

NO. 29915

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JOSEPH ELLIOT, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
EWA DIVISION
(CASE NO. 1DTA-08-10230)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Joseph R. Elliott, Jr. (**Elliott**) appeals from the Judgment entered against him on May 26, 2009, in the District Court of the First Circuit, Honolulu Division (**District Court**).¹ Elliott was convicted of Operating a Vehicle Under the Influence of an Intoxicant (**OVUII**), in violation of Hawaii Revised Statutes § 291E-61(a) and (b) (Supp. 2009).

On appeal, Elliott contends that the District Court erred by denying his motion to dismiss the charge because the oral charge for OVUII failed to state an essential element of the offense, *i.e.*, that Elliott operated or assumed actual physical control of a vehicle upon a public way, street, road, or highway.

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, we resolve Elliott's point 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 Elliott was driving a vehicle upon a

¹ The Honorable Jeannette Castagnetti presided.

public way, street, road, or highway at the time of the offense rendered the charge deficient. Id. Accordingly, the charge must be dismissed for lack of jurisdiction.

Therefore, the District Court's May 26, 2009 Judgment is vacated and this case is remanded to the District Court for dismissal of the OVUII charge without prejudice.

DATED: Honolulu, Hawai'i, May 13, 2010.

On the briefs:

Setsuko Regina Gormley
Deputy Public Defender
for Defendant-Appellant

Presiding Judge

Stephen K. Tsushima
Deputy Prosecuting Attorney
for Plaintiff-Appellee

Associate Judge

Associate Judge