

CONCURRING OPINION BY NAKAMURA, C.J.

I write separately because although I agree with the result reached in the lead opinion, I do not necessarily agree with the analysis used to obtain that result.

I.

I agree with the lead opinion that under the "liberal construction" standard for post-trial challenges to the sufficiency of a charge, the charge against Defendant-Appellant Robert N. Tominiko (Tominiko) for operating a vehicle under the influence of an intoxicant (OVUII) was sufficient. Although the OVUII charge set forth in the complaint failed to allege that Tominiko operated his vehicle "upon a public, way, street, road, or highway," the missing "public road" allegation was supplied by a companion charge in the complaint for driving without insurance. The driving without insurance charge in the complaint alleged that Tominiko "did operate or use a motor vehicle upon a public street, road, or highway of the State of Hawaii."

In State v. Elliot, 77 Hawai'i 309, 312, 884 P.2d 372, 375 (1994), the Hawai'i Supreme Court, applying the liberal construction standard, concluded that one way in which a otherwise deficient count can be reasonably construed to charge a crime is by examining companion counts with which the defendant was charged. Based on the analysis in Elliot, I conclude that in view of the companion driving without insurance charge, the OVUII charge against Tominiko can reasonably be construed to charge a crime.

A.

The complaint filed against Tominiko charged him in pertinent part as follows:

(08287580) On or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawaii, ROBERT TOMINIKO did operate or assume actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty; and/or did operate or assume actual physical control of a vehicle with .08 or more grams of alcohol per two hundred ten liters of breath, thereby committing the offense of Operating a Vehicle Under the Influence of an Intoxicant, in violation of Section 291E-61(a)(1) and/or (a)(3) of the Hawaii Revised Statutes. ROBERT TOMINIKO is subject to sentencing as a

first offender in accordance with Section 291E-61(b) (1) of the Hawaii Revised Statutes, and/or ROBERT TOMINIKO is subject to sentencing in accordance with Section 291E-61(b) (2) of the Hawaii Revised Statutes, where ROBERT TOMINIKO committed the instant offense as a highly intoxicated driver, as a first offense.

. . . . .  
(08282586) On or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawaii, ROBERT TOMINIKO did operate or use a motor vehicle upon a public street, road, or highway of the State of Hawaii at a time when such motor vehicle was not insured under a motor vehicle insurance policy, thereby committing the offense of Driving Without Motor Vehicle Insurance, in violation of Section 431:10C-104(a) of the Hawaii Revised Statutes. ROBERT TOMINIKO is subject to sentencing as a first offender in accordance with Section 431:10C-117(a) of the Hawaii Revised Statutes.

(Emphasis added.)

B.

In State v. Motta, 66 Haw. 89, 657 P.2d 1019 (1983), the Hawai'i Supreme Court adopted the liberal construction standard for post-trial challenges to the sufficiency of a charge. The supreme court stated:

At the outset, we decide that since Motta failed to raise any objection to the indictment until after trial, it must be liberally construed. We are mindful that the failure of an indictment to state an offense is a fundamental defect which can be raised "at any time during the pendency of the proceeding" (HRPP [(Hawai'i Rules of Penal Procedure)] Rule 12(b)(2)), but we choose to adopt the rule followed in most federal courts of liberally construing indictments challenged for the first time on appeal.

Id. at 95, 657 P.2d at 1019-20 (footnote omitted). The supreme court quoted with approval United States v. Pheaster, 544 F.2d 353, 361 (9th Cir. 1976), for the proposition that "When an indictment is not challenged before the verdict, it is to be upheld on appeal if the necessary facts appear in any form or by fair construction can be found within the terms of the indictment." Motta, 66 Haw. at 91, 657 P.2d at 1020 (internal quotation marks, brackets, and citations omitted).

The supreme court held:

[S]ince Motta failed to raise any challenge to the indictment until after conviction, we choose to apply the flexible rule of liberal construction, as discussed above.

Under this standard, we must liberally construe the indictment in favor of validity (U.S. v. Pheaster, 544 F.2d at 361) and uphold it, unless there is some showing of substantial prejudice to Motta, "such as . . . that the indictment is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" U.S. v. Thompson, 356 F.2d [216,] 226 [2d Cir. 1965].

Id. at 93-94, 657 P.2d at 1021-22. Since Motta, the supreme court has interpreted the liberal construction standard to mean that it will "not reverse a conviction based upon a defective indictment or complaint unless the defendant can show prejudice or that the indictment or complaint cannot within reason be construed to charge a crime." State v. Wheeler, 121 Hawai'i 383, 400, 219 P.3d 1170, 1187 (2009) (brackets omitted) (quoting State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996)).

C.

In Wheeler, 121 Hawai'i at 393-96, 219 P.3d at 1180-83, the Hawai'i Supreme Court held that where a timely pre-trial objection was made to a similar OVUII charge, the charge was insufficient because it failed to allege that Wheeler operated or assumed actual physical control of a vehicle "upon a public, way, street, road, or highway" (hereinafter, "the public road requirement"). Wheeler is distinguishable in two significant respects:

First, the oral charge in Wheeler did not contain a companion charge which alleged that Wheeler operated his vehicle upon a public, way, street, road, or a highway.

Second, Wheeler did not involve a tardy, post-verdict objection to the sufficiency of the OVUII charge. Thus, the supreme court in Wheeler did not apply the liberal construction standard in evaluating whether the oral OVUII charge was insufficient. Indeed, the supreme court in Wheeler specifically reserved, and did not address, the question of what the result would have been under the liberal construction standard. Id. at 400 n.19, 219 P.3d at 1187 n.19.

D.

With respect to the sufficiency of an indictment, Hawaii Revised Statutes (HRS) § 806-34 (1993) provides as follows:

§ 806-34 **Sufficiency of averments as to offense and transaction.** In an indictment the offense may be charged either by name or by reference to the statute defining or making it punishable; and the transaction may be stated with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing (if any) in respect to which the offense was committed, as are necessary to identify the transaction, to bring it within the statutory definition of the offense charged, to show that the court has jurisdiction, and to give the accused reasonable notice of the facts.

(Emphasis added.)

In addition, Hawaii Rules of Penal Procedure Rule 7 (2008) provides, in pertinent part:

**Rule 7. INDICTMENT, INFORMATION, OR COMPLAINT.**

(a) **Use of Indictment, Information, or Complaint.** The charge against a defendant is an indictment, an information, or a complaint filed in court . . . .

. . . .

(d) **Nature and Contents.** The charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged. . . . Allegations made in one count may be incorporated by reference in another count.

In Elliot, the Hawai'i Supreme Court, applying the liberal construction standard, addressed whether allegations in a companion count could be used to remedy an otherwise defective count. Elliot was orally charged with resisting arrest and assault against a police officer. Elliot, 77 Hawai'i at 310, 884 P.2d at 373. Both charges were deficient for omitting an essential element. The resisting arrest charge failed to allege that Elliot "intentionally prevent[ed]" a police officer acting under color of authority from effecting an arrest, and the assault against a police officer charge failed to allege that the assault was against "a police officer who [was] engaged in the performance of duty." Id. at 310-11, 884 P.2d at 373-74.

Nevertheless, the supreme court proceeded to analyze whether allegations in the resisting arrest charge could be used

to reasonably construe the assault against a police officer charge as charging a crime, noting that "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." Id. at 312, 884 P.2d at 375. The supreme court observed that although the assault against a police officer charge omitted the engaged-in-the-performance-of-duty element, the resisting arrest count alleged that Elliot "attempted to prevent a Peace Officer acting under color of his official authority from effecting an arrest by using or threatening to use physical force against the peace officer or another." Id. The supreme court reasoned that "[i]t is apparent that a peace officer effecting an arrest under color of his or her official authority is 'a police officer who is engaged in the performance of duty.'" Id. The supreme court therefore concluded that "if it were clear that the 'Peace Officer' in the resisting arrest count referred to Officer Kahiwa and that the 'using or threatening to use physical force' referred to Elliott's act of biting Officer Kahiwa, we would be able to reasonably construe the oral charge as charging assault against a police officer." Id. The supreme court reached this conclusion even though the allegations in the resisting arrest count would not serve to inform Elliot that a police officer's being engaged in the performance of duty was an element of the assault against a police officer charge.

Ultimately, the supreme court held that the allegations in the resisting arrest charge could not cure the deficiency in the assault against a police officer charge because the facts of the case did not permit the inference that both counts referred to the same underlying occurrence.

Under the circumstances of this case, however, we are unable to construe the [oral] charge [as charging assault against the police officer]. The "Peace Officer" could have referred to either Officer Kahiwa or Officer Watai and the "using or threatening to use physical force" could have referred to either Elliott's act of biting Officer Kahiwa or her act of attempting to bite Officer Watai. Therefore, the assault against a police officer conviction must be reversed.

Id. at 312-13, 884 P.2d at 375-76 (footnote omitted).

In support of the proposition that "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole[,] " the supreme court in Elliot cited its prior decision in State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994). Schroeder was charged with and convicted of robbery and kidnapping. The kidnapping count failed to allege that Schroeder had used a firearm in committing the kidnapping. Schroeder, 76 Hawai'i at 519, 880 P.2d at 194. The supreme court noted that under the rule set forth in State v. Estrada, 69 Haw. 204, 738 P.2d 812 (1987), an aggravating circumstance intrinsic to the commission of the charged crime, such as the use of a gun to commit the crime, must be alleged in the indictment to give the defendant notice that it will be relied upon to prove the defendant's guilt and support the sentence to be imposed. Schroeder, 76 Hawai'i at 528-29, 880 P.2d at 203-04. The supreme court held, however, that viewing the charges against Schroeder as a whole, the kidnapping count could reasonably be construed to allege the use of a firearm based on the allegation in the companion robbery count that Schroeder had used a handgun.

