

NO. 24540

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SEAN SMITH, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
(CASE NO. TR51: 8/8/01)

MEMORANDUM OPINION

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

Defendant-Appellant Sean Smith (Smith) appeals from the August 8, 2001 Judgment of the District Court of the Second Circuit, Wailuku Division, State of Hawai'i, finding him guilty of Driving Without a License, Hawaii Revised Statutes (HRS) § 286-102 (1993 and Supp. 2001), and sentencing him to sixty days in jail.

Smith contends that (1) he did not, as prohibited by HRS § 286-102, "operate" a "motor vehicle" as defined by HRS § 286-2 (1993 and Supp. 2001); (2) his conduct constituted a *de minimis* infraction under HRS § 702-236 (1993 and Supp. 2001); and (3) the district court abused its discretion when it sentenced Smith to sixty days in jail. We disagree and affirm.

BACKGROUND

On May 3, 2001, a Complaint and Summons was filed against Smith, charging him with Driving Without a License, HRS § 286-102. The case proceeded to a bench trial before Judge Rhonda I. L. Loo on August 8, 2001.

At trial, Plaintiff-Appellee State of Hawai'i (State) called Sumendar Kumar (Kumar) and Maui Police Officer Todd Schwartz (Officer Schwartz) to testify. The defense called Smith and his girlfriend, Julie Tushinsky (Tushinsky), to testify.

Kumar testified that, on March 23, 2001, he was driving his car on South Kihei Road towards Kahului when a black Ford pickup truck (pickup truck) driven by Smith passed through a stop sign and crashed into the "driver's side" of Kumar's vehicle. Both driver side doors of Kumar's vehicle were "completely smashed." On cross-examination, Kumar stated that he did not know whether "the [pickup] truck was, in fact, running" "after this incident."

Officer Schwartz testified that on March 23, 2001, he responded to a two-car accident at the intersection of South Kihei and Uwapo Road in the Division of Wailuku, County of Maui, State of Hawai'i. When Officer Schwartz arrived at the scene, he saw the pickup truck parked on the side of the road and "not running[.]" Upon learning that the driver of the pickup truck was Smith, Officer Schwartz asked Smith for his driver's license,

car registration, and proof of insurance. Smith provided Officer Schwartz with the car registration and proof of insurance, but he was unable to produce a driver's license. Smith did not show proof that he was exempt from the requirements of HRS § 286-102 and did not show Officer Schwartz an instruction permit or a temporary license. At "Time 1252 Hrs.," Officer Schwartz cited Smith for "Driving Without a License." The citation stated that the offense occurred at "S. Kihei/Uwapo Rd[.]" A sealed, certified copy of a Driver Licensing Report received into evidence as State's Exhibit No. 1 confirmed that Smith had no driver's license or instruction permit at the time of the incident.

Tushinsky testified that she owned the pickup truck involved in the March 23, 2001 accident. Tushinsky said that, on the night before, as she was coming back from Kmart, the vehicle died "right about [Piilani Highway], and [she] managed to get it down, and it's all downhill and [she] got it down to Suda Store." The next day, while she and Smith tried to repair the pickup truck at Suda Store, the car battery died. At that time, Tushinsky left Smith to put another battery on a charger. When she returned, Smith had already moved the pickup truck across the street. Tushinsky did not see the accident happen.

Smith testified that, on the evening of March 22, 2001, the pickup truck was behind Suda Store in South Kihei and "was

not running" despite Smith's attempts to fix it. The next day, on March 23, 2001, Smith and Tushinsky returned to the pickup truck and started working on it. Two men watching Smith and Tushinsky from the back of Suda Store told them that if they could not fix the pickup truck in a couple of hours, they would have to move it or have it towed away since large trucks would be coming into the area where the pickup truck was parked. While Smith and Tushinsky worked on the pickup truck, the battery died. Tushinsky left the area to "get [Smith's] extra battery and put it on [Smith's] charger."

As large trucks started arriving in the area where the pickup truck was parked, Smith "attempted to push [the pickup truck] out into the street." Smith described what happened next as follows:

Q. Okay. What street did you push it out to?

A. I'm not sure of the street name, but I believe it's the one that crosses the intersection of South Kihei Road.

Q. Okay. And is it next to Suda Store?

A. Yes.

Q. Okay. What happened when you pushed it out onto that road?

A. I got it out onto the road, and I was having a tough time. So, two guys had run up and started helping me push.

Q. Were these the same two guys [behind Suda Store] or a different two guys?

A. Different two guys. I never seen them before.

Q. And then where did you push it to?

A. . . . I told 'em that I wanted to get it across the street where it was safe to park and it was in the shade. I was going to get -- go across the street, to the left, over to the beach in the shade.

