IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent-Plaintiff-Appellee,

vs.

ROBERT N. TOMINIKO,
Petitioner-Defendant-Appellant.

SCWC-29535

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29535; HPD TRAFFIC NO. 1DTA-08-08506)

AUGUST 26, 2011

RECKTENWALD, C.J., NAKAYAMA, AND DUFFY, JJ.,
CIRCUIT JUDGE AYABE, ASSIGNED BY REASON OF VACANCY,
WITH ACOBA, J., CONCURRING AND DISSENTING SEPARATELY

OPINION OF THE COURT BY COURT NAKAYAMA, J.

Petitioner-Defendant-Appellant Robert N. Tominiko ("Tominiko") asks us to consider whether he was lawfully detained and subsequently charged with operating a vehicle under the influence of an intoxicant. The facts presented at trial show that Tominiko was near an intersection with a gathering of people who were drinking beer and soda. Upon receipt of a complaint, a

police officer arrived but did not see Tominiko drinking beer. The group dispersed, and Tominiko walked slowly to his car. The officer asked to see his identification, but Tominiko continued walking to his car and got in. When the officer asked Tominiko to exit his vehicle, Tominiko drove away slowly. The officer chased Tominiko and told him to stop driving but Tominiko drove seven feet before being stopped by a vehicle traveling in the opposite direction. The officer then caught up with Tominiko, and, while approaching Tominiko's vehicle, noticed beer bottles in Tominiko's car. Tominiko was subsequently charged in part with Operating a Vehicle Under the Influence of an Intoxicant ("OVUII") and Driving Without Motor Vehicle Insurance. The Driving Without Motor Vehicle Insurance charge contained the allegation that the conduct occurred on a public roadway, but the OVUII charge did not. The District Court of the First Circuit ("district court") convicted Tominiko of OVUII, and he appealed. In his application for writ of certiorari, Tominiko presents the following questions: 1) "Whether the [Intermediate Court of Appeals ("ICA")] gravely erred in concluding that Tominiko's conviction would not be reversed due to the insufficiency of the [OVUII] charge[;]" and 2) "Whether the ICA gravely erred in concluding that the trial court did not err in denying Tominiko's motion to suppress under the totality of the circumstances in this case." We hold that: 1) the charge was not insufficient

under the liberal construction standard because, when reading the charge as a whole, it can be reasonably construed to charge a crime; and 2) Tominiko was subjected to an illegal seizure and the evidence obtained as a result of that seizure must be suppressed.

I. BACKGROUND

A. Factual and Procedural Background

On August 13, 2008, the State of Hawai'i ("the prosecution") charged Tominiko with: 1) OVUII in violation of Hawai'i Revised Statutes (HRS) §§ 291E-61(a)(1) & (a)(3) (Supp. 2009);[1] 2) Operating a Vehicle After License and Privilege Have Been Suspended or Revoked for OVUII in violation of HRS § 291E-62(a)(1) & (a)(2) (2007);[2] and 3) Driving Without Motor Vehicle

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[1] HRS § 291E-61 provides in relevant part:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty; [or]
>
> * * * *
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

[2] HRS § 291E-62(a) provides in relevant part:

> (a) No person whose license and privilege to operate a vehicle have been revoked, suspended, or otherwise restricted pursuant to this section or to part III or section 291E-61 or 291E-61.5, or to part VII or part XIV of chapter 286 or section 200-81, 291-4, 291-4.4, 291-4.5, or

continue...

Insurance, in violation of HRS § 431:10C-104(a) (2005).[3] The complaint read 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.
>
> (08287582) On or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawaii, ROBERT TOMINIKO, a person whose license and privilege to operate a vehicle had been revoked, suspended, or otherwise restricted pursuant to Section 291E-62 or to Part III of Chapter 291E or Section 291E-61, or 291E-61.5, or to Part VII or Part XIV of Chapter 286 or Section 200-81, 291-4, 291-4.4, 291-4.5, or 291-7 of the Hawaii Revised Statutes as those provisions were in effect on December 31, 2001, did operate or assume actual physical control of any vehicle in violation of any restrictions placed on his license, and/or while his license or privilege to operate a vehicle remained suspended or

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[2]...continue
291-7 as those provisions were in effect on December 31, 2001, shall operate or assume actual physical control of any vehicle:

> (1) In violation of any restrictions placed on the person's license; or
>
> (2) While the person's license or privilege to operate a vehicle remains suspended or revoked.

[3] HRS § 431:10C-104(a) provides:

> (a) Except as provided in section 431:10C-105, no person shall operate or use a motor vehicle upon any public street, road, or highway of this State at any time unless such motor vehicle is insured at all times under a motor vehicle insurance policy.

