NOT FOR PUBLICATION

NO. 24914

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
DAN HARRIS, Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(TR Nos. 28-31: 1/16/02)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

The State appeals the February 4, 2002 findings of fact, conclusions of law, and order of the district court of the second circuit[1] that granted the January 11, 2002 motion to suppress blood test result filed by Defendant-Appellee Dan Harris (Defendant). We vacate the February 4, 2002 decision of the court, and remand for entry of an order denying the January 11, 2002 motion, and for further proceedings consistent with this opinion.

I. Background.

On August 28, 2001, the State charged Defendant with the then-extant offense of driving under the influence of intoxicating liquor (DUI), a violation of Hawaii Revised Statutes

[1] The Honorable Douglas H. Ige, judge presiding.

(HRS) § 291-4 (Supp. 2000),[2] along with related traffic offenses of inattention to driving, no safety check, and no insurance. On January 11, 2002, Defendant filed a motion to suppress blood test result. The State filed its memorandum in opposition to Defendant's motion on January 15, 2002. The parties stipulated to the following relevant facts for purposes of the January 16, 2002 non-evidentiary hearing on the motion:

> 3. That on June 27, 2001, at around 11:19 p.m., Defendant was traveling north west on Wailea Alanui Road and was involved in a one motor vehicle accident, in which the motorcycle, driven by the Defendant, collided into a concrete curb causing the [D]efendant to end up in the grassy median;
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> 4. That Marguerite Heart, lay witness, who called the police to the scene, observed a single male, later identified as Dan Harris, the Defendant, within the grassy median;
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> 5. That upon arrival at the scene, Officer Anthony Krau and Officer Ruel Dalere observed a 1979 black, Harley Davi[d]son, motorcycle, license plate 874-MVA with damages, lying in the south bound inner lane of Wailea Alanui Drive;
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> 6. That [O]fficer Anthony Krau made contact with the [D]efendant wherein the Defendant identified himself as the lone occupant and driver of the crashed motorcycle;
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> 7. That upon contact with the [D]efendant, Officer Krau detected an odor of liquor on his breath;
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> 8. That [D]efendant related that he had [drunk] beer;
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> 9. That [D]efendant was observed with abrasions to his left knee area, left elbow, and complained of pain to the rib area;
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> 10. That Medics arrived on the scene and transported [D]efendant to Maui Memorial Medical Center, where he was admitted for treatment of his injuries;
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> 12. That based on Officer Krau's investigation, he concluded that

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[2] Hawaii Revised Statutes (HRS) § 291-4(a) (Supp. 2000) provided:

> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
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> (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 concerned 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; or
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> (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.

the [D]efendant had been involved in a collision resulting in injury and that probable cause existed that the Defendant had violated [HRS § 291-4];

13. That Officer Anthony Krau called dispatch requesting that a police officer respond to Maui Memorial Hospital to ensure that a forcible extraction be conducted on the Defendant;

14. That Officer Jennifer Kapahulehua was directed by Dispatch to go to Maui Memorial Hospital to request that a forcible extraction be conducted on the Defendant;

15. That at the Hospital, the [D]efendant was treated for his injuries, multiple contusions, lacerations, and fractured ribs;

16. That at the Hospital, [D]efendant specifically opposed and refused any routine blood tests, as he particularly opposed and [was] averse to needles;

17. That Officer Kapahulehua from Maui Police Department went to Maui Memorial Hospital to obtain a forcible blood extraction from [D]efendant, which was effected by a Chris Otsuka at Maui Memorial Hospital on June 28, 2001 at 12:37 a.m.;

17.5. The [D]efendant opposed the taking of his blood.

18. That at no time prior to, or incident to, did any police officer advise the [D]efendant of his rights regarding the taking of a blood or breath test;

19. That [D]efendant was fully conscious during the course of his treatment and after his treatment;

20. That at no time did the Defendant expressly or impliedly consent to the taking of said blood test[;]

21. That the sample for the blood test was forcibly extracted from the [D]efendant without any informed consent on the part of the [D]efendant[.]

(Misnumbering in the original.) (Paragraph 17.5. is a handwritten interlineation in the original.)

