

OPINION OF ACOBA, J.,
CONCURRING IN PART AND DISSENTING IN PART

The express authority included in Hawai'i Revised Statutes (HRS) § 803-6 (1993) to conduct a warrant check when the infraction is a violation, rests on the statute's facial premise that a police officer has discretion to either arrest or to cite a person who commits a violation and may, accordingly, conduct the check in aid of that decision. Because, in my view, a "jaywalking" violation is not an arrestable infraction either under our statutes or our state constitution, and, thus, the justification for a warrant check detention -- to enable the officer to choose between making an arrest or issuing a citation -- is lacking in a jaywalking situation, I believe that, under HRS § 803-6, the officer may only cite the violator. Consequently, the police may not detain a person for the purpose of conducting a warrant check in a stop for jaywalking.

Thus, a prolongation of the jaywalking stop for the purpose of conducting a warrant check would render the detention invalid, notwithstanding some suggestion to the contrary. See majority opinion at 11 n.1. While the sufficiency of the evidence as to whether a detention beyond that necessary to cite Defendant-Appellant Robert Barros (Defendant) for jaywalking here is arguable, Defendant did not challenge the court's finding that the citation procedure was conducted simultaneously with the warrant check and, hence, presumably the jaywalking stop was not

extended -- and Defendant not detained -- beyond the jaywalking citation process. On that basis, I concur with the result.

I.

HRS chapter 291C is the Statewide Traffic Code. Under the chapter, "traffic" is defined as referring in part to "pedestrian," HRS § 291C-1 (1993 & Supp. 2001), which, in turn, is denoted, inter alia, as "any person afoot." Id. Defendant was charged with jaywalking, an offense under the traffic code, HRS § 291C-73(c) (1993).¹ The maximum penalty for jaywalking is a fine.² No jail sentence is prescribed. See HRS §§ 291C-161 (Supp. 1999) & 291C-73. HRS chapter 291C does not provide that a "physical arrest" is mandated for jaywalking. In that connection, HRS § 291C-165 (1993 & Supp. 2000) provides for the use of citations in cases of traffic violations for which an arrest is not statutorily mandated:

(a) There shall be provided for use by authorized police officers, a form of summons or citation for use in citing violators of those traffic laws which do not mandate the physical arrest of such violators. . . .

¹ HRS § 291C-73(c) states that "[b]etween adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

² Because jaywalking is punishable only by a fine, it is a violation under our penal code. See HRS § 701-107(5) (1993) ("An offense . . . constitutes a violation . . . in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction[.]"); Cf. State v. Chow, 77 Hawai'i 241, 249, 883 P.2d 663, 671 (App. 1994) (relying on HRS § 701-107(5) to establish that an "illegal turn is a traffic offense and is a violation which is not a crime"). A violation constitutes a civil infraction, not a criminal offense. Cf. State v. West, 95 Hawai'i 61, 63, 18 P.3d 923, 925 (App. 2000) (holding that a speeding violation under the same chapter "is a civil traffic infraction and not a criminal offense" (citations omitted)). Thus, it is understandable that an arrest is not prescribed for jaywalking.

(b) In every case when a citation is issued, the original of the citation shall be given to the violator[.]

(Emphasis added).

Relatedly, chapter 291D concerns the "adjudication of traffic infraction[s]." The purpose of this chapter is the "decriminalization of certain traffic offenses" which "[d]ispense[s] in most cases with the need for witnesses, including law enforcement officers, to be present and for the participation of the prosecuting attorney[.]" HRS 291D-1(4) (1993). HRS § 291D-2 (1993) generally defines a "[t]raffic infraction" as "all violations of statutes, ordinances, or rules relating to traffic movement and control, including . . . pedestrian offenses, for which the prescribed penalties do not include imprisonment." (Emphasis added.) Chapter 291D does not provide that an arrest is statutorily mandated for jaywalking.

II.

HRS § 803-6 is ostensibly germane because it authorizes a police officer to conduct an outstanding warrant inquiry in circumstances where the officer may write a citation for an offense in lieu of making an arrest. HRS § 803-6 provides that

[i]n any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor, or violation, the police officer may, but need not issue a citation in lieu of the requirements of [making an arrest], if the police officer finds and is reasonably satisfied that the person:

- (2) Has no outstanding arrest warrants which would justify the person's detention or give indication that the person might fail to appear in court[.]

(Emphases added.) Thus, by its terms, HRS § 803-6 permits a warrant check in furtherance of the officer's decision of whether to arrest or to cite. In my view, HRS § 803-6, however, does not control because, jaywalking, or "crossing at other than crosswalks," is not an arrestable offense under our statutes or our constitution.³

III.

