

NO. 29809

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JAMES SCOTT GOMES, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
KANEHOHE DIVISION
(HPD Traffic No. 1DTA-09-00318)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Defendant-Appellant James Scott Gomes (Gomes) appeals the judgment entered on April 28, 2009, in the District Court of the First Circuit, Kāneʻohe Division (district court).¹

Gomes was convicted of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes § 291E-61(a) (Supp. 2009).

On appeal, Gomes contends the written complaint and oral charge were insufficient because they failed to state an essential element of the charge, i.e., that Gomes 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 Gomes's point of error as follows:

Prior to trial, Gomes moved to dismiss the charge because it failed to allege all the essential elements of the OVUII offense. The district court denied Gomes's motion. "[T]he operation of a vehicle on a public way, street, road, or highway is an attendant circumstance of the offense of OUVII, and is therefore an element of the offense." State v. Wheeler,

¹ Per diem District Court Judge Philip Doi presided.

121 Hawai'i 383, 393, 219 P.3d 1170, 1180 (2009). The failure to allege that Gomes was driving a vehicle upon a public way, street, road, or highway at the time of the offense rendered the charge deficient. Id.

Therefore,

IT IS HEREBY ORDERED THAT the April 28, 2009 judgment of the District Court of the First Circuit, Kāne'ōhe Division is vacated and the matter is remanded to the district court with instructions to dismiss the charge without prejudice.

DATED: Honolulu, Hawai'i, February 25, 2010.

On the briefs:

Walter J. Rodby,
for Defendant-Appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge