

NO. 29764

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
BETHANN AHSING, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(HPD Traffic No. 1DTA-08-09117)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Bethann Ahsing (Ahsing) appeals the Judgment, entered on March 3, 2009, in the District Court of the First Circuit, Honolulu Division (district court).¹

Ahsing was convicted of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a) and (b) (Supp. 2009) and Excessive Speeding, in violation of HRS § 291C-105 (Supp. 2009).

On appeal, Ahsing contends (1) that although she did not object, the written complaint and oral charge for OVUII failed to state an essential element of the offense, i.e., that Ahsing operated or assumed actual physical control of a vehicle upon a public way, street, road, or highway, and (2) the district court erred by admitting a speed check card over her objection because it lacked proper foundation and was not authenticated as a business record and therefore there was insufficient evidence to convict her of Excessive Speeding.

Upon careful review of the record and the briefs² submitted by the parties and having given due consideration to

¹ The Honorable William Cardwell presided.

² In compliance with this court's order, entered on March 23, 2010, on March 25, 2010, Ahsing, and on April 12, 2010, the State submitted supplemental briefs addressing whether the OVUII charge in this case was sufficient and whether the "Motta/Wells" rule of liberal construction applied in this case. These supplemental briefs were also carefully considered in reaching our decision.

the arguments advanced and the issues raised by the parties, we resolve Ahsing's points of error as follows:

(1) "[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 Ahsing was driving a vehicle upon a public way, street, road, or highway at the time of the offense rendered the charge deficient. Id.

(2) The State failed to establish

- (1) how and when the speed check was performed, including whether it was performed in the manner specified by the manufacturer of the equipment used to perform the check, and
- (2) the identity and qualifications of the person performing the check, including whether that person had whatever training the manufacturer recommends in order to competently perform it.

State v. Fitzwater, No. 28584, 2010 WL 717551, at *23 (Haw. Mar. 3, 2010). Therefore, there was insufficient foundation to admit the speed check card into evidence. Without admission of the speed check card into evidence, there was insufficient evidence to convict Ahsing of Excessive Speeding.

Therefore,

IT IS HEREBY ORDERED THAT the Judgment, entered on March 3, 2009, in the District Court of the First Circuit, Honolulu Division is vacated in part and reversed in part. The conviction and sentence for the offense of Excessive Speeding is hereby reversed. The remainder of the case is remanded to the district court with instructions to dismiss the OVUII charge without prejudice.

DATED: Honolulu, Hawai i, May 21, 2010.

On the briefs:

Samuel P. King, Jr.,
for Defendant-Appellant.

Presiding Judge

Associate Judge

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge