

DISSENTING OPINION BY NAKAMURA, J.

In my view, a defendant who honestly (but mistakenly) believes that he or she has the consent of the vehicle's owner to use the vehicle is not guilty of unauthorized control of a propelled vehicle (UCPV) in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006). I therefore disagree with this court's holding in State v. Palisbo, 93 Hawai'i 344, 3 P.3d 510 (App. 2000), that under HRS § 708-836, "criminal liability attaches if the defendant failed to obtain consent to operate the vehicle from the vehicle's owner." Id. at 347, 3 P.3d at 513.

At the guilty plea hearing, Defendant-Appellant William K. Kalilikane, Jr. (Kalilikane) represented through his attorney that Kalilikane had obtained permission to use the vehicle from a person who had control of the vehicle. Under my reading of HRS § 708-836, Kalilikane would have a defense to the UCPV charge if he honestly believed that the person who gave him permission to use the vehicle was the vehicle's owner, even if that belief turned out to be wrong. In my view, Kalilikane's representation created a substantial uncertainty over whether there was a factual basis for Kalilikane's guilty plea. The trial court should have made further inquiry to clarify whether Kalilikane was asserting that he honestly believed the person who gave him permission to use the vehicle was its owner. Under the circumstances of Kalilikane's case, I would hold that because of the substantial uncertainty over whether there was a factual basis for Kalilikane's guilty plea, the trial court erred in denying his motion to withdraw his plea in Criminal No. 06-1-0554.

Kalilikane's guilty plea in Criminal No. 06-1-0554 was part of a "global" plea agreement with Plaintiff-Appellee State of Hawai'i (the State), in which Kalilikane also agreed to stipulate to the revocation of his probation in Criminal No.

03-1-1229 and to be resentenced to an open term of ten years of incarceration in return for various consideration promised by the State. Allowing Kalilikane to withdraw his guilty plea in Criminal No. 06-1-0554 would require a rescission of the plea agreement, releasing both parties from their obligations under the agreement. Accordingly, I would vacate the Order of Resentencing [and] Revocation of Probation in Criminal No. 03-1-1229, which was entered pursuant to Kalilikane's stipulation in the plea agreement to the revocation of his probation, and permit the State to pursue revocation in Criminal No. 03-1-1229 on grounds independent of the plea agreement.

For the foregoing reasons, I respectfully dissent.

*Craig H. Nakamura*