

NO. 26687

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee,

vs.

CLINT KELAI KALAOLA, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0699)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
Acoba, J., Concurring)

Defendant-appellant Clint Kelai Kalaola appeals from the findings of facts (FOFs), conclusions of law (COLs), and order of the Circuit Court of the First Circuit, the Honorable Sandra A. Simms presiding, filed on May 26, 2004, denying Kalaola's Hawai'i Rules of Penal Procedure (HRPP) Rule 35 motion to dismiss his conviction of and sentence for habitually driving under the influence of intoxicating liquor (habitual DUI), in violation of Hawai'i Revised Statutes (HRS) § 291-4.4 (1995),¹ and reduce the sentence (Rule 35 motion).

¹ HRS § 291-4.4 provided, in relevant part, that:

Habitually driving under the influence of intoxicating liquor or drugs. (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,

(continued...)

On appeal, Kalaola contends that the circuit court erred in denying his Rule 35 motion after he had offered evidence that two of his four predicate DUI convictions used to support his habitual DUI conviction were dismissed by the district court. Specifically, Kalaola asserts that: (1) HRPP Rule 35 clearly allows him to raise a post-judgment challenge to an illegal sentence at any time; (2) his plea of nolo contendere, or "no contest," to the habitual DUI charge did not bar his right to attack any of the predicate prior DUI convictions upon which the habitual DUI offense was based; and (3) his post-judgment attack on the habitual DUI conviction was permissible under State v. Shimabukuro, 100 Hawai'i 324, 60 P.3d 274 (2002), and State v. Veikoso, 102 Hawai'i 219, 74 P.3d 575 (2003).

Upon carefully reviewing 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 hold that:

¹(...continued)

- 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;
- (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 hundred ten liters of breath; []
- (c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony.

(Bold emphasis in original.)

(1) the circuit court did not err in concluding that Kalaola "has no remedy under [HRPP] Rule 35" because he failed to file his Rule 35 motion within the ninety-day time period mandated by HRPP Rule 35² or pursuant to HRPP Rule 40.³

(2) the circuit court did not err in concluding that Kalaola "waived his right to challenge the factual basis that he had been convicted of DUI, a violation of HRS § 291-4, three times within ten (10) years prior to the commission of the [habitual] offense" in view of the fact that Kalaola unconditionally, knowingly and voluntarily pled no contest to the habitual DUI charge. See State v. Morin, 71 Haw. 159, 162-63, 785 P.2d 1316, 1318 (1990); and

(3) the circuit court did not err in concluding that there was "no basis to reduce the sentence within either

² At the time Kalaola filed his motion, HRPP Rule 35 provided, in relevant part, that:

(a) *Correction of Illegal Sentence*. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. A motion to correct a sentence that is made within the 90 day time period shall empower the court to act on such motion even though the time has expired.

(Italics in original) (Underscored emphasis added.)

³ HRPP Rule 40(a), as amended effective July 1, 2003, provides, in relevant part:

(1) . . . At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on[, inter alia,] the [] ground[] . . .
(iii) that the sentence is illegal.

[Shimabukuro or Veikoso] as the procedural and factual history in this case are distinguished from those aspects of the other two cases" because "[n]one of [Kalaola's] prior DUI convictions [] had been vacated at the time he pled guilty," Veikoso, 102 Hawai'i 223, 74 P.3d at 579 (distinguishing Shimabukuro) (emphasis added). Moreover, unlike the defendants in Shimabukuro, 100 Hawai'i at 325-26, 60 P.3d at 275-76, and Veikoso, 102 Hawai'i at 221, 74 P.3d at 577, Kalaola's plea was unconditional. See Morin, 71 Haw. at 162, 785 P.2d at 1318. Therefore,

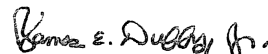

IT IS HEREBY ORDERED that the May 26, 2004 order of the Circuit Court of the First Circuit denying Kalaola's motion to dismiss the habitual DUI conviction and sentence filed pursuant to HRPP Rule 35 is affirmed.

DATED: Honolulu, Hawai'i, September 30, 2005.

On the briefs:

Karen T. Nakasone,
for the defendant-appellant
Clint Kelai Kalaola

Ryan Yeh,
Deputy Prosecuting Attorney,
for the plaintiff-appellee
State of Hawai'i



CONCURRENCE BY ACOBA, J.

I concur in the result only.

