

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27928

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
ALEX F. HARRIS, Defendant-Appellant

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
KANEHOHE DIVISION
(HPD Traffic No. 005231991)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Nakamura, and Fujise, JJ.)

Defendant-Appellant Alex F. Harris (Harris) was convicted and sentenced as a second-time offender for operating a vehicle under the influence of an intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) §§ 291E-61(a) and (b) (2) (Supp. 2005).¹ Our decision in this case is controlled

¹ At the time of the alleged offense, Hawaii Revised Statutes (HRS) § 291E-61 (Supp. 2005) provided in relevant part:

§ 291E-61 Operating a vehicle under the influence of an intoxicant. (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty; [or]

. . . .

- (3) With .08 or more grams of alcohol per two hundred ten liters of breath . . .

. . . .

(b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without possibility of probation or suspension of sentence:

- (1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):

(continued...)

by State v. Kekuewa, 114 Hawai'i 411, 163 P.3d 1148 (2007). Pursuant to Kekuewa, we vacate Harris's conviction and sentence for OVUII as a second-time offender, and we remand the case for

¹(...continued)

- (A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court;
 - (B) Ninety-day prompt suspension of license and privilege to operate a vehicle during the suspension period, or the court may impose, in lieu of the ninety-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a vehicle and, for the remainder of the ninety-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in substance abuse treatment programs;
 - (C) Any one or more of the following:
 - (i) Seventy-two hours of community service work;
 - (ii) Not less than forty-eight hours and not more than five days of imprisonment; or
 - (iii) A fine of not less than \$150 but not more than \$1,000; and
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund;
- (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-4(a) by:
- (A) Prompt suspension of license and privilege to operate a vehicle for a period of one year with an absolute prohibition from operating a vehicle during the suspension period;
 - (B) Either one of the following:
 - (i) Not less than two hundred forty hours of community service work; or
 - (ii) Not less than five days but not more than fourteen days of imprisonment of which at least forty-eight hours shall be served consecutively;
 - (C) A fine of not less than \$500 but not more than \$1,500; and
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund;

(Emphasis added.)

entry of a judgment of conviction against Harris for OVUII as a first-time offender and for resentencing on that offense.

I.

Harris appeals from the judgment of conviction and sentence entered against him by the District Court of the First Circuit (district court)² on April 10, 2006. On appeal, Harris argues that the district court erred in convicting and sentencing him for OVUII as a second-time offender pursuant to HRS §§ 291E-61(a) and (b)(2) because the oral charge by Plaintiff-Appellee State of Hawai'i (the State) was insufficient to charge him with that offense. Harris contends that the case should be remanded for the imposition of a sentence against him for OVUII as a first-time offender pursuant to HRS §§ 291E-61(a) and (b)(1). He further argues that his case should be remanded to the same judge for resentencing.

After a careful review of the record and the arguments and legal authorities submitted by the parties, we resolve the arguments Harris raises on appeal as follows:

1. We agree with Harris that the State's oral charge was insufficient to charge him with OVUII as a second-time offender. The State's oral charge alleged that Harris had committed the offense of OVUII "as a second offense," but did not allege that the charged offense occurred within five years of a prior OVUII conviction. In Kekuewa, the Hawai'i Supreme Court held that a nearly identical oral charge was insufficient to charge the defendant with OVUII as a second-time offender under HRS §§ 291E-61(a) and (b)(2). Id. at 415, 417-23, 163 P.3d at 1152, 1154-60. The court concluded that the failure to allege the five-year time period referred to in HRS § 291E-61(b)(2), an attendant circumstance of the HRS §§ 291E-61(a) and (b)(2) offense, rendered the oral charge deficient. Id. at 417-23, 163 P.3d at 1154-60. The court, however, concluded that because the oral charge was sufficient to allege a first-time OVUII offense

² The Honorable Christopher P. McKenzie presided.

under HRS §§ 291E-61(a) and (b)(1) and sufficient evidence had been introduced to prove the first-time offense, the appropriate remedy was to remand the case for entry of a judgment of conviction for a first-time OVUII offense and for resentencing on that offense. Id. at 423-26, 163 P.3d at 1160-63.

Here, the oral charge against Harris was sufficient to allege a violation of a first-time OVUII offense, in violation of HRS §§ 291E-61(a) and (b)(1). Harris does not dispute that the State introduced sufficient evidence to prove the first-time OVUII offense. Indeed, Harris requests that we remand the case for resentencing under HRS § 291E-61(b)(1), an implicit admission that the evidence was sufficient to prove the first-time OVUII offense. Accordingly, we adopt the remedy set forth in Kekuewa.³

2. We decline Harris's request that we direct that the case be remanded for resentencing before the same judge who conducted the trial and imposed Harris's original sentence. In remanding a case for resentencing, our standard practice is to remand the case without referring to who will conduct the resentencing. Harris does not provide any valid reason for us to deviate from our standard practice. We note that normally, a defendant should be sentenced by the trial judge. See Hawaii Rules of Penal Procedure Rule 25(b) (2008).⁴ We presume that the

³ We note that after briefing was completed, Plaintiff-Appellee State of Hawaii (the State), pursuant to Hawaii Rules of Appellate Procedure Rule 28(j) (2008), submitted a letter dated April 7, 2008, that cited State v. Kekuewa, 114 Hawaii 411, 163 P.3d 1148 (2007), and State v. Ruggiero, 114 Hawaii 227, 160 P.3d 703 (2007). The State acknowledged that Kekuewa and Ruggiero require that Harris's conviction and sentence for OVUII as a second-time offender be vacated and that the case be remanded for entry of a judgment of conviction for a first-time OVUII offense and for resentencing on that offense.

⁴ Hawaii Rules of Penal Procedure Rule 25(b) (2008) states:

(b) *After verdict or finding of guilt.* If by reason of absence from the State, death, sickness or other disability, including retirement or disqualification, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot
(continued...)

district court will follow proper procedures in assigning this case for resentencing.

II.

We vacate the April 10, 2006, judgment entered by the district court, and we remand the case for entry of a judgment of conviction against Harris for OVUII as a first-time offender pursuant to HRS §§ 291E-61(a) and (b)(1) and for resentencing on that offense.

DATED: Honolulu, Hawai'i, April 25, 2008.

On the briefs:

Timothy I. Mac Master
for Defendant-Appellant

Brian R. Vincent
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee

Corinne K. Watanelle

Presiding Judge

Craig H. Nakamura

Associate Judge

Ausa O. J. J. J.

Associate Judge

⁴(...continued)

perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.