

NO. 29677

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
BRENDON LEE PACHECO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(HPD TRAFFIC NO. 1DTA-08-08576)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Brendon Lee Pacheco (**Pacheco**) appeals from the Judgment entered on February 23, 2009, in the District Court of the First Circuit, Honolulu Division (District Court).¹ Pacheco was convicted of Operating a Vehicle Under the Influence of an Intoxicant, in violation of Hawaii Revised Statutes (HRS) § 291E-61(a) and (b) (Supp. 2009) (**OVUII**).

On appeal, Pacheco contends the District Court erred by denying his motion to dismiss the charge on the ground that the written complaint and oral charge failed to state an essential element of the offense, *i.e.*, that Pacheco 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 Pacheco'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

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The Honorable William A. Cardwell presided.

failure to allege that Pacheco was driving a vehicle upon a public way, street, road, or highway at the time of the offense rendered the charge deficient. Id.

Therefore, the District Court's February 23, 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, February 18, 2010.

On the briefs:

James S. Tabe
Deputy Public Defender
for Defendant-Appellant

Presiding Judge

Loren J. Thomas
Deputy Prosecuting Attorney
for Plaintiff-Appellee

Associate Judge

Associate Judge