

DISSENTING OPINION BY ACOBA, J.,  
WITH WHOM NAKAYAMA, J., JOINS

Plaintiff-Appellant State of Hawai'i (the prosecution) challenges the January 16, 2003 findings of fact (findings) and conclusions of law (conclusions) of the circuit court of the first circuit (the court) and appeals from the January 16, 2003 order granting the motion to dismiss indictment of Defendant-Appellee Markham G.K. Young (Defendant).<sup>1</sup>

For the reasons set forth below, I believe the order granting Defendant's motion to dismiss indictment should be affirmed with respect to Hawai'i Revised Statutes (HRS) § 291-4.5 (1993), the repealed statute.

I.

On January 1, 2002, HRS §§ 291-4 through 291-4.5, including HRS §§ 291-4.4(a)(1) and (a)(2) were repealed. On that same date, HRS chapter 291 took effect. On November 13, 2002, Defendant was charged by grand jury indictment with Habitually Driving Under the Influence of Intoxicating Liquor or Drugs (Habitual DUI) in violation of HRS § 291-4.4(a)(1) (Supp. 2000) (Count I); Driving After License Suspended or Revoked for Driving Under the Influence of Intoxicating Liquor (License Suspended or Revoked for DUI), HRS § 291-4.5 (Count II); Non-compliance with Speed Limit Prohibited, HRS § 291C-102 (1993) (Count III); and Operation of a Vehicle Without a Certificate of Inspection in

---

<sup>1</sup> The Honorable Sandra A. Simms presided.

violation of HRS § 286-25 (1993) (Count IV).

On December 17, 2002, Defendant filed a motion to dismiss indictment (motion to dismiss), asserting that the alleged offenses in Counts I and II were based upon violations of HRS §§ 291-4.4 and 291-4.5, statutes which were repealed on January 1, 2002. On January 7, 2003, a hearing on Defendant's motion to dismiss was conducted. At the hearing, the prosecution requested that should the court be inclined to dismiss Counts I and II, the entire indictment should be dismissed "because there may be potential [HRS § 701-]109 problems." At the conclusion of the hearing, the court orally ruled that Defendant "was charged under a statute that has since been repealed and its replacement is not a substantial reenactment of the prior statute and on that basis the [c]ourt will grant the motion to dismiss."

On January 17, 2002, the court issued its findings, conclusions, and order granting Defendant's motion to dismiss. The court issued the following findings:

1. The Defendant was indicted for the instant charges on November 13, 2002;
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;
4. HRS [§§] 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 [sic] 291E.

Upon these findings, the court concluded that "[u]nder Rule 7(f)

of the Hawaii Rules of Penal Procedure, an indictment cannot be amended and thus if incorrect, must be dismissed." Accordingly, the court granted Defendant's motion to dismiss.<sup>2</sup>

The prosecution filed a timely notice of appeal on January 30, 2002.

II.

On appeal, the prosecution argues that (1) HRS §§ 291-4.4(a)(1) and 291-4.5 "were not repealed as to offenses committed prior to January 1, 2002"; (2) "Defendant allegedly committed the offenses . . . on or about December 27, 2001, prior to the effective date of HRS Chapter 291E" and that the prosecution "could not have charged Defendant under HRS Chapter 291"; (3) the court erred in concluding "that Defendant should have been charged under HRS Chapter 291 rather than the statutes that were in force on the date the offenses were allegedly committed"; (4) "the indictment was not subject to dismissal as any such error was a formal defect that did not prejudice Defendant or mislead him to his prejudice" and (5) the prosecution "properly charged Defendant with the statutes in effect on the date the offenses were allegedly committed."

