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NO. 25389

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAMES LYBRAND, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
(CASE NO. TR48:8/30/02)

MEMORANDUM OPINION

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

Defendant-Appellant James Lybrand (Lybrand) appeals from the Judgment entered in the District Court of the Second Circuit, Wailuku Division, by Judge Rhonda I.L. Loo on November 21, 2003. We affirm.

On April 3, 2002, Plaintiff-Appellee State of Hawai'i (State) charged Lybrand, in Count One, with Reckless Driving of Vehicle, Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2003), and in Count Two, with Driving While License Suspended or Revoked, HRS § 286-132 (Supp. 2003).

On August 30, 2002, after a bench trial, Judge Loo found Lybrand guilty in Count One and not guilty in Count Two, and sentenced him to pay a \$500 fine, a \$25 Criminal Injuries Compensation Fee, a \$20 administrative fee, and a \$7 driver's education fee. The sentence was stayed pending the outcome of this appeal.

Lybrand contends that the record lacks substantial evidence that (a) he was aware that his chosen course of action

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would constitute a conscious disregard of substantial and unjustifiable risk to the safety of persons and property, (b) he was consciously aware of a risk that in merging back into the Lahaina-bound lane of traffic he would create a risk to the safety of persons and property, and (c) his conduct amounted to a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

The relevant date and time was Saturday, March 9, 2002, at approximately 10:00 p.m. The relevant area was the two-lane Honoapi'ilani Highway going toward Lahaina in one direction and toward Wailuku in the other direction. There were no streetlights. There was no moonlight. There was a scenic lookout area off of the Wailuku-bound lane. A middle lane of limited length was available for Lahaina-bound cars to use to (a) turn left into the scenic lookout area and (b) exit the scenic lookout area and merge into Lahaina-bound traffic.

Lybrand's testimony described the following facts: While Lybrand was driving his 1984 four cylinder Toyota Tercel two-door hatchback in the Lahaina-bound lane, he approached a line of five vehicles. His male passenger needed to go to the restroom. Intending to pull into a scenic lookout area "and let [his male passenger] go over -- over to the side of the rail to go to the rest room," he moved into the "left turn merging lane" to turn into the scenic lookout area. At that point, Lybrand had not "caught up to" the line of five vehicles that was "already

past the left-turn lane." Because his friend "said he needed a toilet," Lybrand did not pull into the scenic lookout area. By then, Lybrand "was in the middle of five vehicles" or "[r]oughly, . . . third position," and his intention was to "get in front of all the traffic, cuz [sic] the traffic was literally bumper to bumper, moving between 30, 35 miles an hour."¹ As he was passing the line of five vehicles, he noticed that the "third or fourth" vehicle in the line had "MPD" on its license plate, and therefore, was an "unmarked police vehicle." When Lybrand "was going about the speed limit, about 45" miles per hour and attempting to drive in front of the minivan leading the line of five vehicles, the driver of the van "accelerated his speed" and "cut to the left . . . purposely . . . trying to cut [Lybrand] off so [Lybrand] couldn't get in front of him." After "at least six seconds" passed, "the van shot off to the right" allowing Lybrand "the right of way to move up . . . and pass him." In the words of Lybrand, the tires of Lybrand's Toyota "never touched the solid double yellow lines, not one time iota."

The testimony of Maui Police Department Sergeant William Hankins (Sergeant Hankins) described the following facts:

¹ Defendant-Appellant James Lybrand testified that, when he decided not to turn left into the scenic lookout area, he had not caught up to the line of five vehicles. In response to the question why did he not pull in behind the five vehicles, he testified that he was going so much faster than them that, when he had to decide whether to accelerate ahead of them or slow down behind them, he was roughly next to the vehicle that was third in the line of five. He did not explain, if he truly intended to turn left into the scenic lookout area, why he was going so fast when he decided not to turn left into the scenic lookout area, and before he decided whether to accelerate ahead of the line of five or slow down behind them.

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Sergeant Hankins was driving an "unmarked police cruiser" in the Lahaina-bound lane. There were no less than three and no more than five cars in front of him and no less than three and no more than five cars behind him. Sergeant Hankins noticed the headlights of Lybrand's car in the middle lane about three or four vehicles behind him. The markings on the middle lane showed that it started as a left turn lane into the scenic lookout and then changed into a merge lane past the scenic lookout. Sergeant Hankins saw Lybrand drive past him. Sergeant Hankins immediately "pulled in behind this vehicle cuz [sic] it was obvious he was going to overtake a line of cars." Sergeant Hankins observed that Lybrand drove his car past the end of the middle lane, into the Wailuku-bound lane "heading head on into vehicles coming Wailuku direction in their lane of travel," and that Lybrand's car then "swerved" over onto the Lahaina-bound lane in front of the minivan, forcing the minivan onto the shoulder lane of the road. Two cars approaching in the Wailuku direction were forced to move to the side of the road as Lybrand's car approached them. In the words of Sergeant Hankins, "If these guys didn't get out of the way he would have definitely got into a head-on crash." After being stopped by Sergeant Hankins, Lybrand said, "That guy was going too damn slow," and "Those guys almost ran into me." While Sergeant Hankins was transporting Lybrand to the police station, Lybrand stated that "[i]f I'd have known there was a police car in that line of cars I would have never did that."

