***** FOR PUBLICATION *****

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellant

vs.

MARKHAM G.K. YOUNG, Defendant-Appellee

NO. 25610

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2449)

MARCH 30, 2005

MOON, C.J., LEVINSON, AND DUFFY, JJ.,
AND ACOBA, J. DISSENTING, IN WHICH NAKAYAMA, J., JOINS

OPINION OF THE COURT BY LEVINSON, J.

The plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] challenges the findings of fact (FOFs) and conclusions of law (COLS) of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, and appeals from the January 16, 2003 order granting the defendant-appellee Markham G.K. Young's motion to dismiss the indictment.

On appeal, the prosecution contends: (1) that the circuit court abused its discretion when it dismissed the indictment against Young, inasmuch as the prosecution properly charged him under the statutes that were in effect on the date Young allegedly committed the offense; and (2) that, assuming arguendo Counts I and II of the indictment incorrectly cited HRS

§§ 291-4.4 (Supp. 2000)[1] and 291-4.5 (1993 & Supp. 2000),[2]

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[1] HRS § 291-4.4 provided in relevant part:

> (a) A person commits the offense of habitually driving under the influence of intoxicating liquor or drugs if, during a ten-year period the person has been convicted three or more times for a driving under the influence offense; and
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty;
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> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath; or
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> (3) A person operates or assumes actual physical control of the operation of any vehicle while under the influence of any drug which impairs such person's ability to operate the vehicle in a careful and prudent manner. The term "drug" used in this section shall mean any controlled substance as defined and enumerated on schedules I through IV of chapter 329.

[2] HRS § 291-4.5 provided in relevant part:

> (a) No person whose driver's license has been revoked, suspended, or otherwise restricted pursuant to chapter 286 or section 291-4 or 291-7 shall operate a motor vehicle upon the highways of this State either while the person's license remains suspended or revoked or in violation of the restrictions placed on the person's license. The period of suspension or revocation shall commence upon the release of the person from the period of imprisonment imposed pursuant to this section.
>
> (b) Any person convicted of violating this section shall be sentenced as follows:
>
> (1) For a first offense, or any offense not precede within a five-year period by a conviction under this section:
>
> (A) A term of imprisonment at least three consecutive days but not more than thirty days;
>
> (B) A fine not less than $250 but not more than $1,000; and
>
> (C) License suspension or revocation for an additional year;
>
> (2) For an offense which occurs within five years of a prior conviction under this section:
>
> (A) Thirty days imprisonment;

(continued...)

dismissal of the indictment was nevertheless improper, inasmuch as any error was a "formal defect that did not prejudice or mislead [Young] to his prejudice."

Pursuant to this court's published decision in State v. Domingues, 2005 WL 407652 (February 22, 2005), holding that "HRS § 291E-61, which relates to operating a vehicle under the influence of an intoxicant, substantially reenacted HRS § 291-4.4, which pertained to the offense of habitually driving under the influence of intoxicating liquor or drugs[,]" slip op. at 5, we vacate the circuit court's order with respect to Count I.

We further hold that, as to the description of the offense, HRS § 291E-62 (Supp. 2004),[3] which relates to operating

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[2](...continued)

(B) A fine of $1,000; and
(C) License suspension or revocation for an additional two years; and

(3) For an offense that occurs within five years of two or more prior convictions under this section:
(A) One year imprisonment;
(B) A $2,000 fine; and
(C) Permanent revocation of the person's license.

[3] HRS § 291E-62 provides:

(a) No person whose license and privilege to operate a vehicle have been revoked, suspended, or otherwise restricted pursuant to part III or section 291E-61, or to part VII or part XIV of chapter 286 or section 200-81, 291-4, 291-4.4, 291-4.5, or 291-7 as those provisions were in effect on December 31, 2001, shall operate or assume actual physical control of any vehicle:
(1) In violation of any restrictions placed on the person's license; or
(2) While the person's license or privilege to operate a vehicle remains suspended or revoked.

(b) Any person convicted of violating this section shall be sentenced as follows:
(1) For a first offense, or any offense not preceded within a five-year period by conviction for an offense under this section:
(A) A term of imprisonment of not less than three consecutive days but not more than thirty days;
(B) A fine of not less than $250 but not more than

(continued...)

a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant, substantially reenacted HRS § 291-4.5, which pertained to driving after license suspended or revoked for driving under the influence of intoxicating liquor.

Accordingly, we vacate the circuit court's order dismissing the indictment against Young, including Counts III and IV, see infra note 4, and remand the present matter to the circuit court for further proceedings.

