NOT FOR PUBLICATION

NO. 26413

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD Traffic No. 5586801MO)

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

Peter James Phillips (Defendant) appeals the February 19, 2004 judgment of the District Court of the First Circuit (district court)[1] that convicted him of reckless driving, a violation of Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2004).[2] Defendant contends there was insufficient evidence

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[1] The Honorable Valerie Chang presided.

[2] Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2004) reads, in relevant part: "Whoever operates any vehicle . . . recklessly 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 one year or both." HRS § 702-206(3) (1993) defines "recklessly" as follows:

> (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

(continued...)

adduced at trial to prove he drove "recklessly," as required for conviction under HRS § 291-2. Defendant also avers that two Hawai'i Supreme Court cases confirm his claim of insufficiency. Defendant thus submits his conviction should be reversed. We disagree with Defendant's contentions and affirm.

I. Background.

Evidence at the bench trial held on January 6 and 16, 2004 comprised the testimonies of two motorcycle cops who witnessed the August 30, 2003 incident and cited Defendant for reckless driving. On February 3, 2004, the district court issued findings of fact (FsOF) and conclusions of law (CsOL) in support of its finding of guilt. On appeal, Defendant does not challenge any of the district court's FsOF. He challenges only CsOL 2, 3 and 4. "However, an attack on a conclusion which is supported by a finding is not an attack on that finding. If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983). Defendant nonetheless maintains there was insufficient evidence to support CsOL 2, 3, and 4.

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[2](...continued)

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.

The district court found and concluded as follows:

FINDINGS OF FACT

Based on relevant credible evidence adduced at trial, the Court finds the following facts:

1. Both Officers Tanaka and Bueno were employed by the Honolulu Police Department and on duty on August 30, 2003. On that day, Defendant was operating a motor vehicle on the Pail [sic] Highway (a public highway), makai-bound (toward town) past the Pali Tunnel in the City and County of Honolulu, State of Hawaii;

2. Traffic that day was moderate for the time of day, which was approximately 10:50 a.m.;

3. Defendant frequently looked to the front passenger seat, where his dog was the only other occupant of the vehicle;

4. Defendant wove in and out of traffic;

5. Defendant changed lanes from the far right lane to the center lane of traffic, cutting just 1½ to 2 feet in front of a vehicle which was occupying the center lane at the time Defendant changed lanes;

6. Defendant did not signal prior to this lane change;

7. Defendant's lane change caused the car he cut in front of to abruptly apply its brakes to avoid a collision, causing said [sic] the front of said vehicle to dip downward;

8. Defendant then followed 1½ to 2 feet behind a different car in the center lane;

9. Defendant next changed from the center lane to the far left lane of traffic, again cutting just 1½ to 2 feet in front of a vehicle which was occupying the far left lane;

10. Defendant did not signal prior to this lane change either;

11. Again, Defendant's lane change caused the car he cut in front of to abruptly apply its brakes to avoid a collision, causing the front of said vehicle to dip downward[;]

12. Defendant's actions were observed by Officer Tanaka and Officer Bueno who were employed and on duty as police officers of the City and County of Honolulu, State of Hawaii at all relevant times;

13. Officer Tanaka and Bueno had a clear and unobstructed view of Defendant's actions, and were seated on their BMW motorcycles observing all of these actions; and

14. After observing Defendant's actions and the circumstances noted above, Officer Bueno pulled Defendant over and issued him a citation for violating Hawaii Revised Statutes section 291-2, "Reckless driving of vehicle or riding animals."

CONCLUSIONS OF LAW

The State has proven beyond a reasonable doubt that Defendant Peter James Phillips committed the offense of reckless driving in violation of HRS section 291-2 on August 30, 2003, and was properly issued a citation for said violation by Officer Bueno in the course and scope of his duties as an officer on duty for the Honolulu Police Department. In addition, this Court finds:

1. This Court has jurisdiction over this case. Defendant was properly identified. All actions herein occurred in the City and County of Honolulu, State of Hawaii.

2. Defendant by his conduct set forth above, operated his vehicle recklessly in disregard of the safety of persons or property.

3. Defendant by his conduct set forth acted [sic] above, acted recklessly when he consciously disregarded a substantial and unjustifiable risk that his conduct would cause an accident, injuring persons and property.

4. Defendant's conduct created a substantial and unjustifiable risk. Considering the nature and purpose of Defendant's conduct and the circumstances known to him, the disregard of the risk created by his conduct involved a gross deviation from the standard of conduct that a law abiding person would observe in the same situation.

II. Standard of Review.

We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.

"Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)

(brackets, citations, block quote format and some internal quotation marks omitted).

III. Discussion.

A. *There was Substantial Evidence Adduced at Trial to Support Defendant's Conviction for Reckless Driving.*

Defendant argues on appeal that the evidence was insufficient to prove he drove "recklessly," because the State did not show, and the district court implicitly did not conclude, that he was aware of and thus consciously disregarded a substantial and unjustifiable risk. HRS § 291-2; HRS § 702-206(3). According to Defendant, the evidence showed that at most, he should have been aware of the risk and hence acted negligently[3] rather than recklessly. We disagree.

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[3] HRS § 702-206(4) (1993) provides:

> (4) "Negligently."
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> (a) A person acts negligently with respect to his conduct when he should be aware of a substantial and unjustifiable risk taken that the person's conduct is of the specified nature.
>
> (b) A person acts negligently with respect to attendant circumstances when he should be aware of a substantial and unjustifiable risk that such circumstances exist.
>
> (c) A person acts negligently with respect to a result of his conduct when he should be aware of 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 subsection if the person's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a law-abiding person would observe in the same situation.

As for the district court's conclusions, we note its CsOL 2 and 3, which expressly conclude, respectively, that Defendant "operated his vehicle recklessly in disregard of the safety of persons or property"; and "acted recklessly when he consciously disregarded a substantial and unjustifiable risk that his conduct would cause an accident, injuring persons and property."

As for the proof, there was substantial evidence to support the district court's conclusion that Defendant was aware his driving posed a substantial and unjustifiable risk of injury to persons or property, but consciously disregarded that risk.

The binding FsOF show that Defendant was weaving in and out of traffic and, on two separate occasions, chose to abruptly shoehorn his way into an adjacent lane of traffic without signaling. In both instances, Defendant would have caused an accident if not for the abrupt braking of the following drivers. In the former instance, Defendant then proceeded to engage in extreme tailgating, following one-and-a-half to two feet behind the lead car.

In addition, one of the police officers testified that Defendant similarly tailgated the second lead car. And the same police officer remembered that Defendant was going at least ten miles per hour over the speed limit, which changes from forty-five miles per hour to thirty-five miles per hour in that area.

That Defendant was aware of the risks involved in repeatedly performing such daredevil and dangerous maneuvers in traffic was a "reasonable and rational inference[] under the facts in evidence, including circumstantial evidence." Eastman, 81 Hawai'i at 135, 913 P.2d at 61 (citations, internal quotation marks and block quote format omitted).

Defendant makes much of the fact (FOF 3) that he frequently looked at his dog in the front passenger seat as he drove, thus raising the inference that he was not paying attention to his driving and was hence unaware of the risks his driving engendered. This inference is belied, however, by the second police officer's testimony that when he pulled Defendant over, Defendant attempted to justify his conduct by explaining that the motorists he was cutting off "didn't know how to drive."

All in all, we conclude there was substantial evidence that in driving as he did, Defendant was aware of and consciously disregarded a substantial and unjustifiable risk to the safety of persons and property. Eastman, 81 Hawai'i at 135, 913 P.2d at 61; HRS § 291-2; HRS § 702-206(3).

B. The Hawai'i Supreme Court's Decisions in Cadus and Bohannon Do Not Mandate Reversal.

Defendant contends that State v. Cadus, 70 Haw. 314, 769 P.2d 1105 (1989), and State v. Bohannon, 102 Hawai'i 228, 74 P.3d 980 (2003), confirm his claim of insufficient evidence, because these two supreme court cases show by comparison that his

driving was not egregious enough to be deemed "reckless."