The court granted Defendant's motion upon the following relevant conclusions of law:

1. At the time of his request for a forcible extraction on the Defendant pursuant to [HRS §] 286-163 [(Supp. 2000)],[3] Officer Anthony

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[3] The then-extant HRS § 286-163 (Supp. 2000) provided, in pertinent part:

(a) Nothing in this part shall be construed to prevent the police from obtaining a sample of breath, blood, or urine as evidence of intoxication or influence of drugs from the driver of any vehicle involved in a collision resulting in injury to or the death of any person.

. . . .

(c) In the event of a collision resulting in injury or death, and the police have probable cause to believe that a person involved in the incident has committed a violation of section . . . 291-4 . . . , the police shall request that a sample of blood or urine be recovered from the driver or any other person suspected of committing a violation of

Krau had probable cause to believe that Defendant was operating a motor vehicle involved in a collision, which caused injury to himself, while under the influence of intoxicating liquor, in violation of [HRS §] 291-4.

2. A [DUI] suspect must be adequately informed of the sanctions for refusal to submit to testing, [HRS §] 286-151 [(Supp. 2000)],[4] Gray v. [Admin. Dir.] of the Court, 84 Haw. 138, 931 P.2d 580 (1997)[;] State v. Wilson, 92 Haw[.] 45, 987 P.2d 268 (1999).

3. The forcible blood draw performed after the motor vehicle collision was pursuant to [HRS §] 286-163.

4. The language of [HRS §] 286-163 is vague and ambiguous, as section (c) does not address with specific language to whom the injury or death must occur for the section to apply.

5. The court finds in reading the legislative history of [HRS §§] 286-151 and 286-163 that the legislature intended that there must be injury to another person for [HRS §] 286-163 to apply.

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section . . . 291-4[.]

(d) The police shall make the request under subsection (c) to the hospital or medical facility treating the person from whom the police request that the blood or urine be recovered. Upon the request of the police that blood or urine be recovered pursuant to this section, and except where the responsible attending personnel at the hospital or medical facility determines in good faith that recovering or attempting to recover blood or urine from the person represents an imminent threat to the health of the medical personnel or others, the hospital or medical facility shall provide the police with the blood or urine sample requested, recover the sample in compliance with section 321-161, and assign a person authorized under section 286-152 to withdraw the blood sample or obtain the urine.

. . . .

[4] The then-extant HRS § 286-151 (Supp. 2000) provided, in relevant part:

(a) Any person who operates a motor vehicle or moped on the public highways of the State shall be deemed to have given consent, subject to this part, to a test or tests approved by the director of health of the persons's breath, blood, or urine for the purpose of determining alcohol concentration or drug content of the person's breath, blood or urine, as applicable.

(b) The test or tests shall be administered at the request of a police officer having probable cause to believe the person driving or in actual physical control of a motor vehicle or moped upon the public highways is under the influence of intoxicating liquor or drugs, or is under the age of twenty-one and has a measurable amount of alcohol concentration, only after:

(1) A lawful arrest; and

(2) The person has been informed by a police officer of the sanctions [for refusal to submit to the test] under part XIV and sections 286-151.5 and 286-157.3.

(c) If there is probable cause to believe that a person is in violation of section 291-4, 291-4.3, or 291-4.4, then the person shall have the option to take a breath or blood test, or both, for the purpose of determining the alcohol concentration.

. . . .

> 6. [HRS §] 286-154 [(1993)][5] provides for the administration of a test of a person's blood without the consent of the person when the person is "dead, unconscious, or in any other state which renders the person incapable of consenting to examination." The State's interpretation of HRS [§] 286-163 authorizing the administration of a test of a person's blood without the person's consent simply because the person is injured is inconsistent with HRS [§] 286-154.
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> 7. The language of [HRS §] 286-163 must be consistent with the other provisions of Part VII, [HRS ch.] 286 [(1993 & Supp. 2000)] on Alcohol and Highway Safety. The Court finds that the State's interpretation of [HRS §] 286-163 that it authorizes the police, without warning of the sanctions of the implied consent law, to force the withdrawal of a blood sample of an injured driver who is nevertheless able to knowingly and intelligently consent to or refuse a chemical alcohol test, simply because the driver is injured, is inconsistent with [HRS ch.] 286, Part XIV, and contrary to State v. Wilson, which mandates accurate warnings of the implied consent scheme to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test[.]
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> 8. In order for [HRS §] 286-163 to be read consistently with [HRS §] 286-151 and [HRS ch.] 286, Part XIV [(1993 & Supp. 2000)], and State v. Wilson, the court concludes that the application of [HRS §] 286-163 must be limited to cases in which there is injury to another person or to a driver who is unable to knowingly and intelligently consent to or refuse a chemical alcohol test because of the injury to the driver[.]
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> 9. The court concludes that the police acted beyond the scope of their authority when they requested the forcible draw of Defendant's blood pursuant to [HRS §] 286-163(c) to determine his alcohol content at that time.