> revoked, thereby committing the offense of Operating a Vehicle After License And Privilege Have Been Suspended or Revoked for Operating a Vehicle Under the Influence of An Intoxicant in violation of Section 291E-62(a)(1) and/or (a)(2) of the Hawaii Revised Statutes. ROBERT TOMINIKO is subject to sentencing as a first offender in accordance with Section 291E-62(b)(1) of the Hawaii Revised Statutes.
>
> (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.

(Some Emphasis Added.)

The latter two charges were dismissed at trial. Tominiko did not object to the charge or move to dismiss it at any point during the district court's proceedings. State v. Tominiko, No. 29535 at 2 (App. June 30, 2010) (mem.) (lead opinion).

On December 1, 2008, Tominiko orally moved to suppress evidence because the police officer did not have reasonable suspicion to stop Tominiko.

At the hearing on the motion to suppress, Officer Antwan Stuart ("Officer Stuart") testified that he was on duty at around midnight on the night in question, when he was dispatched to investigate a report that a group of people was arguing at an intersection. When he arrived, he saw approximately fifteen or twenty people drinking beer and soda, and eating. Members of the

group started picking up items, and running or walking away quickly. Tominiko started walking towards his vehicle, which was the only vehicle parked in the area. Officer Stuart asked for Tominiko's identification because Tominiko "was the only person that didn't leave in a hurry" and he was able to detain Tominiko. Officer Stuart was interested in obtaining Tominiko's identification to "investigate what was going on over there, if indeed there was a[n] argument or if there was a fight." Officer Stuart also knew that a lot of people drink in that area.

Tominiko mumbled something, kept walking, got into his car, and tried to start his car. Officer Stuart followed Tominiko to the car and asked him to exit the vehicle, but Tominiko started the car and slowly drove away. Officer Stuart chased Tominiko, and told him to stop driving. Tominiko drove about seven feet, before a vehicle coming from the opposite direction forced him to stop.

Officer Stuart approached Tominiko's window and directed his flashlight at the back seat of Tominiko's car to see if anyone else was in the car. He noticed empty forty-ounce beer bottles in Tominiko's car. He asked Tominiko to turn off the car and provide identification. Tominiko said he left his license at home, but had a state identification card.

On cross-examination, Officer Stuart testified that as

he approached the intersection, he heard people talking loudly, but could not determine if there had been an argument. No one was fighting when he approached the intersection. He did not remember Tominiko having a beer bottle in his hand when he first saw Tominiko.

After the hearing, the district court denied Tominiko's motion to suppress. The district court made the following oral findings and conclusions:

> My obligation is to state my essential findings on the record in a motion to suppress. My essential findings are that at approximately midnight on August 2nd, 2008, Officer Stuart was dispatched to investigate a possible argument call where 15 people are arguing at Ahonui and School Street.
>
> He arrived on the scene. He saw a group of 15 or 20 people eating and drinking, including drinking beer. It appeared to be a social gathering. There was loud talk. He could not tell if that talk was arguing, but there was no physical fighting.
>
> He approached defendant to investigate and what -- what is going, ask for his I.D. [sic] Defendant kept going, went to a car. Officer approached [sic] and asked him out of the car [sic] so he could continue his investigation and get the I.D. Defendant ignored that request, started the car, attempted to drive away, and got blocked by another car. And he said he left his license -- told the officer he left his license at home. And there were empty beer bottles in the back of the car.
>
> Based upon that, it's my conclusion that there was reasonable suspicion for Officer Stuart to stop the defendant. A reasonable officer in Officer Stuart's position, had reasonable suspicion to believe that there was criminal activity afoot and therefore had the right to stop defendant.
>
> And once defendant refused to comply with his simple request for identification, the officer had the further right to pursue the defendant and stop him.
>
> So I will deny the motion.

The district court held a stipulated facts trial. The police report was stipulated into evidence, and part of it

stated:

> Upon arrival, I observed a green Isuzu Trooper bearing Hawaii license plate [******] parked on the right side of Ahonui St. about 20 feet from N. School St. Standing around the vehicle were about 12 male [sic] eating and drinking. As I parked behind the Isuzu, everyone started to run and walk away. I told one male who was trying to get inside the Isuzu to stop and show me some identification. The male got inside the Isuzu started it up and put the vehicle in drive. I yelled at the male to turn off the vehicle and show me his identification. The male started driving off slowly. I ran up to the driver door and told the male to stop the car and turn off the engine. The male continued driving for about another 7 feet when he had to stop, due to another vehicle traveling in the opposite direction which had to stop in front of his car due to traffic congestion. I again told the male to turn off the vehicle and show me his identification. I could see two empty 40oz bottles of Old English sitting on top of the back seat directly behind the driver.

