

NO. 24056

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

KERT-PONO KODANI, Petitioner-Appellant, v.  
ADMINISTRATIVE DIRECTOR OF THE COURTS,  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE DISTRICT COURT  
OF THE FIRST CIRCUIT, HONOLULU DIVISION  
(Civil No. JR00-0055, Original Case No. 00-02751)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

In this appeal, Petitioner-Appellant Kert-Pono Kodani (Kodani) urges us to reverse the Judgment on Appeal and the Decision and Order Affirming Administrative Revocation of his driver's license, both entered by the District Court of the First Circuit, Judge Colette Y. Garibaldi presiding, on December 22, 2000. Kodani contends that his driver's license was improperly revoked for driving under the influence of intoxicating liquor because the arresting police officer did not have reasonable suspicion to stop Kodani's vehicle on the evening of September 24, 2000. We agree.

The Hawai'i Supreme Court has stated that

[i]n determining the reasonableness of wholly discretionary automobile stops, this court has repeatedly applied the standard set forth in *Terry v. Ohio*, 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 889] (1968). Guided by *Terry*, we stated in *State v. Barnes*:

To justify an investigative stop, short of arrest based on probable cause, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate.

State v. Bolosan, 78 Hawai'i 86, 92, 890 P.2d 673, 679 (1995)

(citations omitted).

In State v. Spencer, 67 Haw. 95, 95-96, 678 P.2d 1081, 1081-82 (1984), the Hawai'i Supreme Court held that the offense of unlawful exhibition of speed or acceleration in violation of Hawaii Revised Statutes (HRS) § 291C-103(a)<sup>1/</sup> was not established by evidence that the tires of a defendant's vehicle screeched when the defendant shifted from first gear into second gear at twenty miles per hour, while making a left turn from a stopped position at a traffic light. Adopting the Colorado Supreme Court's construction of the term "exhibition of speed or acceleration[,]" our supreme court held that the conduct prohibited by the "exhibition of speed or acceleration" language of HRS § 291C-103(a) was the "intentional participation in operating motor vehicles competitively to test the swiftness of

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<sup>1/</sup> At the time State v. Spencer, 67 Haw. 95, 678 P.2d 1081 (1984), was decided, Hawaii Revised Statutes (HRS) § 291C-103(a) provided as follows:

No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, and no person shall in any manner participate in any such race, competition, contest, test, or exhibition.

the vehicles involved[,]" as well as "an individual's deliberate drawing of public attention to the vehicle's quality for swiftness." Id. at 96, 678 P.2d at 1082 (block quote format omitted).

In 1989, the Hawai'i legislature enacted Act 151, which amended HRS § 291C-103 to add the definition of "exhibition of speed or acceleration" currently found in subsection (d) of HRS § 291C-103 (1993), to be consistent with the supreme court's construction of the term in Spencer, 1989 Haw. Sess. L. Act 151, § 1, at 280. That subsection currently reads:

"Exhibition of speed or acceleration" means the sudden acceleration of a vehicle resulting in the screeching of the vehicle's tires which is done to intentionally draw the attention of persons present toward the vehicle.

The legislative committee reports on House Bill No. 148, which was signed into law as Act 151, reflect that, as originally introduced, the bill proposed "to define an 'exhibition of speed' to include but not be limited to excessive acceleration causing a vehicle's tires to screech loudly or lose traction on a public street or highway." See Hse. Stand. Comm. Rep. No. 490, in 1989 House Journal, at 1021. However, the bill was subsequently amended by the House Judiciary Committee, which explained:

Your Committee received testimony from representatives of the Honolulu Police Department and the State Department of Transportation supporting this bill. This testimony indicated that excessive acceleration adds to the likelihood of automobile accidents and that a clearer definition of "exhibition of speed" will aid in enforcement.