I. BACKGROUND

On November 13, 2002, an O'ahu grand jury returned an indictment against Young charging him with the following offenses: (1) habitually driving under the influence of intoxicating liquor or drugs (Count I), in violation of HRS § 291-4.4, see supra note 1; (2) driving after license revoked for driving under the influence of intoxicating liquor

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[3](...continued)

$1,000; and
(C) Revocation of license and privilege to operate a vehicle for an additional year;

(2) For an offense that occurs within five years of a prior conviction for an offense under this section:
(A) Thirty days imprisonment;
(B) A $1,000 fine; and
(C) Revocation of license and privilege to operate a vehicle for an additional two years; and

(3) For an offense that occurs within five years of two or more prior convictions for offenses under this section:
(A) One year imprisonment;
(B) A $2,000 fine; and
(C) Permanent revocation of the person's license and privilege to operate a vehicle.

The period of revocation shall commence upon the release of the person from the period of imprisonment imposed pursuant to this section.

(Count II), in violation of HRS § 291-4.5, see supra note 2; (3) non-compliance with speed limit prohibited (Count III), in violation of HRS § 291C-102 (1993); and (4) operation of a vehicle without a certificate of inspection (Count IV), in violation of HRS § 286-25 (1993). The indictment alleged that Young committed the foregoing offenses on or about December 27, 2001.

On December 17, 2002, Young filed a motion to dismiss indictment, arguing that the offenses alleged in Counts I and II were based upon violations of HRS §§ 291-4.4 and 291-4.5, statutes that had both been repealed as of the date of his indictment.

On January 7, 2003, the circuit court conducted a hearing on Young's motion to dismiss. At the conclusion of the hearing, the circuit court orally ruled that Young "was charged under a statute that has since been repealed[,] and its replacement is not a substantial reenactment of the prior statute[,] and on that basis[,] the [c]ourt will grant the motion to dismiss the indictment."

On January 17, 2003, the circuit court issued the following FOFs, COLs, and order granting Young's motion to dismiss:

> FINDINGS OF FACTS
>
> 1. [Young] was indicted for the instant charges on November 13, 2002.
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> 2. In Count I, Habitually Driving Under the Influence of Intoxicating Liquor, the indictment cites [HRS §] 291-4.4(a)(1);
>
> 3. In Count II, Driving After License Suspended or Revoked for Driving Under the Influence of Intoxicating Liquor, [the indictment] cites [HRS §] 291-4.5;
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> 4. HRS sections 291-4 through 291-4.5[,] including section[] 291-4.4(a)(1) were repealed on January 1, 2002 and therefore were no longer in effect as of the indictment date

in the instant case;

5. As of January 1, 2002, the appropriate citation would be under HRS section 291E.

CONCLUSION[] OF LAW

1. Under Rule 7(f) of the Hawai'i Rules of Penal Procedure, an indictment cannot be amended and thus[,] if correct, must be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that [Young's] Motion to Dismiss Indictment be granted.

On January 30, 2002, the prosecution timely filed a notice of appeal.

II. STANDARDS OF REVIEW

A. Sufficiency Of A Charge

"'Whether an indictment [or complaint] sets forth all the essential elements of [a charged] offense . . . is a question of law,' which we review under the de novo, or 'right/wrong,' standard." State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002) (quoting State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (quoting State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995) (citations omitted))).

B. Statutory Interpretation

> "[T]he interpretation of a statute . . . is a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); State v. Nakata, 76 Hawai'i 360, 365, 878 P.2d 699, 704 (1994). . . .

Gray v. Administrative Director of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). See also State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we

> must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
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> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai'i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2)(1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-480 (2003) (quoting State v. Rauch, 94 Hawai'i 315, 322-23, 13 P.3d 324, 331-32 (2000) (quoting State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai'i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai'i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai'i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998)))))))).

III. DISCUSSION

The prosecution argues that "the legislature fully intended that . . . HRS § 291-4.5 remain viable for offenses committed prior to January 1, 2002, as the new statute[] not only encompassed the same conduct as the repealed statute[], but also

imposed substantially the same penalties upon conviction."

HRS §§ 291-4.5 was in effect on the date that Young allegedly committed the offense; however, that statute was no longer in effect on the date of his indictment. Effective January 1, 2002, the legislature repealed HRS § 291-4.5 and simultaneously enacted HRS §§ 291E-62. See 2000 Haw. Sess. L. Act 189, Part III, § 33 at 432 and § 23 at 427-28.