A breath test was also administered to Tominiko, and the result was .160. Tominiko was found guilty of OVUII, but found not guilty as a highly intoxicated driver.

B. The ICA's June 30, 2010 Memorandum Opinion

1. Lead opinion

Tominiko subsequently appealed his conviction, asserting that: 1) "The prosecution's written and oral charges for OVUII were fatally insufficient because they failed to allege the essential element that Tominiko operated or assumed actual physical control of a vehicle 'upon a public way, street, road, or highway[;]'" and 2) "The district court erred when it denied a motion to suppress, because under the totality of the circumstances the stop of Tominiko was not justified by specific

and articulable facts that Tominiko was engaged in criminal activity." Tominiko, mem. op. at 1. The ICA issued three opinions on this matter.

The lead opinion held that the prosecution's charges were not insufficient. It observed that, in State v. Wheeler, this court stated:

> [T]his court has applied different principles depending on whether or not an objection was timely raised in the trial court. Under the "Motta/Wells post-conviction liberal construction rule," we liberally construe charges challenged for the first time on appeal . . . . Under this approach, there is a "presumption of validity," . . . for charges challenged subsequent to a conviction. In those circumstances, this court 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." . . . . However, the rule does not apply when reviewing timely motions challenging the sufficiency of an indictment.

Id. at 4 (quoting State v. Wheeler, 121 Hawai'i 383, 399-400, 219 P.3d 1170, 1186-87 (2009)).

Applying the Motta/Wells liberal construction standard, the lead opinion held that Tominiko's conviction was not insufficient. Id. at 7. It observed that under the Motta/Wells standard, Tominiko was required to prove either prejudice or that the charge cannot within reason be construed to charge a crime and held that Tominiko did not make either showing. Id. at 5.

With respect to prejudice, the lead opinion observed that Tominiko did not assert prejudice, but instead argued that he did not need to show prejudice. Id. It held that prejudice

is a factor under the liberal construction standard, and Tominiko had failed to show prejudice. Id.

With respect to the failure to charge a crime, the lead opinion held that "it is proper to 'consider other information in addition to the charge that may have been provided to the defendant during the course of the case up until the time defendant objected to the sufficiency of the charges against him.'" Id. (quoting Wheeler, 121 Hawai'i at 396, 219 P.3d at 1183). It observed that the third paragraph of the complaint charges Tominiko with Driving Without Motor Vehicle Insurance on the day of the incident and alleges that Tominiko "did operate or use a motor vehicle upon a public street, road, or highway of the State of Hawai'i." Id. at 6 (internal quotation marks omitted). It held that "[b]ecause each of these paragraphs state that the events occurred '[o]n or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawai'i,' it is reasonable to construe that they arise from the same event." Id.

The lead opinion also held that from "the stipulated facts in the police report, it can be reasonably construed that the OVUII offense occurred on a public street or road." Id. For instance, it observed that the police report stipulated into evidence states that the place of offense is "AHONUI ST/N. SCHOOL ST HONOLULU, HI 96819." Id. Additionally, the "police report

also states that the vehicle operated by Tominiko was 'parked on the right side of Ahonui St. about 20 feet from N. School St.', and that while being asked for his identification Tominiko got in his car, started to drive off slowly, but 'had to stop, due to another vehicle traveling in the opposite direction which had to stop in front of his car due to traffic congestion.'" Id. Thus, the lead opinion held that under the liberal construction standard, the charge could be reasonably construed to charge a crime. Id. at 6-7.

With respect to Tominiko's second point of error, the lead opinion held that Tominiko was seized "when Officer Stuart followed Tominiko to his vehicle, asked him to get out and, as Tominiko started to drive away, Officer Stuart yelled at Tominiko to stop." Id. at 10. However, it held that "[n]otwithstanding that a seizure did occur, Officer Stuart had reasonable suspicion sufficient to support an investigatory stop." Id. It observed that "there had been the call to police of about 15 people arguing at that location; Tominiko was among the group of individuals at that location; it was midnight; the group was standing around the Isuzu Trooper that Tominiko would attempt to drive away; the vehicle and the group were located by the intersection of two public streets; some members of the group were observed talking loudly and drinking beer; and this was an

area where Officer Stuart knew people liked to drink." Id. at 11. It held that based "on the totality of the circumstances at this point, there are specific and articulable facts to support reasonable suspicion of criminal activity afoot, including disorderly conduct and possession of unsealed containers of intoxicating liquor on a public street." Id. (footnote omitted). It also held that "combined with the facts set forth above and under the circumstances of this case, Tominiko's effort to leave the scene was an added factor supporting reasonable suspicion." Id. at 12.