Your Committee also received testimony from a representative of the Office of the Public Defender proposing a definition of "exhibition of speed" that is consistent with that adopted in State v. Spencer, 67 Haw. 95

(1984). The Office of the Public Defender also proposed that the provision for imprisonment for violations of this chapter be deleted because it is inconsistent with the gravity of the offense.

Your Committee has accordingly amended this bill to define an exhibition of speed as an intentional act done to draw the attention of the public to the vehicle by screeching the vehicle's tires in a sudden acceleration. Your Committee has further amended this bill by deleting references to imprisonment and providing for the performance of community service.

The Senate Transportation Committee similarly reported that House Bill No. 148 "would define 'exhibition of speed' to mean the sudden acceleration of a vehicle resulting in the screeching of the vehicle's tires which is done to intentionally draw the attention of persons present toward the vehicle." Senate Stand. Comm. Rep. No. 1077, in 1989 Senate Journal, at 1206.

The record on appeal in this case indicates that on September 14, 2000, at about 3:12 a.m., Honolulu Police Officer Thayne Costa (Officer Costa or the officer) stopped Kodani, who was driving a white 2000 Dodge Neon (vehicle), on suspicion that Kodani had committed the offense of unlawful exhibition of speed or acceleration, in violation of HRS § 291C-103 (1993).<sup>2/</sup> The

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<sup>2/</sup> HRS § 291C-103 (1993) states:

**Racing on highways.** (a) Except as provided in section 291C-149, no person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, and no person shall in any manner participate in any race, competition, contest, test, or exhibition prohibited by this section.

(b) "Drag race" means the operation of two or more vehicles from a point side by side at accelerating speeds in

(continued...)

issue before us, therefore, is whether specific and articulable facts are present in the record, which, taken together with rational inferences from those facts, warranted an officer of reasonable caution to suspect that Kodani had committed the offense of unlawful exhibition of speed or acceleration, thus justifying a stop of Kodani's vehicle.

Officer Costa did not testify at the hearing before the Administrative Driver's License Revocation Office (ADLRO) hearing officer. The only evidence with respect to reasonableness of the stop of Kodani was Officer Costa's sworn statement, in which the officer noted, in relevant part, as follows:

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<sup>2</sup>(...continued)

a competitive attempt to outdistance each other, or the operation of one or more vehicles over a common selected course, from the same point to the same point, for the purpose of comparing the relative speeds or power of acceleration of the vehicle or vehicles within a certain distance or time limit.

(c) "Racing" means the use of one or more vehicles in an attempt to outgain, outdistance, or prevent another vehicle from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long distance driving routes.

(d) "Exhibition of speed or acceleration" means the sudden acceleration of a vehicle resulting in the screeching of the vehicle's tires which is done to intentionally draw the attention of persons present toward the vehicle.

(e) Any person who violates this section, except subsection (d), shall be fined not more than \$500 or imprisoned not more than six months, or both. Any person who violates subsection (d) shall be fined not more than \$500 or be sentenced to perform community service, or both.

The exception provided for in HRS § 291C-149 (1993) allows bicycle racing on the highways "when a racing event has been approved by local authorities for any highway under their respective jurisdictions or for state highways, by the director of transportation." HRS § 291C-149(b).

INITIAL VIOLATION:

ON 9-14-00 AT ABOUT 0257 HRS. WHILE TRAVELING MAKAI ON KEEAUMOKU APPROACHING YOUNG ST. I OBSERVED A WHITE DODGE NEON SITTING AT THE LIGHT. WHILE APPROACHING I HEARD THE WHITE VEHICLE REVVING ITS ENGINE. **THE WHITE VEHICLE WAS STOPPED AT THE LIGHT AND WAS THE ONLY VEHICLE ON EITHER SIDE.** AT THIS TIME I WAS TRAVELING MAKAI ON KEEAUMOKU IN MY WHITE FORD EXPLORER; 98, WITH MY BLUE LIGHT MOUNTED. AS I PASSED THE VEHICLE THE LIGHT CHANGED AND THE WHITE VEHICLE THEN ACCELERATED IMMEDIATELY FROM THE GUNNING POSITION AND "BURNED OUT"[.] I WAS WATCHING THE VEHICLE AS I PASSED IN MY SIDE MIRROR BECAUSE OF THE ENGINE GUNNING AND FROM ABOUT THREE CAR LENGTHS MAKAI OF THE INTERSECTION I OBSERVED THE WHITE CAR; **WHICH WAS THE ONLY VEHICLE IN THE INTERSECTION "BURN OUT".**

