IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

SHANE SHIGEO SHIMABUKURO, Defendant-Appellant

NO. 23399

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-1291)

DECEMBER 24, 2002

ACOBA, J.; WITH LEVINSON, J., CONCURRING SEPARATELY, WITH WHOM MOON, C.J., JOINS; AND NAKAYAMA, J., DISSENTING, WITH WHOM RAMIL, J., JOINS

OPINION BY ACOBA, J.,
ANNOUNCING THE JUDGMENT OF THE COURT

In a conviction for habitually driving under the influence of intoxicating liquor or drugs (Habitual DUI), Hawai‘i Revised Statutes (HRS) § 291-4.4 (Supp. 1998)[1], the requisite

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[1] Hawai‘i Revised Statutes (HRS) § 291-4.4 prohibits any person from habitually driving under the influence of liquor or drugs. In relevant part, that section provides:

> **Habitually driving under the influence of intoxicating liquor or drugs.** (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

(continued...)

prior driving under the influence (DUI) convictions must be valid.[2] That was not the case with respect to the April 11, 2000 judgment of conviction and sentence entered by the circuit court of the first circuit[3] (the court) adjudging Defendant-Appellant Shane Shigeo Shimabukuro (Defendant) guilty of Habitual DUI. Accordingly, the aforementioned judgment must be vacated and the case remanded.

I.

On June 6, 1999, Defendant was charged in Count I of an indictment for Habitual DUI, in Count II for driving while his license was suspended, revoked, or restricted, and in Count III for disregarding roadways laned for traffic. Since Defendant appeals only his conviction on Count I, we affirm the convictions on Count II and Count III.

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[1](...continued)
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[.]

(Emphasis added.) HRS § 291-4.4 was repealed on January 1, 2002. It has been replaced by HRS § 291E-61 (Supp. 2001).

[2] In his brief, Defendant argued, inter alia, that the prior DUI convictions must be constitutionally valid.

[3] The Honorable Sandra A. Simms presided over the proceedings.

On January 3, 2000, one of Defendant's three prior DUI convictions was vacated because it was "unconstitutionally obtained."[4] Subsequently, on January 18, 2000, Defendant, who at that point had only two prior DUI convictions, filed a motion to dismiss his Habitual DUI charge, on the ground that he had less than the number of convictions necessary for charging that offense. The court, relying on State v. Lobendahn, 71 Haw. 111, 784 P.2d 872 (1989), denied Defendant's motion.[5] Shortly thereafter, Defendant entered into a conditional plea of guilty allowing him to challenge the court's denial of his motion to dismiss.[6] On April 11, 2000, the court sentenced Defendant to a

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[4] The record on appeal does not indicate in what manner the prior conviction was unconstitutionally obtained.

[5] In Lobendahn, the defendant was convicted of kidnapping and terroristic threatening. See Lobendahn, 71 Haw. at 111, 784 P.2d at 872. He appealed those convictions. While the appeal was pending and the defendant was on parole, he was arrested and charged with being a felon in possession of a firearm and ammunition in violation of HRS § 134-7 (1985). See id. at 112, 784 P.2d at 872. After the defendant's arrest, but before his trial for the felon-in-possession charge, this court set aside his kidnapping and terroristic threatening convictions and remanded his case for a new trial. See id. Upon retrial, the defendant was acquitted of the kidnapping and terroristic threatening charges. See id. Subsequently, the defendant was convicted of being a felon in possession of a firearm and ammunition under HRS § 134-7. See id.

On appeal, this court affirmed the defendant's HRS § 134-7 conviction on the ground that "the legislature did not intend to encourage persons to flaunt the law while an appeal is pending." Id. at 112-13, 784 P.2d at 873. The Lobendahn court held that "[defendant]'s status was that of a convicted felon at the time he possessed the firearm and ammunition. Such possession was unlawful and the subsequent reversal of the conviction does not then render such possession lawful." Id. (citing United States v. Liles, 432 F.2d 18, 21 (9th Cir. 1970)).

[6] Under Hawai'i Rules of Penal Procedure (HRPP) Rule 11(a)(2) (2000), appeals may be taken pursuant to a conditional plea. That rule, in relevant part, provides that,

> [w]ith the approval of the court and the consent of the State, a defendant may enter a conditional plea of guilty[,] . . . reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specific pretrial motion.

five-year term of probation with a term of imprisonment of thirty-four (34) days,[7] revocation of his driver's license for the duration of the probation period, and a fine of $250.00. On April 16, 2000, Defendant filed his notice of appeal.

II.