Defendant argues that the "trial court properly exercised its discretion when it dismissed the indictment

---

<sup>2</sup> None of the parties present arguments as to Counts III and IV. Apparently the court did not specifically rule as to these counts, but dismissed the indictment in its entirety.

because: (1) the [prosecution] could not prosecute [Defendant] under the repealed statutes, HRS §§ 291-4.4(a)(1) . . . and 291-4.5 . . . and inasmuch as (a) he could not be charged under a repealed law for offenses occurring prior to the repeal, (b) HRS §§ 291-4.4 and -4.5 were repealed by the plain meaning of Act 189, (c) HRS §§ 291E-61 and -62 are not substantial reenactments of HRS §§ 291-4.4 and -4.5, respectively, and (d) "[a]ny hypothetical ambiguity attendant to the legislature's repeal of HRS §[] 291-4.4 should be resolved, under the 'rule of lenity,' in [Defendant's] favor"; and (2) the trial court lacked the proper subject matter jurisdiction to try, convict and sentence [Defendant]."

III.

In State v. Domingues, No. 25208, slip op. at 5 (Feb. 22, 2005), a majority of this court held that "HRS § 291E-61 . . . substantially reenacted HRS § 291-4.4." Thus, Domingues is dispositive of the prosecution's argument regarding the court's dismissal of Count I. However, this appeal raises a second issue, not addressed in Domingues, concerning the repeal of HRS § 291-4.5 and the enactment of HRS § 291E-62, statutes relating to the offenses of driving after having a license suspended or revoked for DUI and operating a vehicle after having a license and privilege suspended or revoked for OUI, respectively. HRS § 291-4.5(a), § 291E-62(a). At the outset, the prosecution

impliedly concedes that the legislature did not include a specific saving clause to ensure retroactive application of HRS § 291E-62 inasmuch as it limits its arguments to the substantial reenactment exception. Defendant asserts that "the legislature's obvious intent to bar prosecutions for . . . License Suspended or Revoked for DUI after January 1, 2002[] is augmented by the omission of a saving clause pertaining to these statutes." Inasmuch as Act 189 "repealed" HRS § 291-4.5, effective January 1, 2002 without a saving clause, Defendant appears correct in this respect. 2000 Haw. Sess. L. Act 189, § 33, 41 at 432-33.

IV.

Preliminarily, I note that in addition to repealing HRS § 291-4.5, Act 189 "amended" HRS § 291-7, entitled "Driving under the influence of drugs."<sup>3</sup> 2000 Haw. Sess. L. Act 189, § 2, at 389-90. Section 41 of Act 189 provided as follows:

SECTION 41. This Act shall take effect upon approval; provided that:

- (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, § 41, at 433 (emphasis added).

Amendments to HRS § 291-7 were included under Part I of Act 189

---

<sup>3</sup> Act 189, Part I stated that "[s]ection 291-7, Hawaii Revised Statutes, is amended to read as follows . . . ." 2000 Haw. Sess. L. Act 189, § 2, at 389 (emphasis added).

and the repeal of HRS § 291-4.5 was included under Part III. See 2000 Haw. Sess. L. Act 189 §§ 2, 23 at 389, 427-28. In Part IV, § 41 of Act 189, as recounted above, the legislature preserved pending post-amendment prosecutions under HRS § 291-7 by expressly stating that the amendment to the statute "shall apply retroactively to all pending cases for driving under the influence of drugs under section 291-7." 2000 Haw. Sess. L. Act 189, § 41 at 433. The inclusion of this clause for amendments to HRS § 291-7 demonstrates that the legislature knew how to preserve pending prosecutions. Thus, the omission of a saving clause for HRS § 291-4.5, which was contained in Part III of the same act, indicates that the legislature did not preserve post-repeal prosecutions under § 291-4.5.

The majority maintains that the fact "[t]hat § 41 [of Act 189] designated that . . . 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." Majority opinion at 10 (emphasis in original). It reasons that "[t]he legislature explicitly stated that it set out 'development timetables' for the implementation of Act 189[]" and, from this, the majority concludes that "the legislature did not include a savings clause for any part of Act 189." Majority Opinion at 10-11 (emphases in original).