Whereas HRS § 803-6(b) and HRS § 291C-165 both relate to the issuance of citations for violations, the statutes may be construed in pari materia. While HRS § 803-6(b) allows generally that an arrest as well may be made for a violation, HRS § 291C-165 provides for the use of a citation only under the Traffic Code, where no arrest is mandated in the relevant statutes, as is the case with jaywalking. Insofar, then, as HRS § 803-6(b) may conflict with § 291C-165, the latter, relating as it does to traffic infractions, would control in a jaywalking case, it being the more specific statute of the two with respect to the violation involved here. See State v. Kotis, 91 Hawai'i 319, 330, 984 P.2d 78, 89, reconsideration denied, 1999 Haw. LEXIS 306 (1999); Wong v. Takeuchi, 88 Hawai'i 46, 53, 961 P.2d 611, 618 (1998); State v. Vallesteros, 84 Hawai'i 295, 303, 933 P.2d 632, 640, reconsideration denied, 84 Hawai'i 496, 936 P.2d 191 (1997); Richardson v. City and County of Honolulu, 76 Hawai'i 46, 55, 868

³ Notably, the arresting officer in the instant case testified to his understanding that jaywalking is not an arrestable offense.

P.2d 1193, 1202, reconsideration denied, 76 Hawai'i 247, 871 P.2d 795 (1994), judgment aff'd, 124 F.3d 1150 (9th Cir. 1997) ("[W]here there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.").

As a result, HRS § 291C-165 and not HRS § 803-6 applies in this case and only a citation may issue as a result of the infraction.⁴ Because HRS § 803-6 does not apply, there is no statutory authorization for a warrant detention on a jaywalking

⁴ As to related statutes, HRS § 291C-164 (1993) does not apply in this case because it pertains to the issuance of a citation to a "driver," and Defendant was a pedestrian. HRS § 291C-164 reads:

Procedure upon arrest. Except when authorized or directed under state law to immediately take a person arrested for a violation of any of the traffic laws before a district judge, any authorized police officer, upon making an arrest for violation of the state traffic laws shall take the name, address, and driver's license number of the alleged violator and the registered license number of the motor vehicle involved and shall issue to the driver in writing a summons or citation, hereinafter described, notifying the driver to answer to the complaint to be entered against the driver at a place and at a time provided in the summons or citation.

(Emphases added.) I agree that Vallesteros is not factually relevant because there was not in the instant case, as there was in that case, any police order to Defendant to exit a vehicle at issue. I do not believe "the plain language of HRS § 286-10 (1993)," with respect to the "issu[ance of] a citation in lieu of arrest in those instances where they are not required to take the alleged violator before a judge[,]" majority opinion at 6, is pertinent to jaywalking. Because the jaywalking provision, HRS § 291C-73, is not part of chapter 286, HRS § 286-10 (1993) is inapplicable. HRS § 286-10 reads:

Arrest or citation. Except when required by state law to take immediately before a district judge a person arrested for violation of any provision of this chapter, hereinafter referred to enforcement officer, upon arresting a person for violation of any provision of this chapter, including any rule adopted pursuant to this chapter shall issue to the alleged violator a summons or citation printed in the form hereinafter described, warning the alleged violator to appear and answer to the charge against the alleged violator at a certain place and at a time within seven days after such arrest.

(Boldfaced type in original.) (Emphasis added.)

citation. HRS § 803-6(2) would only condone a warrant check when the officer may lawfully choose to arrest or, in the alternative, to issue a citation.

IV.

Furthermore, in my view, HRS § 803-6 would not apply in this case because an arrest for jaywalking, as purportedly permitted under HRS § 803-6, would violate our state constitution's prohibition against unreasonable seizures. Article I, section 7 of the Hawai'i Constitution prohibits unreasonable governmental seizures.⁵ I believe an arrest for jaywalking would constitute an unreasonable seizure.

In Atwater v. City of Lago Vista, 532 U.S. 318 (2001), Gail Atwater was stopped while driving her children in her truck. None of them was wearing a seatbelt, a violation of the Texas seatbelt law. The violation was a misdemeanor punishable only by a fine. See id. at 323. However, "Texas law expressly authorizes any peace officer to arrest without warrant a person found committing a violation of these seatbelt laws, although it

⁵ In full, article I, section 7 of the Hawai'i Constitution reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or thing to be seized or the communications sought to be intercepted.

(Emphases added.)

permits police to issue citations in lieu of arrest[.]” Id. at 323 (brackets, internal quotation marks, and citation omitted).

The officer approached Atwater’s truck, yelled at her, “[Y]ou’re going to jail,” and eventually arrested the woman for seatbelt violations. Id. at 324 (brackets omitted). Atwater was transported to jail, where her “mug shot” was taken, and where she was placed into a cell for an hour, before being released on bond. See id.

Atwater sued the officer, the city, and its police chief for violation of her “Fourth Amendment right to be free from unreasonable seizure[.]”⁶ Id. at 325 (internal quotation marks omitted). The Fifth Circuit Court of Appeals, sitting en banc, upheld summary judgment in favor of the defendants on the ground that “the arrest was not unreasonable for Fourth Amendment purposes.” Id. The United States Supreme Court granted certiorari “to consider whether the Fourth Amendment . . . limits police officers’ authority to arrest without warrant for minor criminal offenses.” Id. at 326.