In Queen v. Ah Hum, 9 Haw. 97, 98 (1893), the Supreme Court of the Republic of Hawai'i stated that

> the repeal of a penal statute operates as a remission of all penalties for violation of it committed before its repeal, and a release from prosecution therefor after said repeal unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution.

As such, "all prosecutions under the repealed [a]ct should thereafter" cease, unless the legislature has included a general savings clause or a statute provides otherwise. Id.

In the present matter, the prosecution concedes that "[i]t does not appear that the instant case would qualify as a pending prosecution [within the meaning of the general savings statute, HRS § 1-11 (1993),[4] inasmuch] as the indictment was filed after January 1, 2002."

Young argues that "the legislature's obvious intent to bar prosecution[] for . . . [l]icense [s]uspended or [r]evoked for [driving under the influence of intoxicating liquor, HRS § 291-4.5,] after January 1, 2002, is augmented by the omission of a savings clause pertaining to th[is] statute[]."

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[4] HRS § 1-11 provides that "[n]o suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall be affected by such repeal."

Young contends that "Act 189 evidences the legislature's intent to preserve post-repeal prosecutions under HRS § 291-7 [Supp. 2000],[5] [d]riving [u]nder the [i]nfluence of [d]rugs, by including a savings clause." Young is mistaken.

Act 189, 2000 Session Laws of Hawai'i, Part IV, § 41 sets forth a timetable delineating when Parts I through III were to take effect: (1) "Part I shall take effect upon approval and shall apply retroactively to all pending cases for driving under the influence of drugs under section 291-7, Hawaii Revised Statutes"; (2) "Part II shall take effect on September 30, 2000"; and (3) "Part III shall take effect on January 1, 2002." 2000 Haw. Sess. L. Act 189, Part IV, § 41(1) through (3) at 433. Part I, which pertained solely to HRS § 291-7 and the amendments included therein, became effective on June 8, 2000. See 2000 Haw. Sess. L. Act 189, Part IV, § 41(1) at 433. The legislature stated that the purpose of Part I was

> to reduce the maximum jail time that may be imposed upon drug impaired offenders. The effect of such a reduction will be to make the application of the right to a jury trial for driving under the influence of drugs consistent with that for operating a vehicle under the influence of intoxicating liquor. The legislature further intends that, by making these reduced penalties retroactive to pending driving under the influence of drugs cases, it be made clear that these offenders are not entitled to a jury trial, as the offense is a "petty offense" in the constitutional sense.

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[5] HRS § 291-7, entitled "Driving under the influence of drugs," was amended by Act 189 and was in effect as amended from June 8, 2000 through December 31, 2001. See 2000 Haw. Sess. L. Act 189, Part I, § 2 at 389 and Part IV, § 41 at 433. Act 189 amended HRS § 291-7, inter alia, by reducing the maximum jail time that could be imposed upon drug impaired offenders from one hundred eighty days to not more than thirty days. See 2000 Haw. Sess. L. Act 189, Part I, § 2 at 389.

Effective January 1, 2002, Act 189 repealed HRS § 291-7 and, simultaneously, HRS § 291E-61, entitled "Operating a vehicle under the influence of an intoxicant," became effective. See 2000 Haw. Sess. L. Act 189, Part III, § 23 at 425 and Part IV, § 41 at 433.

2000 Haw. Sess. L. Act 189, Part I, § 1 at 389 (emphasis added). The legislature thus made HRS § 291-7 immediately and retroactively effective upon approval, and, as amended, HRS § 291-7 was in effect from June 8, 2000 until December 31, 2001. That § 41 designated that Part II take effect on September 30, 2000 and Part III take effect on January 1, 2002 does not demonstrate that the legislature failed to preserve "post-repeal" prosecutions under HRS § 291-4.5.

Part II of Act 189 amended the existing Chapter 249 by creating new sections, and Part III created an entirely new chapter with provisions substantially identical to old provisions. The purpose of Part III, at least in part, was also to dispense with the need for jury trials for "petty offenses":

> It is the intent of the legislature to provide, where appropriate, uniform provisions, rights, and penalties, including immediate license revocation under the administrative revocation of license provisions and the same rights with respect to jury trials, for impaired driving and boating offenders. The legislature further intends that individuals who are charged under this part with an offense for operating a vehicle, including a vessel underway, under the influence of an intoxicant shall not be entitled to a jury trial if the maximum term of imprisonment for the offense does not exceed thirty days.