However, a saving clause is "[o]rdinarily a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal." Black's Law Dictionary 1343 (6th ed. 1990) (emphases added). To reiterate, § 41 of Act 189 expressly stated that amendments to HRS § 291-7 "shall apply retroactively to all pending cases." 2000 Haw. Sess. L. Act 189, § 41 at 433. Contrary to the majority's position, this statement was in effect a saving clause inasmuch as it "save[d]" the amendments for retroactive application. The striking significance of the purported "timetables" in Act 189 is the omission of a similar clause to "save" the "penalties" under the repealed HRS § 291-4.5 from "annihilation." Without such a saving clause, the "unrestricted repeal" of HRS § 291-4.5<sup>4</sup> constituted a break in the law and, absent a determination that HRS § 291-4.5 was "virtually identical" to HRS § 291E-62, see discussion infra, the prosecution could not charge Defendant under the repealed HRS § 291-4.5.

The "saving clause" to HRS § 291-7 notwithstanding, as the prosecution readily admits, no saving clause was included for the repealed law at issue, HRS § 291-4.5.

---

<sup>4</sup> Act 189, Part III stated that "[s]ection 291-4.5, Hawaii Revised Statutes, is repealed." (Emphasis added.)

V.

The prosecution concedes that "[i]t does not appear that the instant case would qualify as a pending prosecution as the indictment was filed after January 1, 2002[,]” and, therefore, the general saving statute, HRS § 1-11 (1993),<sup>5</sup> does not apply to the instant matter. Thus, the prosecution is left to argue that “[HRS §] 291E-62 substantially reenacted [HRS §] 291-4.5” because (1) “the essential elements of [HRS §] 291-4.5 were retained in [HRS §] 291E-62 and (2) “the penalty provisions of both statutes are identical.” The prosecution may charge Defendant under a repealed law only if the repealed statute, HRS § 291-4.5(a), and the new statute, HRS § 291E-62(a), are “virtually identical.” In re Dapper, 454 P.2d 905, 910 (Cal. 1969). HRS § 291-4.5, entitled “Driving after license suspended or revoked for driving under the influence of intoxicating liquor; penalties[,]” provided,

[n]o 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.

HRS § 291-4.5(a) (Supp. 2000) (emphases added). This statute was

---

<sup>5</sup> 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.”



---

repealed on January 1, 2002. See 2000 Haw. Sess. L. Act 189, § 33 at 432. HRS § 291E-62, entitled "Operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant; penalties[,]” (emphases added) took effect on that same date. See 2000 Haw. Sess. L. Act 189, §§ 23, 41 at 427, 433. That statute provided,

[n]o 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, 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.

HRS § 291E-62(a) (Supp. 2002) (emphases added).

The repealed HRS § 291-4.5(a) prohibited "operat[ing] a vehicle upon the highways of this State" while having a license "revoked, suspended, or otherwise restricted pursuant to chapter 286 or section 291-4 or 291-7." HRS § 291E-62(a) differs from § 291-4.5(a) in at least three fundamental respects. First, it expands the class of persons that fall within the ambit of proscription to include those who had their licenses suspended or revoked under statutes not originally enumerated in HRS § 291-

4.5, such as HRS §§ 291E-61,<sup>6</sup> 200-81,<sup>7</sup> and 291-4.4.<sup>8</sup> Second, it broadens the scope of the offense by encompassing the acts of "operat[ing] or assum[ing] actual physical control of any vehicle," as opposed to "operat[ing] a motor vehicle." (Emphasis added.) It is evident that the latter act, stated in the alternative by the legislature, would not necessarily encompass "operation" in the ordinary sense. Finally, it also expands the scope of the offense beyond that of the repealed statute by encompassing situations where the defendant "operate[s] or assume[s] actual physical control of any vehicle," presumably at any location, and not just "upon the highways."