Finally, the lead opinion held that "even if there was an improper seizure at the point Officer Stuart asked Tominiko to exit or to stop his car, there were no fruits from such seizure" because Tominiko drove away from Officer Stuart and was forced to stop by another vehicle. Id. at 13. At that point, Officer Stuart noticed the empty beer bottles. Id. The district court's December 1, 2008, judgment was therefore affirmed. Id. at 14.

2. Concurring opinion

The concurrence "agree[d] with the lead opinion that under the 'liberal construction' standard for post-trial challenges to the sufficiency of a charge, the charge against [Tominiko] for operating a vehicle under the influence of an intoxicant . . . was sufficient." Tominiko, concurring op. at 1

(Nakamura, C.J., concurring). The concurrence would have held that 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." Id. The concurring opinion observed that 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." Id. Based on that analysis, the concurrence concluded that, under the liberal construction standard, Tominiko's OVUII charge was sufficient to charge a crime. Id. at 7.

With respect to Tominiko's motion to suppress, the concurrence would have held that Tominiko was seized at the initial stop and Officer Stuart did not have reasonable suspicion to stop or detain him at that point. Id. at 7-8. The concurrence would have held that no fruit came of Officer Stuart's illegal search because Tominiko did not comply with his request to get out of the car. Id. at 8.

The concurrence observed that it wasn't until after Tominiko traveled a short distance and he was forced to stop by

an oncoming car that Officer Stuart noticed beer bottles in the back of his car. Id. The concurring opinion would have held that 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)." Id. It would have also held that Officer Stuart's search was lawful because he "acquired probable cause to seize Tominiko based on evidence obtained independent of his initial unlawful (unsuccessful) seizure" and would have affirmed the district court's December 1, 2008, judgment. Id.

3. Dissenting opinion

The dissenting opinion would have vacated and remanded the case for dismissal without prejudice because the charge was defective under State v. Wheeler, 121 Hawai'i 383, 219 P.3d 1170 (2009) and the district court lacked subject matter jurisdiction over the case. Tominiko, dissenting op. at 1 (Fujise, J., dissenting) (citing State v. Cummings, 101 Hawai'i 139, 145, 63 P.3d 1109, 1115 (2003)).

Tominiko subsequently applied for a writ of certiorari to the ICA's July 15, 2010 Judgment on Appeal filed pursuant to its June 30, 2010 Memorandum Opinion affirming the district

court's judgment filed on December 1, 2008.[4]

II. STANDARDS OF REVIEW

A. Application For Writ Of Certiorari

The acceptance or rejection of an application for writ of certiorari is discretionary. HRS § 602-59(a) (Supp. 2010). "In deciding whether to accept an application, this court reviews the decisions of the ICA for (1) grave errors of law or of fact or (2) obvious inconsistencies in the decision of the ICA with that of the supreme court, federal decisions, or its own decisions and whether the magnitude of such errors or inconsistencies dictate the need for further appeal." State v. Wheeler, 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009) (citing HRS § 602-59(b)).

B. Sufficiency Of a Charge

"Whether an indictment sets forth all the essential elements of an offense to be charged is a question of law" reviewed under the right/wrong standard. State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995).

C. Motion to Suppress

"An appellate court reviews a ruling on a motion to suppress de novo to determine whether the ruling was 'right' or

[4] The Honorable William Cardwell presided.

'wrong.'" State v. Prendergast, 103 Hawai'i 451, 453, 83 P.3d 714, 716 (2004) (internal quotation marks omitted) (quoting State v. Rodgers, 99 Hawai'i 70, 72, 53 P.3d 209, 211 (2002)).

III. DISCUSSION

A. The OVUII Charge Was Not Insufficient Under the Liberal Construction Standard.

Tominiko asserts that the ICA gravely erred because the charge cannot be construed to charge an offense. In response, the prosecution asserts that under the liberal construction standard, the charge was sufficient because the driving without insurance charge alleged that the incident took place "upon a public street, road, or highway of the State of Hawaii . . . ." We hold that the charging language was not insufficient under the liberal construction standard.

Neither party disputes that the liberal construction standard applies. Under the liberal construction standard, when a party raises an objection to the indictment for the first time on appeal, the indictment is liberally construed. State v. Motta, 66 Haw. 89, 90, 657 P.2d 1019, 1019 (1983). This standard "means we will not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." Id. at 91, 657 P.2d at 1020. This court has also recognized that

one "way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." State v. Elliot, 77 Hawai'i 309, 312, 884 P.2d 372, 375 (1994) (citing State v. Schroeder, 76 Hawai'i 517, 530, 880 P.2d 192, 205 (1994)).