On appeal, Defendant essentially makes three contentions with respect to his motion to dismiss. First, he argues that, as of January 3, 2000, he lacked the required three prior DUI convictions necessary to charge him with Habitual DUI. Hence, according to Defendant, the court erred in denying the motion to dismiss. Second, Defendant maintains that Lobendahn is distinguishable because HRS § 134-7 (1985), the statute in that case, converts a lawful act (possessing a firearm and ammunition) into an unlawful act solely by reason of a person's status, whereas, "by contrast, HRS § 291-4.4 applies to the offense of driving while intoxicated, which is per se a criminal act." Third, construing HRS § 291-4.4 as a recidivist statute, Defendant contends that "the term 'conviction' as used in HRS

[7] The record on appeal states that, as part of his probation, Defendant is to "[s]erve a term of imprisonment of Thirty-Four (34) Days, with credit for time already served[.]" It is not evident as to what offenses the thirty-four day sentence pertains. Habitual DUI is punishable by a maximum term of imprisonment of thirty days. See HRS § 291-4(b)(3)(C) (Supp. 2000). With respect to Count II, HRS § 291-4.5(b) (1993) provides for a term of imprisonment of up to one year. In connection with Count III, HRS § 291C-49(3) (1993) does not provide for any term of imprisonment as a penalty. See HRS § 291C-161 (Supp. 2000). HRS § 291-4.5 was repealed on January 1, 2002. Its replacement is found in HRS § 291E-62 (Supp. 2001).

In light of our remand, the circuit court should set forth the sentences as they may separately pertain to each offense for which Defendant is found guilty.

§291-4.4 [sic] must be contemplated to mean a 'constitutionally valid conviction.'"

The prosecution counters that culpability under HRS § 291-4.4 is measured by the DUI convictions Defendant had at the time of his arrest, not at the time of trial. It relies on Lobendahn, maintaining that in the instant case, "[a]s in Lobendahn, the Legislature would not want to encourage a person formerly convicted of [three] or more DUI offenses to gamble by driving DUI in the hope that he or she could defend against the felony offense by having the prior DUI convictions set aside." The prosecution does not address Defendant's second argument. As to Defendant's third contention, the prosecution argues, relying on the legislative history of HRS § 291-4.4, that that statute involves a status offense and is not a recidivist statute.

III.

In relevant part, HRS § 291-4.4 states that the offense is committed if during the preceding ten years, the defendant has been "convicted three or more times for" DUI. This court has held that "[t]he meaning of the term 'convicted' or 'conviction' varies according to the context in which it appears and the purpose to which it relates." State v. Akana, 68 Haw. 164, 166-67, 706 P.2d 1300, 1303, reconsideration denied, 68 Haw. 164, 706 P.2d 1300 (1985) (citations omitted).

Generally, a conviction is defined as "[t]he final judgment on a verdict or finding of guilty, a plea of guilty, or

a plea of nolo contendere, but does not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory." Black's Law Dictionary 333-34 (6th ed. 1990).[8] See Akana, 68 Haw. at 166-67, 706 P.2d at 1303 ("The word 'conviction' is more commonly used and understood to mean a verdict of guilty or a plea of guilty. The more technical definition includes the judgment or sentence rendered pursuant to an ascertainment of guilt. . . . Use of the term 'conviction' in a statute presents a question of legislative intent." (Citation omitted.)[9]

As employed in HRS § 291-4.4, the term "convicted" is susceptible to two reasonable interpretations. The first is that the prior DUI convictions must be valid to charge an individual with Habitual DUI.[10] Cf. State v. Sinagoga, 81 Hawai'i 421, 434, 918 P.2d 228, 241 (App. 1996) (holding that "an uncounseled [and thus unconstitutional] conviction is not reliable for purposes of

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[8] There is no specific legislative history with respect to the term "convicted" in HRS § 291-4.4.

[9] The definitions of "conviction" are referred to only to illuminate the fact that "[t]he meaning of the term 'convicted' or 'conviction' varies according to . . . context[.]" Akana, 68 Haw. at 166-67, 706 P.2d at 1303 (citations omitted) (emphasis added). The dissent concedes that the meaning of "convicted" depends on "the context in which it appears[,]" quoting the same language from Akana. See dissenting opinion at 5. As discussed in detail supra, because HRS § 291-4.4 is an ambiguous criminal statute, the rule of lenity mandates that the term "convicted" be strictly construed. Hence, in this context, i.e., in the present case, the term "convicted" means a prior valid DUI conviction.