2000 Haw. Sess. L. Act 189, Part III, § 22 at 406. Furthermore, the legislature stated its reasoning for making January 1, 2002 the effective date of Part III:

> The legislature is also mindful that the statutory changes proposed in this part will require the judiciary and law enforcement agencies to develop new procedures and forms to ensure compliance. The legislature believes that an enactment date of January 1, 2002 will provide sufficient time to accommodate these development timetables.

2000 Haw. Sess. L. Act 189, Part III, § 22 at 407 (emphasis added). The legislature explicitly stated that it set out "development timetables" for the implementation of Act 189.

Accordingly, the legislature did not include a savings clause for any part of Act 189.

The prosecution submits that "[u]nder a 'carry forward theory,' 'a repeal accompanied by enactment of a new statute [is treated] as the fundamental equivalent of an amendment to the old statute. There is no interruption of the rights and liabilities flowing from those provisions which are substantially retained in the new statute.'" (quoting State v. Nichols, 718 P.2d 1261 (Idaho Ct. App. 1986) (some brackets in original and some omitted) (citation omitted)).

The prosecution cites the decision of the California Supreme Court in In re Dapper, 454 P.2d 905, 908 (Cal. 1969), for an explanation of the "legislative intent theory":

> It is established that the rule which bars prosecution under a repealed law for offenses occurring before repeal does not apply where there is an outright repeal and a substantial reenactment, because it will be presumed that the legislative body did not intend that there should be a remission of crimes not reduced to final judgment. When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.

(emphases added) (citations and internal quotation marks omitted).

> In re Dapper held a defendant's convictions under certain sections of the San Diego municipal code invalid because the old sections had been repealed and not substantially reenacted by any provisions in the new code. In applying its ruling, the California Supreme Court examined each section of the municipal code under which the defendant had been charged. It affirmed those convictions charged under the sections of the repealed code that had been substantially reenacted and reversed the convictions

> charged under sections that had not been substantially reenacted. 454 P.2d at 909-10.
>
> . . . .
>
> The legislature's intent in enacting Act 189 was to consolidate Hawaii's impaired driving statutes. The legislature explained that Act 189 "consolidates the various statues relating to operating a vehicle while under the influence of intoxicants, and makes these provisions more uniform and consistent." Hse. Stand. Comm. Rep. No. 70-00, in 2000 House Journal, at 974. The legislature also declared that HRS chapter 291E "consolidates, into a new chapter within the HRS, all provisions relating to impaired (alcohol or drugs) driving or boating[.]" Sen. Stand. Comm. Rep. No. 3347, in 2000 Senate Journal, at 1399-1401. . . . In the original enactment of HRS chapter 291E, the act stated that "[i]f any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable." 2000 Haw. Sess. L., Act 189, [§ 37] at 433.
>
> "Substantially" means "[e]ssentially; without material qualification; in the main; in substance; materially; in a substantial manner." Black's Law Dictionary 1428-29 (6th ed. 1990) To "re-enact" means "[t]o enact again; to revive." Id. at 1280. Thus, a statute is "substantially reenacted" when the legislature revives a statute in essentially the same terms, form, or substance as the previous statute, with only minor changes that do not alter its essential substantive content. See Natatorium Preservation Comm. v. Edelstein, 55 Haw. 55, 61, 515 P.2d 621, 625 (1973) (explaining that the latter provisions of the statute were "substantially reenacted" and "any and all variation being only in provisions as to the form in which legislative approval or disapproval might be expressed"); see also State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 285, 965 P.2d 1284, 1285 (1998) (noting that "HRS § 294-36 was reenacted in substantially the same form" as the previous statute, HRS § 431:10C-315).

Dominques, slip op. at 11-13 (some brackets added and some in original).

In our substantial reenactment analysis, HRS §§ 281-4.4 and 4.5 are virtually indistinguishable. See Dominques. By their plain language, the relevant provisions of HRS § 291E-62 "re-enact" the definition of the offense contained in HRS § 291-4.5 "without substantial changes."

The offense with which Young was charged in Count II, HRS § 291-4.5, is substantially reenacted in HRS § 291E-62. As such, Young may be prosecuted under HRS § 291-4.5, as there is no evidence that "the legislative body 'did not intend that there should be a remission of crimes not reduced to final judgment.'" In re Dapper, 545 P.2d at 900 (quoting Sekt v. Justice's Court of San Rafael, 159 P.2d 17, 22 (Cal. 1945)).

IV. CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's January 16, 2003 order dismissing the indictment and remand the present matter for further proceedings.

On the briefs:

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