Applying the foregoing standard in this case, the charge was not defective because Tominiko has not persuasively argued that he was prejudiced or that the charge failed to charge a crime. Tominiko does not assert that he was prejudiced, and therefore the critical question is whether the charge can be construed to charge a crime. As discussed below, it can.

Count 3 alleged that Tominiko "did operate or use a motor vehicle upon a public street, road, or highway of the State of Hawaii . . . ." Under the liberal construction standard, two counts can be read together. Elliot, 77 Hawai'i at 312, 884 P.2d at 375; State v. Sprattling, 99 Hawai'i 312, 319, 55 P.3d 276, 283 (2002) ("[W]e now interpret a charge as a whole, employing practical considerations and common sense.") (citing State v. Daly, 4 Haw. App. 52, 55, 659 P.2d 83, 85-86 (1983)). Although the OVUII charge did not allege that the conduct occurred on a public roadway, under the liberal construction standard, reading the third count with the first count renders the charge sufficient. See State v. Johnson, No. 28471 at 2-4 (Aug. 2,

2010) (Recktenwald, J., dissenting). Because both charges refer to operating a motor vehicle on the same day in Honolulu, Hawai‘i, it can be reasonably inferred that they refer to the same incident. Therefore, the charge was not defective.

Tominiko asserts that this court has held that the operation of the vehicle on a public way, street, road, or highway is an essential element of the offense of OVUII. (Citing State v. Wheeler, 121 Hawai‘i 383, 393, 219 P.3d 1170, 1180 (2009.)) In Wheeler, this court held that, where the defendant made a timely objection to an OVUII charge, the charge was insufficient because it failed to allege the public road element of the offense. Wheeler, 121 Hawai‘i at 396, 219 P.3d at 1183. This argument is not persuasive because Wheeler did not apply the liberal construction standard and the defendant was not charged with a second count alleging the public road element. Id. at 400, 219 P.3d at 1187 ("Thus, because Wheeler timely objected to the oral charge in the district court, the Motta/Wells analysis is not applicable here."). This court also held that "we do not address whether the application of [the Motta/Wells] analysis would require a different result in the circumstances of this case, if the objection was not timely made." Id. at n.19. Therefore, Wheeler does not indicate that the charge was insufficient in this case because the liberal construction

standard did not apply in that case.

Finally, although the Driving Without Motor Vehicle Insurance charge was dismissed prior to trial, this does not affect our conclusion that the charge was not insufficient. Tominiko did not raise any argument concerning the dismissal of the Driving Without Motor Vehicle Insurance charge before the ICA. However, even assuming arguendo that Tominiko has preserved this argument, it is not persuasive. The district court's dismissal of the third count did not alter the fact that both counts referred to the same incident, which occurred on a public roadway. Although the Driving Without Insurance charge was dismissed, the complaint, when read as a whole, apprised Tominiko that he was being charged for conduct that occurred on a public roadway. See Wheeler, 121 Hawai'i at 394, 219 P.3d at 1181 ("This court's analysis of charges under the Hawai'i constitution has focused on whether the language actually used in the charge provides fair notice to the defendant.").[5] Therefore, the charge

[5] The dissent asserts that this court cannot construe counts I and III together because count III was dismissed prior to trial. Concurring and Dissenting Opinion at 14-18. The dissent argues that our prior cases on this issue are not determinative because those cases involved counts that were not dismissed at trial. Id. (citing Elliot, 77 Hawai'i at 312, 884 P.2d at 375; State v. Schroeder, 76 Hawai'i 517, 529, 880 P.2d 192, 205 (1994)). However, neither of those cases held that counts could only be construed together if they were not dismissed prior to trial. See Elliot, 77 Hawai'i at 312, 884 P.2d at 375; Schroeder, 76 Hawai'i at 530, 880 P.2d at 205. Because the charging document, when liberally construed, provided Tominiko with notice that he was being charged with conduct that occurred on a public roadway, the

continue...

was not insufficient when examining it as a whole.

B. Officer Stuart's Seizure Of Tominiko Was Unconstitutional and the ICA Gravely Erred By Affirming the District Court's Judgment.

The ICA gravely erred by affirming the district court's judgment because: 1) Officer Stuart did not have reasonable suspicion at the time he seized Tominiko; and 2) the evidence Officer Stuart obtained was a result of his unlawful seizure.

