

NO. 23423

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

JOSEPH KINO KAIWI, SR., Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NO. TR18-21: 3/24/00)

SUMMARY DISPOSITION ORDER

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

We have considered the record and arguments of the parties and have determined, for the reasons stated herein, that the March 31, 2000 sentence imposed upon Defendant-Appellant Joseph Kaiwi (Defendant) by the District Court of the Second Circuit, Wailuki Division (the court)¹ must be vacated and the case remanded for resentencing of Defendant on his conviction of Driving Under the Influence of Intoxicating Liquor (DUI) (Count I), Hawai'i Revised Statutes (HRS) § 291-4 (Supp. 1999).²

The court sentenced Defendant, who had a prior DUI conviction within a five-year period of his arrest in the instant case, as follows: 1) obtain a substance abuse assessment; 2) pay

¹ The Honorable Douglas Ige presided over the sentencing hearing.

² Defendant was also convicted of Disregarding Longitudinal Traffic Lane Markings (Count II), HRS § 291C-38 (Supp. 2001), Mandatory Use of Seatbelts (Count III), HRS § 291-11.6 (Supp. 1997), and Turning Movements and Required Signals (Count IV), HRS § 291C-84(b) (1993).

a fine of \$1500, a Driver's Education³ assessment of \$107, a criminal injuries compensation fund assessment of \$25, and administrative fees of \$20; 3) serve a fourteen-day jail sentence, nine days of which were stayed by the district court judge pending the fulfillment of certain conditions. The conditions imposed by the judge were that Defendant attend AA meetings once a day for ninety consecutive days at the same AA agency and publish two apologies in the front section of the Maui News. Defendant assigns error (1) to these latter conditions and (2) to the sentence of a \$1500 fine and the costs associated with publishing the letters.

A court's power to sentence a defendant is limited to, among other things, the authority provided to it by statute. See State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995) ("The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed." (Internal quotation marks and citation omitted.)); State v. Fry, 61 Haw. 226, 229, 602 P.2d 13, 16 (1979) ("Because both the original oral sentences and the amended sentences did not conform to the statute, they were illegal[.]" (Citations

³ HRS § 286G-3 (1998) requires a driver's education assessment of \$100 for those convicted of DUI and a \$7 driver's education assessment for those found in "violation of a statute . . . relating to vehicles."

omitted.)). Under the plain language of HRS § 291-4(b) and (c)⁴ the court did not have the authority to suspend any portion of the sentence or to order either attendance at the AA meetings without first requiring an assessment by a substance abuse counselor or the publication of the letters. The court also erred in not considering Defendant's ability to pay when determining his \$1500 fine. See HRS § 706-641(3) (1993) ("The

⁴ HRS § 291-4(b) and (c) govern in part the sentencing of those convicted of DUI where the offense at issue "occurr[ed] within five years of a prior conviction for [DUI]" and states, in pertinent part:

(b) A person committing the offense of driving under the influence of intoxicating liquor shall be sentenced as follows without possibility of probation or suspension of sentence:

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- (2) For an offense that occurs within five years of a prior conviction for driving under the influence of intoxicating liquor under this section or section 291-4.4 by:
- (A) Prompt suspension of license for a period of one year with the absolute prohibition from operating a motor vehicle during suspension of license;
 - (B) Either one of the following:
 - (i) Not less than one hundred hours of community service work; or
 - (ii) Not less than forty-eight consecutive hours but not more than fourteen days of imprisonment of which at least forty-eight hours shall be served consecutively; and
 - (C) A fine of not less than \$500 but not more than \$1,500.

. . . .

(c) Whenever a court sentences a person pursuant to subsection (b), it shall also require that the offender be referred to a substance abuse counselor who has been certified pursuant to section 321-193 for an assessment of the offender's alcohol abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court may require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's alcohol abuse or dependence.

(Emphases added.)

court shall not sentence defendant to pay a fine unless: (a) The defendant is or will be able to pay the fine[.]”); State v. Johnson, 68 Haw. 292, 297-98, 711 P.2d 1295, 1299 (1985) (“We hold that it is incumbent upon the trial court to enter into the record findings of fact and conclusions that the manner of payment is reasonable and one which Defendant can afford.”). Hence, the court committed plain error and Defendant’s March 31, 2000 sentence must be vacated and the case remanded.⁵ Therefore,

IT IS HEREBY ORDERED that the March 31, 2000 sentence is vacated and the case remanded to the court for resentencing on the grounds set forth herein.

DATED: Honolulu, Hawai‘i, July 9, 2002.

On the briefs:

Jon N. Ikenaga, Deputy
Public Defender, for
defendant-appellant.

Simone C. Polak, Deputy
Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.

⁵ This case may be remanded to the same judge. See State v. Sumera, 97 Hawai‘i 430, 440, 39 P.3d 557, 567 (2002) (“Inasmuch as the court could not lawfully sentence Defendant as it believed it could, we vacate the September 11, 2000 judgments and sentences herein and remand the cases to the court for resentencing.” (Citing State v. Perry, 93 Hawai‘i 189, 198 n.17, 998 P.2d 70, 79 n.17 (App. 2000).)).