Q. Okay. So you were going to push it across Kihei Road; is that right?

A. Yes.

Q. Okay. . . . [S]o, was it the three of you that were pushing it towards the stop sign?

A. At that point, yes.

Q. Okay. And then what happened after that?

A. After that, I -- it looked like it was going to be clear, so we pushed it up till the last minute. And then I -- you know, I got underneath the stop sign, so I went to jump in and hit the brake, and I missed the pedal. It was -- it was -- my timing was all wrong, and I went -- rolled right out into the intersection.

Q. Okay. And what happened when it rolled into the intersection?

A. I hit that gentleman that was in here earlier.

After hearing arguments from each party, Judge Loo summarized the testimony of the four witnesses and ruled, in relevant part, as follows:

All right. The Court is aware that the State has . . . charged [Smith] with driving without a license. And I think we're all in concurrence that this event did occur on March 23rd, 2001; that it was in the Division of Wailuku, County of Maui; that [Smith] has been identified as the person behind the wheel of the vehicle involved. I don't think there's any contest there.

. . . And the Court is also aware that [Smith] does not have a valid license, not only according to [Officer Schwartz's] checks, but according to the sealed and certified document, State's [Exhibit] 1, dealing with [Smith] So, I think we're all in agreement there.

What it really comes down to is whether or not the Court can find whether [Smith] was operating the vehicle. I think that's the whole issue here. On one hand, I have the testimony of [Kumar] who said he was hit by [Smith] and [Smith] was behind the wheel, that he did not see anyone else in the vicinity. There was no testimony that anyone else was -- he saw anyone else pushing that particular vehicle.

. . . .

The Court also heard from [Smith] and [Tushinsky] saying that the car was not operable. Apparently, it had broken down the night before and [Smith], in trying to get this car across the street, the car at one point was moving at some point and did make its way across the street when there was an accident.

So, I think the key comes down to operate. On one hand, if the Court finds [Kumar] credible, I guess the Court can go ahead and find [Smith] was operating the vehicle and I should find him guilty of [driving without a license]. On the other hand, I could also side with [Smith] and [Tushinsky] that the car was inoperable; however, he was still behind the wheel of the car.

And whether or not a car on the roadway with the engine not working or the battery not operating, . . . would that still be considered operating if the car is not technically running? You know, being pushed or, . . . something along those lines which we have here.

So, this is how the Court's going to rule as far as driving without a license. First of all, the Court does find that [Kumar's] testimony is credible, that he did see [Smith] behind the wheel of the vehicle And he did say that he did not see any -- he didn't testify as to any other people being in he [sic] vicinity pushing . . . this truck that [Smith] was operating.

The Court also finds, on the other hand, that if the vehicle was not running due to no battery or whatever else was wrong with the vehicle, then [Smith] being behind the wheel of the car, being in the driver's seat, on a public roadway, even though the car may be technically not able to run on its own, you know, the momentum through the pushing of the vehicle, whatever, the Court still finds . . . that would also be operate under the statute.

So, either way, the Court does find [that] the State has proven its case beyond a reasonable doubt. I'm going to find [Smith] guilty of driving without a license.

At sentencing, the State advised Judge Loo that this was Smith's fifth conviction for driving without a license within the past five years and that, upon his previous conviction, Smith received a sentence of thirty days in jail, served on fifteen consecutive weekends. The State requested that Smith be sentenced to sixty days in jail based upon his prior history.

Counsel for Smith opposed the State's request and asked that Judge Loo suspend any jail time faced by Smith. Smith's

counsel also indicated that Smith would be willing to pay any fines imposed by the court.

After listening to the arguments of counsel and allowing Smith to speak on the matter of his sentence, Judge Loo sentenced Smith to sixty days in jail and fined him \$77 in fees. Based upon the facts of the case and Smith's circumstances, Judge Loo allowed Smith to serve his jail time on thirty consecutive weekends.

POINTS OF ERROR

On appeal, Smith asserts the following points of error: (1) the district court erred in convicting Smith of Driving Without a License, HRS § 286-102, because Smith was not "operating," within the meaning of HRS § 286-102, a "motor vehicle" or "vehicle" within the meaning of HRS § 286-2; (2) the district court erred in convicting Smith of Driving Without a License because Smith's conduct constituted a *de minimis* infraction under HRS § 702-236; and (3) the district court abused its discretion in sentencing Smith to sixty days in jail because the district court failed to consider the factors enumerated in HRS §§ 706-606 (1993) and 706-621 (1993 and 2001 Haw. Sess L. Act 127, § 3 at 286) in deciding its sentence.

