NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29149

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

FILED
2009 MAR -6 AM 8:01
ELAINE RUMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CARSON LALEPA WHEELER, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD TRAFFIC NO. 1DTA-07-07206)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Carson Lalepa Wheeler (**Wheeler**) appeals the Judgment, filed on April 1, 2008, in the District Court of the First Circuit, Ewa Division (District Court).[1/]

Wheeler was convicted of Operating a Vehicle Under the Influence of an Intoxicant (**OVUII**), in violation of Hawaii Revised Statutes (**HRS**) § 291E-61(a) (Supp. 2007).[2/]

[1/] The Honorable Gerald H. Kibe presided.

[2/] At the time Wheeler was charged, HRS § 291E-61(a) provided, in relevant part:

> **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;
>
> (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
>
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

HRS § 291E-1 provides, *inter alia*:

> "Operate" means to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway or to navigate or otherwise use or assume physical control of a vessel underway on or in the waters of the State.

On appeal, Wheeler contends that the District Court erred when it: (1) denied his motion to dismiss; (2) denied his motion for judgment of acquittal, pursuant to Hawai'i Rules of Penal Procedure (**HRPP**) Rule 29; and (3) convicted him of OVUII, because the State failed to allege an essential element of the charge thereby making the charge insufficient.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Wheeler's points of error as follows:

The oral charge in this case was insufficient. The charge failed to include a plain, concise and definite statement of each of the essential facts constituting the offense of OVUII because it failed to allege that Wheeler operated a vehicle on a public road, street or highway, an attendant circumstance of the offense.[3/] See HRPP Rules 5(b) and 7(a); HRS § 702-205; State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977) (oral charge must sufficiently allege all of the essential elements of the offense charged; defective charge constitutes denial of due process). The District Court erred by denying Wheeler's motions. Inasmuch as the charge was defective, the District Court was without jurisdiction in this matter. See State v. Sprattling, 99 Hawai'i 312, 327, 55 P.3d 276, 291 (2002).

Therefore, the District Court's April 1, 2008 Judgment is vacated and the matter remanded to the District Court with instructions to dismiss without prejudice.

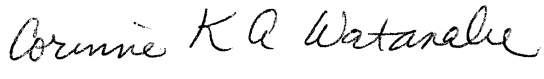
[3/] This is the defect raised by Wheeler. In light of our disposition on this point, our analysis is limited to this issue.

DATED: Honolulu, Hawai'i, March 6, 2009.

On the briefs:

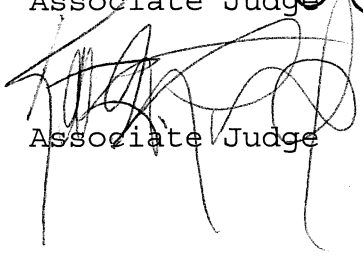
Timothy I. Mac Master
for Defendant-Appellant

Peter B. Carlisle
Prosecuting Attorney
Donn Fudo
Deputy Prosecuting Attorney
for Plaintiff-Appellee



Presiding Judge

Associate Judge



Associate Judge