[10] Aside from the argument in his opening brief, in oral argument Defendant suggested that HRS § 291-4.4 is a recidivist statute, and therefore, the prior conviction must be constitutionally valid, citing State v. Sinagoga, 81 Hawai'i 421, 434, 918 P.2d 228, 241 (App. 1996) (holding that "an uncounseled [and thus unconstitutional] conviction is not reliable for purposes of imposing or enhancing a sentence of imprisonment").

imposing or enhancing a sentence of imprisonment"). The other is, as the prosecution contends, that any prior conviction, whether vacated or not, suffices. Obviously, we are not confronted in the instant case with re-interpreting HRS § 134-7 (1985), the statute construed in Lobendahn.[11] In the present case, inasmuch as HRS § 291-4.4 can reasonably be interpreted in two ways, the statute is ambiguous. See State v. Fukusaku, 85 Hawai'i 462, 491, 946 P.2d 32, 61 ("A statute is ambiguous if it is 'capable of being understood by reasonably well-informed people in two or more different senses.'" (Quoting State v. Toyomura, 80 Hawai'i 8, 19, 904 P.2d 893, 904 (1995).)). (Brackets omitted.), reconsideration denied, 85 Hawai'i 462, 946 P.2d 32 (1997).

Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity. See State v. Kaakimaka, 84 Hawai'i 280, 292, 933 P.2d 617, 629 ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (Quoting Busic v. United States, 446 U.S. 398, 406 (1980).)), reconsideration denied, 84 Hawai'i 280, 933 P.3d 617 (1997); State v. Auwae, 89 Hawai'i 59, 70, 968 P.2d 1070,

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[11] In his opening brief, Defendant argued that the language of HRS § 134-7, which was at issue in Lobendahn, was dissimilar from that of HRS § 291-4.4 in that: (1) as mentioned, the statute in that case, converts a lawful act (possessing a firearm and ammunition) into an unlawful act solely by reason of a person's status, whereas, "by contrast, HRS § 291-4.4 applies to the offense of driving while intoxicated, which is per se a criminal act[]"; (2) the language of HRS § 291-4.4 and its legislative history indicate that the legislature "intended [that statute] to operate as a recidivist statute i.e., increasing the punishment based on each additional conviction[]"; and (3) under HRS § 134-7, "it is the intent of the legislature to render a person of a particular status based on [a] 'probable cause' standard rather than 'proof beyond a reasonable doubt.'"

1081 (App. 1998) (because ambiguity exists as to legislative intent with respect to applicable unit of prosecution under statute, rule of lenity requires that statute be interpreted to allow only single punishment in such circumstances), overruled on other grounds by State v. Jenkins, 93 Hawai‘i 87, 997 P.2d 13 (2000). Under the rule of lenity, the statute must be strictly construed against the government and in favor of the accused. See Staples v. United States, 511 U.S. 600, 619, n.17 (1994) ("[U]nder [the rule of lenity,] an ambiguous criminal statute is to be construed in favor of the accused.").

IV.

Applying the rule, we strictly construe the term "convicted" in HRS § 291-4.4 as referring to a prior valid DUI conviction. In this area of the law, this court has held that justice requires that the condition precedent to liability be validly established before the ultimate sanction can be imposed. See Farmer v. Administrative Dir. of the Court, 94 Hawai‘i 232, 241, 11 P.2d 457, 466 (2000) ("[J]ustice requires that [the defendant] be given an opportunity to challenge the lifetime revocation of his driver's license because one of the three predicate [DUI] convictions on which his revocation is based has been set aside."). Here, one of Defendant's three prior convictions was vacated on the ground that it was unconstitutionally obtained. As such, as of January 3, 2000, Defendant presumably had only two valid convictions. Inasmuch as

Defendant lacked the requisite number of convictions, the court erred in denying Defendant's motion to dismiss.[12]

V.

With all due respect, it is not accurate to suggest, as the dissent does, that applying the rule of lenity "permits a

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[12] According to the legislative history of HRS § 291-4.4, the requisite prior DUI convictions were considered an element of the offense. See House. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345 ("This bill already includes as an element of habitually driving under the influence, three convictions for DUI." (Emphasis added.)). The purpose of HRS § 291-4.4 was to "establish a felony offense for those who are convicted of habitually driving under the influence of intoxicating liquors or drugs." Id.

The House Judiciary Committee also considered, but did not adopt, the Office of the Public Defender's position that "the philosophy established in the Penal Code to address the repeat offender is by way of enhanced penalties, rather than an elevation of the classification of the offense." Id. (emphasis added). Hence, the legislature did not intend that HRS § 291-4.4 be viewed as a sentencing enhancement statute.

HRS § 291-4.4 was repealed on January 1, 2002. The substance of the repealed § 291-4.4(a)(1), under which Defendant was convicted, is now incorporated in HRS § 291E-61 (Supp. 2001). Incorporation of the substance of HRS § 291-4.4(a)(1) was part of the consolidation of all driving under the influence provisions into one offense and sentencing scheme:

> More specifically, the provisions [of H.B. No. 1881] consolidate impaired driving and boating offenses, under present sections 291-4 (alcohol), 291-7 (drugs), and 200-81 (boating), into one single offense (operating a vehicle under the influence of an intoxicant), with uniform penalties. This offense also includes the present class C felony habitual DUI (section 291-4.4).
>
> Your Committee finds that consolidation of the habitual offense will ensure that all DUI convictions, whether under section 291-4 or 291-4.4, count as priors for purposes of sentencing.

Senate Stand. Comm. Rep. No. 1881, in 2000 House Journal, at 1400 (emphases added).

Hence, as set forth in HRS § 291E-61, the habitual DUI provision has become part of a sentencing scheme expressly "address[ing] the repeat offender . . . by way of enhanced penalties" as the public defender had recommended in 1995. House. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345. According to the legislative history of HRS § 291-4.4, that was not the case prior to the effective date of HRS § 291E-61.

It is also to be noted that Defendant contested the habitual DUI charge prior to trial, not at the sentencing proceeding, on the ground that he had not been convicted of the requisite number of DUI offenses. Thus, his position is that the habitual DUI charge should have been dismissed prior to trial.

repeat DUI offender to collaterally attack all prior DUI convictions," dissenting opinion at 8, inasmuch as the right to collaterally challenge a conviction is available in every criminal case, irrespective of the offense involved. The fact that every conviction is subject to collateral attack does not result in a defendant "escaping the scope of HRS § 291-4.4," dissenting opinion at 8, since an invalid conviction must be set aside.[13]

Further, contrary to the dissent's contention, not "all" prior DUI convictions are subject to collateral attack, dissenting opinion at 8, because collateral challenges must be based on specific grounds. See supra note 13. Furthermore, collateral attacks on prior DUI convictions cannot be had in "perpetuity," see dissenting opinion at 1, for once a decision in

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[13] After the time for appeal has expired, a collateral attack on a conviction may be brought only on limited grounds. See Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994) ("HRPP Rule 40(a)(3) restricts the issues that may be raised in a post-conviction proceeding[.]"); cf. Turner v. Hawai'i Paroling Auth., 93 Hawai'i 298, 307, 1 P.3d 768, 777 (App. 2000) ("While [inmate] may seek habeas corpus relief under HRPP Rule 40, judicial review of a parole board's decision denying parole is a very narrow one, confined essentially to violations of a prisoner's constitutional rights."). HRPP Rule 40(a)(1) (2002) provides, in relevant part, that

> [a]t any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:
> (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;
> (ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;
> (iii) that the sentence is illegal;
> (iv) that there is newly discovered evidence; or
> (v) any ground which is a basis for collateral attack on the judgment.

(Emphasis added.)

the collateral proceeding is made, the inquiry into the validity of the prior conviction is concluded. See Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994) (holding that defendant's claim challenging the sufficiency of evidence for attempted manslaughter conviction was "prohibited by HRPP Rule 40(a)(3) because the issue was previously ruled upon [by the federal district court in defendant's] habeas corpus petition[]"). The discussion raised by the dissent is not germane to the facts in this case. Defendant's conviction was vacated and the prosecution apparently did not appeal the vacation.

VI.

However, in appealing his conviction for Habitual DUI, Defendant does not contest the fact that he was under the influence of an intoxicating liquor at the time of his arrest. Because he pled guilty to the Habitual DUI offense, under the conditional plea procedure, he admitted to DUI at the time of his arrest. See State v. Kealaiki, 95 Hawai'i 309, 316, 22 P.3d 588, 595 (2001) (concluding that "[u]nder HRPP Rule 11(a)(2), a defendant is precluded from obtaining a dismissal of the charge except for the possibility of a successful legal challenge on the reserved question," and thus "'the defendant stands guilty [or waives contest of the charges] and the proceeding comes to an end [when] the reserved issue is ultimately decided on appeal'" (citation omitted) (brackets omitted)).

Under HRS § 291-4.4, the prosecution must prove the DUI on the occasion of the arrest and three prior convictions for DUI. Thus, the DUI for which Defendant was arrested is an included offense of the Habitual DUI offense. See State v. Wallace, 80 Hawai‘i 382, 415, 910 P.2d 695, 728 (1996) (holding that "[f]or purposes of article I, section 10, [of the Hawai‘i Constitution,] a lesser included offense is an offense that is (1) 'included' in a charged offense, within the meaning of HRS § 701-109(4) (1993)[], and (2) 'of a class and grade lower than the greater [charged] offense,' as described in HRS §§ 701-109(4)(a)" (quoting State v. Malufau, 80 Hawai‘i 126, 134, 138, 906 P.2d 612, 620, 624 (1995) (citations and footnotes omitted))). Consequently, we remand the case to the court with instructions to grant the motion to dismiss, to enter a judgment of guilty as to the DUI included offense, and to sentence Defendant accordingly.

Theresa Marshall (Rose Anne Fletcher on the brief), Deputy Public Defenders, for defendant-appellant.

Bryan K. Sano, Deputy Prosecuting Attorney, City and County of Honolulu, for plaintiff-appellee.