We are convinced that a plain reading of the kidnapping count of the indictment against Schroeder must result in a conclusion that the use of a handgun--i.e., the relevant aggravating circumstance supporting the imposition of enhanced sentencing--was being charged. As we have noted, Count I of the indictment expressly alleged that Schroeder committed the offense of robbery "while in the course of committing theft and while armed with a dangerous instrument, to wit, a handgun. . . ." Count I alleged that robbery was committed (1) on April 13, 1985, (2) in the City and County of Honolulu, (3) by Schroeder, and (4) through the use of the threat of imminent use of force against Richards while armed with a handgun.

Count II alleged that kidnapping was committed (1) on April 13, 1985, (2) in the City and County of Honolulu, (3) by Schroeder, (4) through the intentional restraint of Richards, and (5) with intent to facilitate the commission of a *felony* or flight after the commission of a *felony*. The "felony" referred to in Count II must reasonably be construed as the robbery charged in Count I.

Id. at 530, 880 P.2d at 205 (brackets omitted).

E.

Here, the companion charge against Tominiko for driving without insurance alleged that he "did operate or use a motor vehicle upon a public street, road, or highway of the State of Hawaii." Both the driving without insurance and the OVUIII charges alleged that Tominiko "did operate" his vehicle on or about August 2, 2008, in the City and County of Honolulu. I conclude, based on Elliot and Schroeder, that Tominiko's operation or assumption of actual physical control of a vehicle referred to in the OVUIII charge must reasonably be construed as his operation or use of a vehicle upon a public, road, or highway alleged in the driving without insurance charge. Thus, under Elliot and Schroeder and the liberal construction standard, Tominiko's OVUIII charge, which he challenges for the first time on appeal, was sufficient to charge a crime.

As noted in the lead opinion, Tominiko did not meet his burden, under the liberal construction standard, of showing that he was prejudiced by the failure of the OVUIII charge to specifically allege the public road requirement. See Wheeler, 121 Hawai'i at 400, 219 P.3d at 1187. Indeed, Tominiko does not contend that he was prejudiced by this omission. There was undisputed evidence that Tominiko drove his car in Honolulu on Ahonui Street, a public street or road.

II.

Although I do not agree with the lead opinion that Officer Antwan Stuart's initial attempt to stop Tominiko was supported by reasonable suspicion, I concur in the conclusion that Tominko's motion to suppress evidence was properly denied. In my view, Tominiko was deemed to have been seized, at least in the constitutional sense, when Officer Stuart first requested that Tominiko get out of Tominiko's car. At that point, a reasonable person in Tominiko's position would not have felt free to leave. I also believe that although Officer Stuart may have had reasonable suspicion that someone in Tominiko's group was involved in unlawful activity at that time, he did not have

reasonable suspicion that Tominiko himself was involved in unlawful activity. Thus, Officer Stuart did not have reasonable suspicion to stop or detain Tominiko at that point in time.

However, Tominiko did not comply with Officer Stuart's request to get out of the car. Instead, Tominiko started his car and drove away. Therefore, there was no fruit or tainted evidence obtained as the result of the initial unlawful seizure. After traveling a short distance, Tominiko was forced to stop because another vehicle, traveling in the opposite direction, blocked his path. This enabled Officer Stuart to catch up to Tominiko's car. As Officer Stuart approached from the rear driver's side of Tominiko's car, he observed empty beer bottles in the back seat of the car. This observation gave Officer Stuart probable cause to believe that Tominiko had an open container of intoxicating liquor in his car, in violation of Hawaii Revised Statutes (HRS) § 291-3.3 (2007).<sup>1/</sup>

Officer Stuart's observation of the empty beer bottles was not the fruit of an unlawful detention, but resulted from Tominiko being forced to stop by another car. By the time Officer Stuart was actually able to successfully detain Tominiko, Officer Stuart had acquired probable cause to seize Tominiko based on evidence obtained independent of his initial unlawful (unsuccessful) seizure. Under these rather unusual circumstances, the evidence obtained by Officer Stuart after Tominiko was successfully seized, which was used to convict Tominiko of the OVUII charge, was lawfully acquired pursuant to

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<sup>1/</sup> HRS § 291-3.3 provides in pertinent part:

(a) No person shall keep in a motor vehicle, or on a moped when such vehicle or moped is upon any public street, road, or highway or at any scenic lookout, any bottle, can, or other receptacle containing any intoxicating liquor which has been opened, or a seal broken, or the contents of which have been partially removed or fully removed, unless such container is kept in the trunk of the vehicle, or kept in some other area of the vehicle not normally occupied by the driver or passengers, if the vehicle is not equipped with a trunk. A utility or glove compartment shall be deemed to be within the area occupied by the driver and passengers.



a lawful seizure. Accordingly, the trial court did not err in denying Tominiko's motion to suppress evidence. See State v. Fukagawa, 100 Hawai'i 498, 506, 60 P.3d 899, 907 (2002) (stating that an appellate court may affirm a trial court on any ground in the record that supports affirmance, even if the trial court did not rely on it).

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