Thus, HRS § 291E-62(a) does more than merely "secure clarification, a new arrangement of clauses, [or] delete superseded provisions[.]" In re Dapper, 454 P.2d at 908. It makes substantive changes to the definition of the offense of driving while having a license suspended or revoked for DUI. Applying the In re Dapper standard, these two statutes are not "virtually identical," and, hence, HRS § 291-4.5(a) was not "substantially reenacted" by HRS § 291E-62(a). Id. at 910.

---

<sup>6</sup> HRS § 291E-61 (Supp. 2002) defines the offense of "Operating a vehicle under the influence of an intoxicant."

<sup>7</sup> HRS § 200-81 (Supp. 2000), defining the offense of "Operating a vessel under influence of intoxicating liquor[.]" was repealed January 1, 2002. See 2000 Haw. Sess. L. Act 189, §§ 27, 41 at 432-33.

<sup>8</sup> HRS § 291-4.4 (Supp. 2000), defining the offense of "Habitually driving under the influence of intoxicating liquor or drugs," was repealed on January 1, 2002. See 2000 Haw. Sess. L. Act 189, §§ 32, 41 at 432-33.

VI.

Defendant also maintains that the sentencing provisions of HRS § 291-4.5(b) and HRS § 291E-62(b) differ inasmuch as, under the new statute, "revocation is mandatory[.]" In this regard, the repealed statute, HRS § 291-4.5(b) stated,

- (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 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;
    - (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.

(Emphases added.) Thus, under the former law, the sentencing judge had the discretion to suspend or revoke the defendant's license. Defendant, however, correctly observes that under the new statute, HRS § 291E-62(b), revocation is mandatory and suspension is not an option. HRS § 291E-62(b) provides,

- (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 \$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.

(Emphases added.) Consequently, inasmuch as HRS § 291E-62(b) mandates a single "harsher" penalty than the dual option prescribed under the repealed HRS § 291-4.5(b), the two sentencing provisions are not "virtually identical," In re Dapper, 454 P.2d at 910, thereby precluding application of the substantial reenactment exception.

VII.

The majority declares that HRS §§ 291E-62 and 291-4.5 are "virtually indistinguishable" without actually applying the In re Dapper standard to the statutes. Majority Opinion at 12. Its opinion misconstrues the "substantial reenactment" exception as an example of the so-called "legislative intent theory." Majority Opinion at 11. The exception, however, restricts the court to scrutinizing the text of the repealed statute and the new statute. This is because "[e]ven where the Court is

convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used." State v. Meyer, 61 Haw. 74, 77, 595 P.2d 288, 291 (1979) (quoting Queen v. San Tana, 9 Haw. 106, 108 (1893)); see id. ("We do not legislate or make laws."); Burdick v. Disher, 1 Haw. 67, 67 (1852) (stating that the court's "province" is to "administer the laws as [it] find[s] them, leaving it with the legislature to correct [its] faults").

The "substantial reenactment" exception, therefore, is a narrow one. By restricting the court's inquiry to the text of the statutes, the exception allows the court, in limited circumstances, to provide for the continuous operation of a repealed law without assuming legislative powers. So long as the court restrains its analysis to the language of the statutes, the separation between judicial and legislative power is preserved. Pursuant to In re Dapper, only upon a determination that the two statutes contain "virtually identical" language may the court "presume[]" that the legislative body did not intend that there should be a remission of crimes not reduced to final judgment." 454 P.2d at 908 (emphasis added).

The majority misapprehends the In re Dapper standard, turning a blind eye to the text of HRS §§ 291-4.5 and 291E-62. Rather than address the language of the statutes, the majority

improperly explores legislative history. See Majority Opinion at 12-13. Such a backward application of the "substantial reenactment" exception undermines the very reason for its limited existence -- that the court's "province" is to "administer the laws as [it] find[s] them, leaving it with the legislature to correct [its] faults." Burdick, 1 Haw. at 67. If, as the prosecution contends, the legislature intended to preserve post-repeal prosecutions under HRS § 291-4.5, it failed to express that intent.

VIII.

For the foregoing reasons, I would affirm the court's order as to the dismissal of Count II.

*Pumia U. Takayama*  