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HRS § 291-2 (2003) states as follows:

Reckless driving of vehicle or riding of animals; penalty.

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

HRS § 702-206 (1993) states, in relevant part:

Definitions of states of mind. . . .

. . . .

(3) "Recklessly."

- (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
- (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
- (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
- (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

Judge Loo orally decided, in relevant part, as follows:

[T]he Court does find [Sergeant Hankins'] testimony to be credible in this particular case. The Court does find that [Lybrand] did operate his vehicle recklessly in disregard of the safety of persons and property, one, that he was going faster than the line of cars. . . .

[Lybrand] crossed over a double solid line. . . . [Lybrand] not only went into a left-turn lane, he did not turn off as indicated by a left-turn lane, and more so the merge was for people coming out of the scenic lookout and he didn't even turn in like he was supposed to. When he did try to merge back into the lane of traffic he stated there were five cars there and his intent was to get ahead of the five cars. Whereas, perhaps, a law-abiding person would wait till the five cars had gone by and then get behind of them. As [Lybrand] said, there was only five cars, wasn't like there was 20 cars or 30 cars and no one would let him in, there was only five cars.

Further, [Lybrand] forced two cars off the road completely who were headed in the opposite direction. . . . [Lybrand]'s

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vehicle, his whole entire vehicle went into the opposite lane of travel over the double solid line. When cutting back into the Lahaina-bound traffic lane, he forced a minivan off onto the right-hand shoulder of the roadway. Obviously, we have some disregarding of traffic lane markings and crossing of the double solid line. . . . But I think the whole conduct together does show that [Lybrand] was operating his vehicle recklessly and in disregard of the safety of persons and property.

. . . [S]o I find that the state has proven its case beyond a reasonable doubt . . . and find [Lybrand] guilty of reckless driving.

In the amended opening brief, Lybrand contends:

Lybrand testified, and there was no contradictory evidence presented, that he was simply trying to merge back into the Lahaina-bound land of traffic, after having decided not to turn into the scenic lookout.

. . . .

Nevertheless, the court found Lybrand guilty of reckless driving, citing the alleged traffic violations that had occurred and holding that a law-abiding person would have waited until after the group of cars had passed, rather than trying to merge in front of them.

. . . .

In this case, Lybrand's choice to merge in front of the group of cars, instead of waiting until they had passed may not have been the ideal choice, but it did not constitute a gross deviation from the standard of conduct that a law-abiding person would have observed in the same situation. . . . Although Lybrand may have exceeded the posted speed limit or disregarded lane markings, the alleged traffic violations in and of themselves were insufficient to prove that Lybrand was operating his car in a reckless manner.

Further, even if Lybrand's conduct were found to be reckless, there was no substantial evidence that he was aware that his chosen course of action would constitute a conscious disregard of substantial and unjustifiable risk to the safety of persons and property. . . . Given the undisputed testimony that Lybrand's only intention was to merge back into the Lahaina-bound lane of traffic, there was no evidence that he was consciously aware of a risk that in doing so he would create a risk to the safety of persons and property[.]

(Citations omitted.)

We disagree with Lybrand's interpretation of the applicable statutes. We conclude that it was the State's burden to prove beyond a reasonable doubt that Lybrand operated a

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vehicle in a manner that, considering the nature and purpose of Lybrand's conduct and the circumstances known to him, Lybrand consciously disregarded a risk to the safety of persons or property to the extent that he engaged in a gross deviation from the standard of conduct that a law-abiding person would have observed in the same situation. We further conclude that there is evidence in the record supporting the court's decision that the State satisfied its burden of proof in this case.

Accordingly, we affirm the November 21, 2003 Judgment convicting Defendant-Appellant James Lybrand of Reckless Driving of Vehicle, HRS § 291-2 (Supp. 2003), and sentencing him to pay a \$500 fine, a \$25 Criminal Injuries Compensation Fee, a \$20 administrative fee, and a \$7 driver's education fee.

DATED: Honolulu, Hawai'i, September 2, 2004.

On the briefs:

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Chief Judge

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

Associate Judge

Associate Judge