1. Officer Stuart did not have reasonable suspicion to stop Tominiko.

Article I, section 7 of the Hawai'i Constitution and the Fourth Amendment of the United States Constitution provide the right to be free from unreasonable searches and seizures. To determine whether a seizure is unconstitutional, this court determines: 1) whether the person was seized; and 2) whether the seizure was justified. State v. Dawson, 120 Hawai'i 363, 369, 205 P.3d 628, 634 (App. 2009).

Neither party disputes the lead opinion's conclusion

[5]...continue
charge was sufficient.

Additionally, to the extent that the dissent asserts that Hawai'i Rules of Penal Procedure Rule 7(d) requires explicit language incorporating elements from one count into another, this argument is unpersuasive because it was rejected in this court's opinion in Schroeder. See Concurring and Dissenting Opinion at 18 (citing State v. Schroeder, 10 Haw. App. 535, 545, 880 P.2d 208, 212-13 (App. 1992), aff'd on other grounds, Schroeder, 76 Hawai'i at 532, 880 P.2d at 207). In that opinion, this court held that a count could incorporate language from another count, even though the charging document did not contain language specifically doing so in that case. See Schroeder, 76 Hawai'i at 518-19, 530, 880 P.2d at 193-94, 205.

that Tominiko was seized at the first stop. "[A] person is seized if, given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave." State v. Kearns, 75 Haw. 558, 566, 867 P.2d 903, 907 (1994) (citing State v. Quino, 74 Haw. 161, 168-73, 840 P.2d 358, 362-64 (1992)). "Whether a reasonable person would feel free to leave is determined under an objective standard that this court reviews de novo." Id. (citing State v. Tsukiyama, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974)). A "person is seized, for purposes of article I, section 7 of the Hawai'i Constitution, when a police officer approaches that person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information." Id. at 567, 867 P.2d at 907.

In this case, Officer Stuart told Tominiko to exit his car. At a minimum, a reasonable person would not have felt free to leave when Officer Stuart asked Tominiko to exit his car, which is also demonstrated by Officer Stuart's subsequent chasing of Tominiko. Thus, Tominiko was seized when Officer Stuart told him to exit the vehicle.

This stop was not supported by reasonable suspicion. This court has held that "the police may temporarily detain an individual if they have a reasonable suspicion based on specific and articulable facts that criminal activity is afoot." Kearns,

75 Haw. at 569, 867 P.2d at 908 (citing State v. Melear, 63 Haw. 488, 493, 630 P.2d 619, 624 (1981)). This court has adhered to the following standard for reasonable suspicion:

> To justify an investigative stop, short of an arrest based on probable cause, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate. (Citations omitted.)

Melear, 63 Haw. at 493, 630 P.2d at 624 (emphasis added) (quoting State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977)).

This court evaluates the totality of the circumstances to determine whether a stop is supported by reasonable suspicion. State v. Spillner, 116 Hawai‘i 351, 357, 173 P.3d 498, 504 (2007).

Tominiko asserts that the lead opinion gravely erred by concluding that the initial stop was supported by reasonable suspicion because: 1) the anonymous tip "lacked sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop of Tominiko[;]" 2) the fact that Tominiko attempted to avoid confrontation with the police did not create reasonable suspicion; and 3) "the evidence used to convict Tominiko of OVUII, including evidence of empty beer bottles, was fruit or tainted evidence obtained as a result of Officer

Stuart's illegal seizure of Tominiko[.]" In response, the prosecution asserts that "[g]iven the reports received by Officer Stuart of a fairly large group arguing at about midnight and Officer Stuart's own observation of alcoholic consumption by members of the group and the Petitioner and other members of the group's sudden dispersal upon Officer Stuart's arrival, Officer Stuart's initial suspicion that Petitioner and other members of the group were drinking alcohol in public in violation of Revised Ordinances of Honolulu (ROH) 40-1.2(a) (2008) and/or that members of the group may have been fighting or making unreasonable noise in violation of HRS § 711-1101(a) or (b) (2008 Supp.) was not objectively unreasonable." (Emphasis omitted.)

We hold that Officer Stuart did not have reasonable suspicion to seize Tominiko because Officer Stuart did not have evidence that Tominiko, rather than other members of his group, had committed or was about commit a crime. Hawai‘i courts have held that "[b]ased upon all the circumstances, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." State v. Koanui, 3 Haw. App. 255, 258, 649 P.2d 385, 387 (App. 1982) (emphasis added) (citing United States v. Cortez, 449 U.S. 411, 417 (1981)); State v. Uddipa, 3 Haw. App. 415, 418, 651 P.2d 507, 510 (App. 1982) (stating that reasonable suspicion requires

"that the particular individual being stopped is engaged in wrongdoing") (internal quotation marks omitted). Additionally, the United States Supreme Court has also required reasonable suspicion that the person stopped was involved in criminal activity. Cortez, 449 U.S. at 417-18 (citing Brown v. Texas, 443 U.S. 47, 51 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975)). Under both federal and state law, Officer Stuart needed reasonable suspicion that Tominiko was involved in criminal conduct.

