

CONCURRING AND DISSENTING OPINION BY BURNS, C.J.

In part, I concur with the majority. In part, I dissent.

At the February 23, 2005 trial, Defendant was found guilty of Racing on Highways "at a speed exceeding the posted speed limit by thirty miles per hour or more[.]" The February 14, 2006 judgment sentenced him to ten days in jail, a ninety-day suspension of his license, and fees totaling \$77.00.

On November 7, 2004, at about 12:28 a.m., a police officer cited Defendant for (1) speeding, Hawaii Revised Statutes (HRS) § 291C-102(a) (Supp. 2005), (2) racing on a highway, HRS § 291C-103(a) (1993), and (3) racing on a highway "at a speed exceeding the posted speed limit by thirty miles per hour or more[.]" HRS § 291C-103(a) (1993) and (f) (Supp. 2005).

The officer testified that he had stopped at a red light when he noticed two cars traveling side by side in the opposite direction, revving their engines and screeching their tires, and going at a high rate of speed. The officer made a U-turn and chased after the two cars. As the officer came "around the turn on Kaahumanu onto Hana Highway, the first car that was on the right-hand lane kind of pulled off to the side, but the second car refused to stop." Defendant was the driver of the second car. The officer testified that he had to pace a vehicle "[a]bout .2 miles" before he could accurately determine that person's speed, that he caught up to the two cars and turned on his lights and siren where Kaahumanu Avenue turns into Hana

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Highway, and that when the first car took the first right onto Kamehameha Avenue, he followed the second car. The officer further testified:

Q Were there any speed limit signs over there on Hana Highway or Kaahumanu Avenue?

A Yes.

. . . .

Q So that is right where Kaahumanu Avenue turns into Hana Highway?

A Just past that.

Q Just past that, okay.

And so do you start pacing this vehicle before or after those speed limit signs?

A The one right before that, before the second 25 [sic] mile an hour zone.

Q So . . . the one right after where Kaahumanu becomes into Hana?

A Into Hana, yes.

On the question whether he paced Defendant's car for the "[a]bout .2 miles" distance necessary for an accurate determination of speed during the time it was racing the first car, the officer testified:

Q

So you are saying that the pacing began not at the turn of Kaahumanu onto Hana Highway

A Uh-huh.

Q You are saying the pacing began a little later, right?

A Just around that turn.

Q Okay. More or less where Kamehameha Avenue intersects?

A Just around the turn.

Q Well, Kamehameha Avenue is the first intersection there, right?

A That is about .1, maybe .2 miles away from there, yes.

. . . .

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Q You testified a minute ago that from the turn onto Hana Highway and Kamehameha Avenue was about .1 miles?

A Between .1 and .2.

Q Okay. So that area would not have been enough to pace because you didn't begin pacing until you rounded that turn, right?

A Uh-huh.

Q Okay. Now, after the other vehicle pulled onto Kamehameha Avenue, my client was no longer racing against anyone, was he?

A No.

At the conclusion of the evidence presented by the State, the court entered a judgment of acquittal of the speeding charge because Defendant had been charged with driving "a vehicle at a speed greater than the maximum speed limit established by county ordinance" and Defendant had, in fact, been driving on a state highway. This left the charge of Racing on Highways and the charge of Racing on Highways "at a speed exceeding the posted speed limit by thirty miles per hour or more[.]" The court found him guilty of the latter charge.

HRS § 291C-103 states in part:

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.

. . . .

(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.

. . . .

(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

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be fined not more than \$500 or be sentenced to perform community service, or both.

(f) Any person who violates this section while operating a vehicle at a speed exceeding the posted speed limit by thirty miles per hour or more shall be subject to a fine of not more than \$2,000, a term of imprisonment of not more than one year, or both[.]

Although there is evidence sufficient to support a decision that Defendant violated HRS § 291C-103(a), there is no evidence sufficient to support a decision that he violated HRS § 291C-103(f).¹ To violate HRS § 291C-103(f), the driver must violate HRS § 291C-103(a) "while operating a vehicle at a speed exceeding the posted speed limit by thirty miles per hour or more[.]" The court found that "the defendant was in excess of 30 miles per hour at the time he was racing with the other vehicle." There is no evidence to support this finding. There is no evidence of how fast Defendant's car was moving when it was racing with the other car. The officer did not determine the speed of Defendant's car until after the other car had stopped. Even if there was evidence that Defendant's car was moving "in excess of 30 miles per hour at the time he was racing with" the other car, the evidence would have been insufficient because the first car had stopped before the officer had paced either car for the "[a]bout .2 miles" that, according to the officer, was required to determine the speed it was traveling.

I would vacate the decision that Defendant is guilty of violating HRS § 291C-103(a) and (f), affirm the decision that

¹ Defense counsel raised this issue at the trial when he stated that the police officer "really had no evidence, Your Honor, of how fast [Defendant] was going during the alleged race."

Defendant is guilty of violating HRS § 291C-103(a), and remand for re-sentencing in the light of this opinion.

James S. Burns