According to the supreme court, Cadus's crime unfolded as follows:

> On Saturday, March 7, 1987 after 9:00 p.m., Honolulu Police Department Officer Michael Cho ("Officer Cho") cited Cadus for driving recklessly on Kalakaua Avenue and Liliuokalani Avenue in Waikiki. According to Officer Cho, the car Cadus was driving had sped through the crowded intersections with screeching tires, prevented many pedestrians from traversing the crosswalks, caused other pedestrians already on the road to jump back onto the curb, and disregarded the right-of-way which other vehicles had possessed.

Cadus, 70 Haw. at 315-16, 769 P.2d at 1107. The supreme court's reasoning and holding, in their entirety, were as follows: "The trial court, employing the testimony of Officer Cho, possessed enough evidence to find Cadus guilty of reckless driving through the streets of Waikiki." Id. at 320, 769 P.2d at 1110 (citation omitted).

Bohannon's alleged crime (drunk driving) was uncovered as follows:

> On November 28, 1999, at approximately 2:24 a.m., Officer Kashimoto was on routine patrol duty in the City and County of Honolulu. He stopped his vehicle, a three-wheeled Cushman, at the intersection of Kalakaua Avenue and Ala Wai Boulevard "in the makai most lane" and waited for the traffic light to turn from red to green. Officer Kashimoto testified that, at the time of the subject incident, the area was well lit -- *i.e.*, that the overhead street lamps and Officer Kashimoto's headlights, back lights, and brake lights were all illuminated -- and that there was nothing in the area to obstruct Bohannon's view of Officer Kashimoto's vehicle or the traffic lights ahead of her.
>
> While Officer Kashimoto waited at the intersection, he heard the "screeching of tires coming from behind his vehicle"; the screeching sound persisted for approximately two seconds. Officer Kashimoto "immediately looked into his rear view mirror and observed Bohannon's vehicle trying to come to a screeching halt in order to avoid colliding into his vehicle." Based on the fact that Bohannon's vehicle was close enough to Officer Kashimoto's vehicle that he was unable to see Bohannon's headlights, Officer Kashimoto surmised that Bohannon's vehicle had stopped "within two feet" of his vehicle. Officer Kashimoto further noted that there were no other vehicles in the immediate

> vicinity; for that reason, he activated his siren and "blue flashing" lights and circled around to Bohannon's vehicle in order to investigate whether she was operating her vehicle "in a safe and prudent manner." Bohannon did not immediately respond to Officer Kashimoto's signal for her to pull over -- *i.e.*, the flashing lights and siren -- but "stayed exactly where she was when she came to a stop." Officer Kashimoto testified that Bohannon appeared to be "trying to figure out what was going on." After approximately ten seconds had elapsed, Bohannon maneuvered her vehicle around the corner onto Ala Wai Boulevard and stopped to speak with Officer Kashimoto.

Bohannon, 102 Hawai'i at 230-31, 74 P.3d at 982-83 (brackets and footnotes omitted). The supreme court decided that Bohannon's driving gave Officer Kashimoto reasonable suspicion of reckless driving, and thus held that the circuit court had erred in suppressing evidence of intoxication obtained after the traffic stop. Id. at 237-38, 74 P.3d at 989-90.

Obviously, neither of these cases is generally helpful to us here, for neither Cadus nor Bohannon attempts to outline a comprehensive list of actions, factors or other circumstances necessary, beyond a reasonable doubt, for a reckless driving conviction under HRS § 291-2. Indeed, neither of these cases is particularly helpful to us here, for we do not consider the comparison between the driving of Cadus and Bohannon, and the driving of Defendant, in any way invidious. Cadus and Bohannon do not dissuade us from our conclusion that Defendant's conviction was supported by substantial, and hence sufficient evidence. Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

IV. Conclusion.

Accordingly, the February 19, 2004 judgment of the district court is affirmed.

DATED: Honolulu, Hawai'i, August 11, 2005.

James A. Burns
Chief Judge

Associate Judge

Daniel R. Foley
Associate Judge

On the briefs:

Michael J. Park and
Jacob M. Merrill,
for Defendant-Appellant.

Anne K. Clarkin,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.