STANDARDS OF REVIEW

Statutory Interpretation

The interpretation of a statute is a question of law which this court reviews *de novo*. . . . [O]ur foremost obligation is to

ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to [the statute's] plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995)

(citations, brackets, and internal quotation marks omitted).

Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court below. State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988); Hawai'i Rules of Penal Procedure 52(b). This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

De Minimis

HRS § 702-236 provides the court with discretion to treat an infraction as *de minimis* and appellate courts will not disturb the district court's decision absent an abuse of

discretion. State v. Viernes, 92 Hawai'i 130, 133, 988 P.2d 195, 198 (1999).

Abuse of Discretion

A court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. State v. Akina, 73 Haw. 75, 78, 828 P.2d 269, 271 (1992).

Sentencing

A sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Factors that indicate a plain and manifest abuse of discretion are arbitrary or capricious actions by the judge and a rigid refusal to consider the defendant's contentions. In general, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Tauiliili, 96 Hawai'i 195, 198, 29 P.3d 914, 917 (2001)
(citations, brackets, and internal quotation marks omitted).

RELEVANT STATUTES

HRS § 286-2 provides, in relevant part, as follows:

"Motor vehicle" means every vehicle which is self-propelled and every vehicle which is propelled by electric power but which is not operated upon rails, but excludes a moped.

. . . .

"Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, but excludes devices moved by human power or devices used exclusively upon stationary rails or tracks or mopeds.

HRS § 286-102 provides, in relevant part, as follows:

(a) No person, except one exempted under section 286-105[] [or] one who holds an instruction permit under section 286-110, . . . shall operate any category of motor vehicle listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles.

(b) A person operating the following category or combination of categories of motor vehicles shall be examined as provided in section 286-108 and duly licensed by the examiner of drivers:

. . . .

(3) Passenger cars of any gross vehicle weight rating, buses designed to transport fifteen or fewer occupants, and trucks and vans having a gross vehicle weight rating of fifteen thousand pounds or less;

HRS § 702-236 provides as follows:

(1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:

(a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or

(b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

HRS § 706-606 provides as follows:

The court, in determining the particular sentence to be imposed, shall consider:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;

(b) To afford adequate deterrence to criminal conduct;

(c) To protect the public from further crimes of the defendant; and

- (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
- (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

HRS § 706-621 provides as follows:

The court, in determining whether to impose a term of probation, shall consider:

- (1) The factors set forth in section 706-606 to the extent that they are applicable;
- (2) The following factors, to be accorded weight in favor of withholding a sentence of imprisonment:
 - (a) The defendant's criminal conduct neither caused nor threatened serious harm;
 - (b) The defendant acted under a strong provocation;
 - (c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
 - (d) The victim of the defendant's criminal conduct induced or facilitated its commission;
 - (e) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
 - (f) The defendant's criminal conduct was the result of circumstances unlikely to recur;
 - (g) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;
 - (h) The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both;
 - (i) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents; and
 - (j) The expedited sentencing program set forth in section 706-606.3, if the defendant has qualified for that sentencing program.

DISCUSSION

1.

On appeal, Smith argues that the clear and unambiguous definitions of "motor vehicle" and "vehicle" preclude a conviction for Driving Without a License because the pickup truck was not a "motor vehicle" when the collision occurred. It was not a "vehicle" because it was "moved by human power[.]" It was not a "motor vehicle" because it was not "self-propelled" at the time of the accident. We disagree. When Smith "went to jump in [the pickup truck] and hit the brake, and missed the pedal[,]" the pickup truck was not being moved by human power. At that time, no one was pushing it. It was self-propelled by gravity and/or inertia.

Smith further contends that he did not violate HRS § 286-102 because, when the collision occurred, he was not "operating" the pickup truck. We disagree. One of the definitions of the word "operate" is to "control the functioning of[.]" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 920 (2d ed. 1969). There is no dispute that Smith was in control of the functioning of the pickup truck when the collision occurred. The fact that his control was negligent is not relevant.

2.

At trial, Smith never argued for a dismissal of the Driving Without a License charge pursuant to the *de minimis*

infractions statute, HRS § 702-236. On appeal, Smith contends that the district court plainly erred by failing to dismiss the Driving Without a License charge as *de minimis*. We disagree.