Officer Stuart did not have a reasonable suspicion that Tominiko was engaged in criminal activity. Officer Stuart admitted that he did not recall seeing Tominiko drinking beer or holding a beer bottle in his hand when he approached the group. Additionally, Officer Stuart did not see Tominiko fighting or talking loud. Although a call reporting an argument was made, Officer Stuart could not determine if the group was arguing, and did not see Tominiko or anyone in the group fighting.

Other courts have held that there is no reasonable suspicion to stop an individual in similar situations. For instance, in United States v. Williams, the Sixth Circuit held that a police officer did not have reasonable suspicion to stop the defendant when people in the defendant's group were drinking in public and allegedly trespassing on private property. 615

F.3d 657, 667 (6th Cir. 2010). The court held that "the argument for reasonable suspicion based on others' drinking and presence on [the] property is weak in light of the Supreme Court's emphasis on 'individualized suspicion of wrongdoing.'" Id. (quoting Chandler v. Miller, 520 U.S. 305, 313 (1997)); see also State v. Regnier, 212 P.3d 1269, 1274 (Or. App. 2009) (holding that police officers did not have reasonable suspicion that the defendants possessed alcohol in public when members of their group were drinking). Likewise, because Officer Stuart did not observe Tominiko drinking, arguing, fighting, or making unreasonable amounts of noise, he did not have reasonable suspicion that Tominiko committed a crime.

The call regarding fifteen people arguing also does not provide reasonable suspicion to stop Tominiko. "A forcible stop of a person suspected of criminal activity may . . . be predicated upon an informer's word, provided the information carries 'enough indicia of reliability.'" State v. Temple, 65 Haw. 261, 270, 650 P.2d 1358, 1364 (1982) (quoting Adams v. Williams, 407 U.S. 143 (1972)). This court has analyzed whether the circumstances of the stop corroborate a tip in assessing its reliability. See State v. Ward, 62 Haw. 459, 461-62, 617 P.2d 565, 566-67 (1980) (holding that a tip was sufficiently reliable to create reasonable suspicion where the informant had provided

reliable information in the past, the substance of the tip was very specific, and the officers' observations coincided in verifiable respects with their informant's tip). Officer Stuart's observations did not confirm the substance of the tip, which asserted that the group was arguing. For instance, Officer Stuart testified that the group was having a social gathering. He testified that some people were talking loudly, but he could not discern whether the group was arguing. Furthermore, the call provided no information that Tominiko had argued or fought. Therefore, the tip was not reliable because Officer Stuart's observations did not confirm it.

Additionally, the call to dispatch did not indicate that Tominiko had engaged in any illegal activity. The call did not single out Tominiko and did not allege that any illegal conduct took place. Because the central inquiry of the legality of an investigatory stop is whether there is a reasonable suspicion that a person was involved in illegal conduct, the call could not have provided reasonable suspicion to stop Tominiko. See State v. Heapy, 113 Hawai‘i 283, 285, 151 P.3d 764, 766 (2007) ("It is axiomatic that reasonable suspicion to justify a stop must relate to criminal activity."); Koanui, 3 Haw. App. at 257-58, 649 P.2d at 387.

Finally, Tominiko's walk to his car does not

demonstrate reasonable suspicion that he committed a crime. "[T]he majority of jurisdictions which have addressed the issue of flight have held that the mere act of avoiding confrontation does not create an articulable suspicion." Heapy, 113 Hawai'i at 294, 151 P.3d at 775 (internal quotation marks omitted) (quoting State v. Talbot, 792 P.2d 489, 493-94 (Utah Ct. App. 1990)). This court has held that flight from police can support a finding of probable cause. State v. Melear, 63 Haw. 488, 494-95, 630 P.2d 619, 625 (1981). In this case, the flight was not as inculpatory as in Malear. For instance, in Malear, the defendant ran away after the police asked him to stop and show identification. Id. In this case, Tominiko mumbled something, walked to his car, and attempted to start it. Officer Stuart testified that Tominiko was the only person in the crowd that did not leave in a hurry. Tominiko's walking to his car did not raise reasonable suspicion that he committed a crime.

Additionally, the lead opinion held that Tominiko's flight, in conjunction with the other circumstances, created reasonable suspicion. Tominiko, mem. op. at 13. However, this argument is not persuasive because the other circumstances did not provide a reasonable suspicion that Tominiko had committed a crime. See supra at 23-27. Thus, the lead opinion gravely erred by holding that Officer Stuart had reasonable suspicion that

Tominiko was engaged in criminal conduct.

