

*** NOT FOR PUBLICATION ***

NO. 22937

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant

vs.

ADI ADOLF BUCAR, also known as Adi A. Bucar,
Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-1915)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff-appellant State of Hawaii [hereinafter, "the prosecution"] appeals from the October 13, 1999 order of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, granting Adi Adolf Bucar's motion to dismiss and dismissing the indictment. On September 2, 1998, Bucar was indicted on: (1) one count of habitually driving under the influence of intoxicating liquor or drugs (Habitual DUI), in violation of HRS §§ 291-4.4(a)(1) and/or 291-4.4(a)(2) (Supp. 1996)¹ (repealed on January 1, 2000 and replaced by HRS §

¹ HRS § 291-4.4 provides:

(a) A person commits the offense of habitually driving under the influence of intoxicating liquor or drugs if, during a ten-year period the person has been convicted three or more times for a driving under the influence offense; and

- (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty;
- (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath; or

(continued...)

*** NOT FOR PUBLICATION ***

291E-61.5 (Supp.2003)) (Count I); (2) one count of unsafe lane change while driving on roadways laned for traffic, in violation of HRS § 291C-49 (1993)² (Count II); and (3) and one count of driving while license suspended, revoked or restricted for driving under the influence of intoxicating liquor (DUI), in violation of HRS § 291-4.5 (1993)³ (Count III). On October 13,

¹(...continued)

(3) A person operates or assumes actual physical control of the operation of any vehicle while under the influence of any drug which impairs such person's ability to operate the vehicle in a careful and prudent manner. The term "drug" as used in this section shall mean any controlled substance as defined and enumerated on schedules I through IV of chapter 329.

(b) For the purposes of this section a driving under the influence offense means a violation of section 291-4, 291-7, or 707-702.5, or violation of laws in another jurisdiction which requires proof of each element of the offenses punishable under either section 291-4, 291-7, or 707-702.5 if committed in Hawaii.

(c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony.

² HRS § 291C-49 provides in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply.

- (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such a movement can be made with safety.
- (2) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same direction when the center lane is clear of traffic within a safe distance, or in preparation for making a left turn or where the center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and such allocation is designed by official traffic control devices.

³ HRS § 291-4.5 provides in relevant part:

(a) No person whose driver's license has been revoked, suspended, or otherwise restricted pursuant to part XIV of
(continued...)

*** NOT FOR PUBLICATION ***

1999, the circuit court granted Bucar's motion to dismiss and dismissed the indictment, namely Counts I, II, and III.

On appeal, the prosecution argues that "the lower court erroneously concluded that the state failed to prove that defendant had 3 prior DUI convictions because [the prior convictions] were vacated between the time of the offense and defendant's indictment." The prosecution further argues that, even if the circuit court properly concluded that the prosecution was required to establish that Bucar's prior DUI convictions were outstanding at the time of the indictment, the circuit court erred by dismissing the entire indictment.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the circuit court did not err in concluding that the prosecution failed to meet its burden of establishing the elements of Habitual DUI. See State v. Veikoso, 102 Hawai'i 219, 223, 74 P.3d 575, 579 (2003); State v. Shimabukuro, 100 Hawai'i 324, 327-28, 60 P.3d 274, 277-78 (2002). However, we further hold that the circuit court erred in dismissing the indictment, inasmuch as the proceedings should have continued on Count II, Count III, and the lesser included offense of DUI in Count I. See Shimabukuro, 100 Hawai'i at 329, 60 P.3d at 279. Therefore,

³(...continued)

chapter 286 or section 291-4 shall operate a motor vehicle either upon the highways of this State while the person's license remains suspended or revoked or in violation of the restrictions placed on the person's license. . . .

***** NOT FOR PUBLICATION *****

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is vacated and this case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, January 21, 2004.

On the briefs:

Caroline M. Mee,
Deputy Prosecuting Attorney,
for the plaintiff-appellant

Theodore Y.H. Chinn,
Deputy Public Defender,
for the defendant-appellee
Adi Adolf Bucar