The facts contradict Smith's allegation in his opening brief that he "move[d] a disabled car out of the way so as not to inconvenience others" and "moved the pickup truck with the intent to accommodate others[.]" Smith moved the pickup truck after he and Tushinsky were advised that if they could not fix the pickup truck in a couple of hours, they would have to move it or have it towed away since large trucks would be coming into the area where the pickup truck was parked.

The facts contradict Smith's argument that the intended movement of the pickup truck was *de minimis*. The facts show that Smith intended for the pickup truck to cross from one side of Kihei Road to the other side of Kihei Road and for him to be the person in control of the pickup truck when it did so.

3.

On appeal, Smith contends that the district court abused its discretion in sentencing him to sixty days in jail because the district court failed to consider the factors enumerated in HRS §§ 706-606 and 706-621 in reaching its decision. We disagree.

When sentencing Smith to sixty days in jail, the district court engaged in the following dialogue with Smith:

THE COURT: . . . Mr. Smith, would you like to say anything?
. . . .

[SMITH]: All I can say is I have got two kids, I'm moving right now. I really need to work as much as possible.

THE COURT: Are you working right now?

[SMITH]: Yes.

THE COURT: And who do you work for?

[SMITH]: I work for myself.

THE COURT: Okay. And what kind of work do you do?

[SMITH]: I do landscaping.

THE COURT: . . . Okay. Go ahead, Mr. Smith, what else would you like to say?

[SMITH]: Right now I'm working six to seven days a week. I can't pass up any opportunities to make money. Like I said, [Tushinsky and I are] moving right now. We don't even have a place cuz [(sic)] we can't find it. The money is not a problem, but I just got -- any moment, any time wasted in jail is going to be a waste

THE COURT: All right. I can see why the State would ask for 60 days because this is . . . your fifth conviction. If it was first[,] [sic] second, or even third, the Court would definitely not consider putting you in jail.

On the other hand, I understand this case was a little bit more unusual than your standard driving without a license case.

. . . .

THE COURT: It sounded like here you were just trying to --

[SMITH]: I didn't know I couldn't push it down the road.

. . . .

THE COURT: That's what I'm saying, this is not your standard driving-without-a-license case. This is a little bit different where, you know, the car may not have been able to run without the battery. However, . . . it was on a public roadway, and the Court did thus find that, you know, that's still under the definition of operating, you were still in control and operating the vehicle. But I do understand, like I said, this is not your typical driving without a license.

So, what the Court's going to do -- last time you got a 30-day jail term, 15 consecutive weekends. Is that right?

[DEPUTY PUBLIC DEFENDER]: That's correct.

THE COURT: You -- do you work regular hours or regular days or what's your schedule like? . . .

[SMITH]: Every -- every day is anywhere from seven in the morning till five in the evening.

THE COURT: Seven days a week?

[SMITH]: Six to seven, yeah.

THE COURT: I'm inclined to give you a jail term only because this is your fifth conviction and because your last sentence was a 30-day jail term as well. However, I'm trying to make it as easy as I can for you and I have -- I'm not opposing any kind of days off. If you can give me an idea what days are better for you, I could try and work around your schedule.

[SMITH]: I guess weekends.

THE COURT: Saturday and Sunday?

[SMITH]: Yeah.

. . . .

THE COURT: We can do that. Is that -- is that what you want to do, Mr. Smith?

[SMITH]: No, but, yeah, that's what I have to do.

THE COURT: I know. I know, this is -- like I said, this is an unusual case, that's why I'm going to give you a chance to do it all on weekends. I would normally just go straight 60 days. But I'm going to go on weekends for you to give you a chance to get your family moved and get your life back together and take care of these matters.

So, I'm going to order a 60-day jail term, and we'll do that on 30 consecutive weekends.

Because the dialogue with Smith indicates that the district court tailored Smith's sentence to reflect the facts of the case and Smith's driving record prior to the accident, we decide that the district court acted reasonably and did not disregard the rules or principles of law or practice to the substantial detriment of Smith when it sentenced him to sixty days in jail in this instance.

CONCLUSION

Accordingly, we affirm the Judgment of the district court entered on August 8, 2001, finding Smith guilty of Driving Without a License, HRS § 286-102, and sentencing him to sixty days in jail on thirty consecutive weekends.

DATED: Honolulu, Hawai'i, February 25, 2003.

On the briefs:

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Associate Judge