

NO. 23325

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

MICHAEL KEONE REGAN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT¹
(TRAFFIC NO. 99-324024)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Acoba, JJ.;
and Nakayama, J. Dissenting, With Whom Ramil, J. Joins)

At 11:10 p.m. on September 16, 1999, Defendant-Appellant Michael Keone Regan (Defendant) was arrested for driving under the influence of intoxicating liquor (DUI), Hawaii Revised Statutes (HRS) § 291-4 (Supp. 2000).² Subsequently, the

¹ The district court judge in this case was the Honorable W. Patrick O Connor.

² HRS § 291-4 provides, in pertinent part, as follows:

Driving under the influence of intoxicating liquor.

(a) A person commits the offense of driving under the influence of intoxicating liquor if:

- (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 concerned 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; or
- (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.

arresting officer read to Defendant Honolulu Police Department (HPD) form 396B entitled, ADMINISTRATIVE DRIVER S LICENSE REVOCATION LAW[,] which provided in pertinent part as follows:

I READ THE FOLLOWING TO THE ARRESTEE: Pursuant to the Administrative Driver s License Revocation Law, I must inform you (arrestee) of the following:

. . . .

B. That if you refuse to take any [blood alcohol concentration (BAC)] tests the consequences are as follows:

1. If your driving record shows no prior alcohol enforcement contacts during the five years preceding the date of your arrest, your driving privileges will be revoked for one year instead of the three month revocation that would apply if you chose to take a test and failed it[.]

. . . .

Defendant chose to take a BAC test. The test revealed that Defendant s BAC was more than the 0.08 grams required for committing a DUI offense under HRS § 291-4(a)(2). Thereafter, the Administrative Driver s License Revocation Office revoked Defendant s driver s license for a period of three months.

I.

On October 26, 1999, this court decided State v. Wilson, 92 Hawai i 45, 987 P.2d 268 (1999), which deemed the advice imparted in HPD form 396B to be faulty and required suppression of any incriminating test result that was obtained following such advice.

On January 26, 2000, Defendant moved to suppress the BAC test result based on Wilson. On February 17, 2000,

Plaintiff-Appellee State of Hawaii (the prosecution) filed a memorandum in opposition to Defendant's motion to suppress.

On February 17, 2000, the district court of the first circuit (the court) held a hearing on Defendant's motion. The court orally denied Defendant's motion to suppress on the basis that Defendant lacked standing and Wilson should not be given retroactive effect. After the court's ruling on the motion, the prosecution and defense agreed that Defendant would enter a conditional no contest plea to the DUI charge, preserving his right to appeal the denial of the motion. Based on that representation, the court sentenced Defendant and entered judgment accordingly.

On March 7, 2000, the court filed its findings of fact, conclusions of law, and an order denying Defendant's motion to suppress the BAC test result. In one of its written conclusions, the court said, as the apparent basis for its standing ruling, that Defendant has failed to show that he has suffered any harm as [sic] result of an alleged incomplete disclosure by the police officer[.]

On March 15, 2000, Defendant filed a notice of appeal.

II.

In this appeal, Defendant contends that (1) his rights to correct advice under the Hawaii implied consent statutes

were violated, giving him standing to contest the admission of the [test result], (2)Wilson should be applied retroactively, and (3) Wilson s holding mandates suppression of his BAC test result. The prosecution contends that the court was correct in refusing to apply Wilson retroactively.

III.

State v. Garcia, No. 23513, slip op. (Haw. Aug. 10, 2001), sets forth the relevant arguments and law common to the appeal in Garcia and in this case. Contrary to the court s ruling, Garcia holds that Wilson indicated prejudice (i.e., harm) inhered in the police officer s failure to properly render a complete explanation of the possible penalties that drivers might incur, and that Wilson must be applied retroactively to cases not yet final at the time of its publication. Garcia s holding thus requires suppression of Defendant s BAC test result. Therefore,

IT IS HEREBY ORDERED that the court s March 7, 2000 findings of fact, conclusions of law, and order denying Defendant s motion to suppress, Defendant s February 17, 2000 conditional no contest plea, and the court s February 17, 2000 judgment and sentence are vacated based on the reasons set forth

in Garcia, and the case is remanded for disposition in accordance with this order.

DATED: Honolulu, Hawaii, August 27, 2001.

On the briefs:

Jonathan Burge and Craig
Kinsel for defendant-
appellant.

James Anderson, Deputy
Prosecuting Attorney,
City & County of Honolulu,
for plaintiff-appellee.