The Supreme Court, in a five-to-four decision, affirmed the Fifth Circuit, holding that Atwater’s “arrest satisfied constitutional requirements.” Id. at 354. However, Justice O’Connor, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, dissented. As posed by Justice O’Connor, “the

⁶ Like article I, section 7 of our state constitution, the Fourth Amendment of the United States Constitution states, in part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]”

precise question presented [was] the constitutionality of a warrantless arrest for an offense punishable only by fine." Id. at 362 (O'Connor, J., dissenting). According to Justice O'Connor, a citable fine-only offense did not warrant a "full custodial arrest":

Because a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on "the degree to which it is needed for the promotion of legitimate governmental interests," Wyoming v. Houghton, 526 U.S. [295,] 300 [(1999)]. In light of the availability of citations to promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. . . .

. . . .
The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable. . . . While [the officer] was justified in stopping Atwater, neither law nor reason supports his decision to arrest her instead of simply giving her a citation. The officer's actions cannot sensibly be viewed as a permissible means of balancing Atwater's Fourth Amendment interests with the State's own legitimate interests.

Id. at 365, 368 (O'Connor, J., dissenting) (citation omitted)

(emphases added). I would agree with Justice O'Connor's reasoning as it applies to arrests for violations punishable only by a fine.

An arrest of an individual who commits a citable violation offense for which prison time cannot be imposed is, in my view, a seizure that is unreasonable. Accordingly, insofar as HRS § 803-6 permits an arrest for a citeable violation, punishable by a fine only, it contravenes the prohibition against unreasonable seizures in article I, section 7 of our state constitution. Relying on the rationale expressed by Justice

O'Connor, I would so hold on such independent state constitutional grounds.

Hence, in my view, "it is [not] lawful for an officer to arrest a person," HRS § 803-6, for a violation such as jaywalking which is punishable by fine only; the officer may only "issue a citation" for that infraction. Id. Whereas an arrest would not be sanctioned under the foregoing proposition, the premise for allowing a warrant check pursuant to HRS § 803-6, i.e., to effectuate the officer's exercise of discretion to arrest or to cite, is lacking.

V.

Also, I cannot agree with the suggestion in footnote 1 that brief warrant checks that do not "significantly extend" investigatory stops or are not of an "unduly long" period are acceptable under the Hawai'i Constitution. See majority opinion at 11 n.1 (stating that "[s]everal other jurisdictions . . . have held that such action does not constitute an unreasonable seizure so long as the check does not significantly extend the period of detention[,]" but clarifying that investigative methods used to verify or confirm information "'might cast doubt upon the reasonableness of the detention . . . if their use makes the period of detention unduly long or involves moving the suspect to another locale'" (quoting State v. Silva, 91 Hawai'i 111, 118, 979 P.2d 1137, 1144 (App. 1999) [hereinafter Silva I])). To the contrary, this court has indicated that such conduct can, in

fact, intrude upon a person's state constitutional rights. In State v. Silva, 91 Hawai'i 80, 979 P.2d 1106 (1999) [hereinafter Silva II], this court agreed with the concurring and dissenting opinion in the decision of the Intermediate Court of Appeals (the ICA) in Silva I.

It was explained that this court "d[id] not read the ICA majority's opinion as generally allowing the police to prolong the detention of individuals subjected to brief, temporary investigative stops -- once such stops have failed to substantiate the reasonable suspicion that initially justified them -- solely for the purpose of performing a check for outstanding warrants." Silva II, 91 Hawai'i at 81, 979 P.2d at 1107. Thus, contrary to what is implied in footnote 1, generally, whenever a warrant check prolongs a detention beyond its purpose, such a procedure violates article I, section 7 of the Hawai'i Constitution.

VI.

I note that Officer Hood's testimony was conflicting with regard to the time line of events surrounding the warrant check and with regard to when he decided to request the check. The officer initially testified that he asked Defendant for identification for the purpose of citing Defendant for jaywalking and because he "intended to run him for a warrant check."

(Emphasis added.) The officer then said that he immediately requested the warrant check after he had received Defendant's

information, and contemporaneously wrote Defendant's information in his notebook. However, upon further questioning, he stated that he was jotting down Defendant's information when Defendant "start[ed] acting weird, which prompt[ed him] or heighten[ed his] suspicions, so [he] decide[d] to ask for a warrant check."

(Emphasis added.) He then testified that he did not run the warrant check until twenty-five to thirty seconds after he stopped Defendant.

These inconsistencies arguably call into question Officer Hood's testimony. However, Defendant did not challenge any of the court's findings of fact. Thus, finding 7, that, "[a]s Hood began getting the salient information from Defendant's identification card in order to issue the citation, he also contacted dispatch on his shoulder mounted radio to have them determine whether Defendant had any outstanding warrants," (emphasis added) is binding. Given that finding, the officer's actions did not violate the strictures of Silva II. See 91 Hawai'i at 81, 979 P.2d at 1107.