees to pay, or offers to pay a fee to another to engage in sexual conduct.

Prior to this version, section (1) of the statute was not split into two subsections. Rather, it only stated that "[a] person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee" (1990 version of the statute)¹ -- which is the same language in (1) (a) above -- under which purchasers of sex could be charged. See State v. Espinosa, 120 Hawai'i 478, 480, 210 P.3d 1, 3 (App. 2009) (discussing the amendment to HRS § 712-1200(1) in 1990 that deleted the words "in return," thus making it clear the statute applied also to the "customer of a prostitute").

Given the plain language of the applicable version of HRS § 712-1200(1),² and the history of the statute, I conclude that the district court was correct that, with regard to the person who pays/agrees to pay/offers to pay a fee to another to engage in sexual conduct, the individual could have been charged under either HRS § 712-1200(1) (a) or (1) (b) and that the prohibited conduct was the same under both subsections. In short, for such person, the elements of proof for conviction under either subsection (1) (a) or (1) (b) were the same, and a

¹ See 1990 Haw. Sess. Laws Act 204, § 1 at 442.

² In 2016, after the relevant period in this case, HRS § 712-1200(1) (a) was amended to add back the words "in return" as follows: "(1) A person commits the offense of prostitution if the person: (a) Engages in, or agrees or offers to engage in, sexual conduct with another person in return for a fee[.]" (Emphasis added.) See 2016 Haw. Sess. Laws Act 231, § 51 at 763.

violation of subsection (1)(a) would invariably and necessarily constitute a violation of subsection (1)(b).

Under Modica, a defendant's rights to due process and the equal protection of the laws are violated "where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same[.]" 58 Haw. at 251, 567 P.2d at 422 (emphasis added); Friedman, 93 Hawai'i at 74-75, 996 P.2d at 279-80. Although Modica addresses a felony versus a misdemeanor offense, the Hawai'i Supreme Court has recognized that the Modica principle applies with regard to different grades of felonies. State v. Arceo, 84 Hawai'i 1, 22, 928 P.2d 843, 864 (1996) (stating that Modica "applies equally to the possibility of prosecution and conviction under two differentially classed felonies"); see also State v. Hatori, 92 Hawai'i 217, 226, 990 P.2d 115, 124 (App. 1999). Thus, it appears the Modica principles would also apply here where a violation of HRS § 712-1200(1)(a) and (1)(b) are both petty misdemeanors, but the penalty under subsection (1)(b) is more severe in that a DAG is precluded under HRS § 853-4(a)(13)(V).

Given the above, I conclude that the district court properly dismissed the HRS § 712-1200(1)(b) charges under Modica. If the defendants in these cases had been charged under subsection (1)(a), rather than subsection (1)(b), there would not have been a violation under Modica principles. See State v. Hoang, 86 Hawai'i 48, 58-59, 947 P.2d 360, 370-71 (1997) (holding that although the statutory scheme in that case "generate[s] the very evils rendered unlawful by the Modica rule[,]" because the defendant was charged with the misdemeanor rather than the felony offense, the defendant's constitutional rights were not violated).

For these reasons, I respectfully dissent and would affirm the dismissal of the charges in these cases.

Jess M. King