STOP MADE:

AFTER TURNING AROUND AND CATCHING UP TO THE WHITE DODGE ON YOUNG ST. I THEN ACTIVATED MY LIGHT AND STOPPED THE VEHICLE "JDZ637" AT PIIKOI AND BERETANIA. AFTER TURNING ONTO YOUNG STREET I NOTICED THAT **THE WHITE DODGE WAS THE ONLY VEHICLE ON YOUNG IN EITHER DIRECTION.**

(Bolded emphases added.)

We conclude that the foregoing facts alone would not warrant a reasonable police officer to suspect that Kodani was engaged in unlawful exhibition of speed or acceleration. Although the facts presented in Officer Costa's sworn statement may reasonably suggest that Kodani "suddenly accelerated" his vehicle on the morning in question, resulting in the tires screeching when they "burned out[,]" there is a complete absence of specific and articulable facts to suggest that any person other than Officer Costa<sup>3/</sup> was present or that Kodani's sudden acceleration of his vehicle was "done to intentionally draw the attention of persons present toward the vehicle." HRS

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<sup>3/</sup> Respondent-Appellee Administrative Director of the Courts, State of Hawai'i concedes in his answering brief that "it might be questionable that [Kodani] was attempting to draw the attention of a police officer[.]"

§ 291C-103(d) (emphasis added). Officer Costa's clear statement was that Kodani's vehicle was the only one at the intersection of Ke'eaumoku and Young streets and the only one on Young Street in either direction. Moreover, Officer Costa noted in his statement that he was traveling in the makai direction on Ke'eaumoku Street when he noticed Kodani's vehicle stopped at the stop light at the intersection of Ke'eaumoku and Young streets, its engine revving. The officer claimed that he passed Kodani's vehicle and was three car-lengths makai of the Ke'eaumoku and Young streets intersection when he observed, through his side mirror, Kodani's vehicle "burn out[,] " headed 'ewa towards Pi'ikoi Street. Given the early morning hour, the light commercial nature of the vicinity where Kodani was stopped, and the lack of evidence that there were any onlookers present to witness Kodani's handling of his vehicle, we conclude that the record provides no specific and articulable facts that Kodani was deliberately drawing the attention of persons present towards the vehicle's quality for swiftness.

Respondent-Appellee Administrative Director of the Courts, State of Hawai'i argues alternatively that even if Officer Costa did not have reasonable suspicion to stop Kodani for unlawful exhibition of speed or acceleration, the stop can still be justified based upon reasonable suspicion that Kodani was engaged in reckless driving of his vehicle, in violation of

HRS § 291-2 (Supp. 2001), which provides now, as it did when Kodani was arrested, as follows:

Whoever operates any vehicle . . . in disregard of the safety of persons or property is guilty of reckless driving of vehicle . . . and shall be fined not more than \$1,000 or imprisoned not more than thirty days, or both.

Based on our review of the record, however, we are unable to discern any specific or articulable facts to suggest that Kodani was driving his vehicle in disregard of the safety of persons or property.

Accordingly, we reverse the Judgment on Appeal, which affirmed the Decision and Order Affirming Administrative Revocation, both entered by the District Court of the First Circuit on December 22, 2000.

DATED: Honolulu, Hawai'i, August 27, 2002.

On the briefs:

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for petitioner-appellant.

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