(Footnotes supplied.)

II. Discussion.

On appeal, the State contends "the district court erred in granting [Defendant's] motion to suppress results of the blood test, as such testing is mandated by HRS § 286-163(c), where [Defendant] was the driver injured in a motor vehicle collision, and exhibited signs of intoxication sufficient to establish

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[5] The then-extant HRS § 286-154 (1993) provided:

> The consent of a person deemed to have given the person's consent pursuant to section 286-151 shall not be withdrawn by reason of the person's being dead, unconscious, or in any other state which renders the person incapable of consenting to examination, and the test may be given. In such event, a test of the person's blood shall be administered.

probable cause for DUI." Opening Brief at 11 (capitalization omitted). Defendant concedes the court erred, and we confirm that it did.[6]

The facts underlying the court's grant of Defendant's motion to suppress were undisputed. "We review the . . . court's ruling on a motion to suppress *de novo* to determine whether the ruling was 'right' or 'wrong.'" State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997)(citation omitted).

In State v. Entrekin, 98 Hawai'i 221, 47 P.3d 336 (2002), the Hawai'i Supreme Court confronted a case which is factually on all fours with this one. Id. at 223-25, 47 P.3d at 338-40. There, the trial judge -- incidentally, the same trial judge as in our case -- granted a motion to suppress virtually identical, *mutatis mutandis*, to the one in our case, id. at 224-25, 47 P.3d at 339-40, upon reasoning and conclusions of law

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[6] Cf. State v. Hoang, 93 Hawai'i 333, 3 P.3d 499 (2000), in which the supreme court explained our duty where the State concedes error:

> An appellant's burden of demonstrating error in the record is consistent with Hawaii's case law and court rules. In "confession of error" cases where the prosecution "admits" to error, see State v. Wasson, 76 Hawai'i 415, 418, 879 P.2d 520, 523 (1994); Territory v. Kogami, 37 Haw. 174, 175 (1945), this court has stated that, "even when the prosecutor concedes error, before a conviction is reversed, 'it is incumbent on the appellate court [first] to ascertain . . . that the confession of error is supported by the record and well-founded in law and [second] to determine that such error is properly preserved and prejudicial.'" Wasson, 76 Hawai'i at 418, 879 P.2d at 523 (quoting Kogami, 37 Haw. at 175). In other words, a confession of error by the prosecution "is not binding upon an appellate court, nor may a conviction be reversed on the strength of [the prosecutor's] official action alone." Kogami, 37 Haw. at 175.

Id. at 336, 3 P.3d at 502 (brackets and ellipsis in the original).

virtually identical, *mutatis mutandis*, to those in our case. Id. at 225, 47 P.3d at 340. In holding that the trial court had erred in granting Entrekin's motion to suppress, the Entrekin court rejected the trial court's conclusions of law and the reasoning supporting them. Id. at 226-33, 47 P.3d at 341-48. Thereupon, the supreme court held that

> the district court erred in ruling that HRS § 286-163 was inapplicable to the present matter on the basis that Entrekin was the only person injured as a result of the vehicular accident in which he was involved. We further hold that HRS § 286-163 applies to drivers injured or killed in a single-vehicle collision in which no other person is injured.

Id. at 229, 47 P.3d at 344. The Entrekin court also held that "HRS ch. 286, Part VII does not require the police to comply with the prerequisites of HRS § 286-151 in order to obtain breath, blood, or urine samples pursuant to HRS § 286-163[,]" id. at 230, 47 P.3d at 345, and that the action of the police was not unconstitutional. Id. at 233, 47 P.3d at 348.

III. Conclusion.

Hence, Entrekin is controlling in this case and dispositive. Accordingly, we vacate the February 4, 2002 findings of fact, conclusions of law, and order of the court, and remand for entry of an order denying Defendant's January 11, 2002 motion to suppress blood test result, and for further proceedings consistent with this opinion.

DATED: Honolulu, Hawaii, August 25, 2003.

On the briefs:

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Acting Chief Judge

Associate Judge

Associate Judge