

NO. 29813

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
KHAMSAVAN THAMDY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NO. 1DTA-09-00062)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding J., Fujise, and Leonard, JJ.)

Defendant-Appellant Khamsavan Thamdy (Thamdy) appeals from the Judgment filed on April 8, 2009 in the District Court of the First Circuit, Honolulu Division (district court).¹

The district court convicted Thamdy of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a)(1) and (3) and (b)(4) (Supp. 2008).

On appeal, Thamdy contends the district court (1) erred by denying his oral motion to dismiss the charge because the charge failed to state an essential element of the offense, *i.e.*, that Thamdy operated or assumed actual physical control of a vehicle upon a public way, street, road, or highway and (2) plainly erred by failing to adequately advise Thamdy of his right to testify before trial.

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, as

¹ Per diem District Judge Lenore K.J.H. Lee presided.

well as the relevant statutory and case law, we resolve Thamdy's points of error as follows:

"[T]he operation of a vehicle on a public way, street, road, or highway is an attendant circumstance of the offense of OVUII, and is therefore an element of the offense." State v. Wheeler, 121 Hawai'i 383, 393, 219 P.3d 1170, 1180 (2009). The failure to allege that at the time of the offense, Thamdy was driving a vehicle upon a public way, street, road, or highway rendered the charge deficient. Id. We need not address Thamdy's other point of error.

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on April 8, 2009 in the District Court of the First Circuit, Honolulu Division, is vacated and this case is remanded to the district court with instructions to dismiss the charge without prejudice.

DATED: Honolulu, Hawai'i, February 24, 2010.

On the briefs:

Jonathan Burge
for Defendant-Appellant.

Presiding Judge

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge