

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM MOON, C.J., JOINS

While I agree with the analysis that, consistent with this court's previous approach in State v. Domingues, 106 Hawai'i 480, 107 P.3d 409 (2005), HRS §§ 291E-61(a) and (b)(2)-(3) (Supp. 2004) must be construed as delineating separate status offenses,¹ I respectfully disagree with the majority's conclusion that HRS § 291E-61(b)(1) also describes attendant circumstances (*i.e.*, essential elements). See majority opinion, slip op. at 24.

In my view, HRS § 291E-61(a) contains the essential elements of the default offense of Operating a Vehicle Under the Influence of an Intoxicant ("OVUII"), and HRS § 291E-61(b)(1) is its attendant sentencing provision. I agree that, per the doctrine of constitutional doubt, see majority opinion, slip op. at 13-18, and consistent with what the legislature appears to have intended, see majority opinion, slip op. at 18-21, HRS § 291E-61(b)(2)-(3) must be interpreted as consisting of additional attendant circumstances differentiating separate status offenses. Thus, conceptually, HRS § 291E-61 (Supp. 2004) continues to consist of a hierarchy of separate status offenses, see Domingues, 106 Hawai'i at 416, 107 P.3d at 487 ("In other words, the . . . language of HRS § 291E-61(b)(1) through 291E-61(b)(4) describes attendant circumstances, . . . that are intrinsic to

¹ I agree with the approach, insofar as no compelling justification has been presented to justify overruling Domingues. See State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001) ("While there is no necessity or sound legal reason to perpetrate an error under the doctrine of stare decisis, . . . we agree with the proposition expressed by the United States Supreme Court that a court should not depart from the doctrine of stare decisis without some compelling justification." (Internal quotation marks omitted.) (Internal citation omitted.) (Brackets omitted.) (Emphasis in original).)

and 'enmeshed' in the hierarchy of offenses that HRS § 291E-61 as a whole describes."), but described as follows: (1) HRS § 291E-61(a) sets forth the default OVUII offense; (2) HRS §§ 291E-61(a) and (b)(2) describe the second level OVUII offense designed to punish those persons who commit an OVUII offense "within five years of a prior conviction for an offense under this section or section 291E-4(a)"; and (3) HRS §§ 291E-61(a) and (b)(3) describe the third level OVUII offense designed to punish those persons who commit an OVUII offense "within five years of two prior convictions for offenses under this section or section 291E-4(a)"

I recognize that the foregoing interpretation begs the question why, in applying the Dominques approach, HRS § 291E-61(b)(1) is not again deemed to be an attendant circumstance. To that end, I believe that common sense dictates this natural progression from Dominques.² The inescapable consequence of the majority's position -- that HRS § 291E-61(b)(1) describes attendant circumstances -- is that the prosecution must prove, beyond a reasonable doubt, the defendant's status as a first-time offender. See HRS § 701-114 (1993) (stating that a conviction must be based upon proof beyond a reasonable doubt of "[e]ach element of the offense[]"). With all due respect, I believe that this result is "absurd." See HRS § 1-15(3) ("Every construction which leads to an absurdity shall be rejected."). Moreover, the

² I note that Dominques interpreted the version of HRS § 291E-61 in effect in 2002. Inasmuch as HRS § 291E-61 was substantially amended in 2003, see 2003 Haw. Sess. L. Act 71, § 1, at 123-24, Dominques does not necessarily inform our interpretation of the version of HRS § 291E-61 in effect in 2004.

phrase "[f]or the first offense" contributes nothing to the definition of the OVUII offense set forth in HRS § 291E-61(a). The lack of definitional value further indicates that HRS § 291E-61(b)(1) does not describe essential elements of the offense. See HRS § 702-205 (1993) ("The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as . . . [a]re specified by the definition of the offense") (Emphasis added.). Finally, there is no practical reason why a defendant must be informed that the offense for which he or she is charged with is his or her first offense. Indeed, a defendant is uniquely aware of his or her status as a first-time offender and will not ever contest his or her classification as such. In short, such information is neither essential, nor elemental.

In order to avoid that conclusion, the majority has carved a narrow exception maintaining that HRS § 291E-61(b)(1) describes attendant circumstances, but declaring its terms a nullity. See majority opinion, slip op. at 27. I must respectfully disagree with this unprecedented deviation from the unequivocal rule announced in State v. Cummings, 101 Hawai'i 139, 63 P.3d 1109 (2003), requiring that the prosecution allege all of the essential elements of the offense charged. Id. at 142, 63 P.3d at 1112. As mentioned, the absence of definitional value logically suggests that HRS § 291E-61(b)(1) is not an essential element, not that it is an essential element with no practical value. See discussion supra.

Nevertheless, I agree with the majority's ultimate

decision to vacate Ruggiero's conviction and sentence under HRS §§ 291E-61(a) and (b)(2), and remand for entry of judgment and for resentencing in accordance with HRS §§ 291E-61(a) and (b)(1). See majority opinion, slip op. at 29. I therefore concur in the result, but for the aforementioned reasons.



Puna C. Radayane