2. The ICA gravely erred because the evidence obtained was the result of Officer Stuart's unconstitutional seizure.

The lead opinion also held that "even if there was an improper seizure at the point Officer Stuart asked Tominiko to exit or to stop his car, there were no fruits from such seizure." Tominiko, mem. op. at 13. It observed that another vehicle stopped Tominiko's car and that Officer Stuart then saw the beer bottles in Tominko's car. Id. The concurrence also would have held that there were no fruits or tainted evidence obtained from Officer Stuart's initial seizure of Tominiko because Tominiko drove off after being stopped by Officer Stuart, and was later stopped by another vehicle. Tominiko, concurring op. at 8. The concurring opinion would have held that Officer Stuart gained probable cause to believe that Tominiko had an open container in his car in violation of HRS § 291-3.3 (2007) after observing beer bottles in Tominiko's car. Id.

Tominiko asserts that the lead opinion and concurring opinion gravely erred because the evidence obtained by Officer Stuart was tainted evidence. Tominiko asserts that the concurring opinion adopts a test for "seizure" that this court rejected in State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362 (1992) ("[W]e decline to adopt the definition of seizure employed

by the United States Supreme Court in Hodari D.[, 499 U.S. 621, 625 (1991)] and, instead, choose to afford greater protection to our citizens by maintaining the Mendenhall standard."). In Quino, this court described the United States Supreme Court's definition of "seizure" in Hodari D. as requiring "either physical force or submission to an assertion of authority." Quino, 74 Haw. at 169-70, 840 P.2d at 362. This court rejected the Hodari D. standard, and continued to adhere to the following standard to offer greater protection under article I, section 7 of the Hawai'i Constitution: "we must evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe he was free to go." Id. at 170, 840 P.2d at 362 (internal quotation marks omitted) (quoting State v. Tsukiyama, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974)). We hold that the evidence obtained was the result of an illegal seizure because: 1) Officer Stuart's stop was a single illegal seizure; and 2) even viewing the incident as two separate seizures, the evidence recovered after the second seizure was the fruit of the first illegal seizure.

The ICA gravely erred because Officer Stuart's stop was a single illegal seizure. This court rejected Hodari D.'s holding that a seizure requires "either physical force or submission to an assertion of authority." Id. at 169-70, 840

P.2d at 362. Furthermore, some courts that have rejected Hodari D. have also concluded that pursuit of a person can constitute a seizure. For instance, in Commonwealth v. Matos, the Pennsylvania Supreme Court noted that the "issue in each of these cases is whether the pursuit by the police officer was a seizure" and held that it was. 672 A.2d 769, 771, 776 (Pa. 1996); see also Commonwealth v. Thibeau, 429 N.E.2d 1009, 1010 (Mass. 1981) ("For present purposes, a stop starts when pursuit begins."). Although this court has not held that a person is continually seized upon fleeing from police, this court's rejection of Hodari D. supports that conclusion. If a seizure occurs when police officers start to chase a person, a seizure continues when the person runs after disobeying a command to stop. Thus, Officer Stuart's encounter with Tominiko was a single seizure. Officer Stuart's continuing attempt to improperly seize Tominiko placed the officer in the position from which he could observe the bottles in Tominiko's car. State v. Poaipuni, 98 Hawai‘i 387, 393, 49 P.3d 353, 359 (2002) ("Assuming, arguendo, that [the defendant's] father[] voluntarily informed the police that the [contraband was] located in the tool shed and, moreover, voluntarily consented to the search of the tool shed, the police still would not have been in a position to learn of the firearms or to discover them in the tool shed had not they executed the

defective search warrant.").[6] Therefore, the circuit court erred by failing to suppress the evidence recovered as a result of that seizure.

Alternatively, the evidence obtained after the second stop is fruit of the poisonous tree because it was obtained as a result of the first illegal stop. This court has held that the "fruit of the poisonous tree" doctrine "prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police." State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (internal quotation marks omitted) (quoting State v. Medeiros, 4 Haw. App. 248, 251 n.4, 665 P.2d 181, 184 n.4 (1983)). To determine whether evidence is tainted from an illegal search, this court has adhered to the following standard:

> Admissibility is determined by ascertaining whether the evidence objected to as being the 'fruit' was discovered or became known by the exploitation of the prior illegality or by other means sufficiently distinguished as to purge the later evidence of the initial taint. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Where the government proves that the evidence was discovered through information from an independent source or where the connection between the illegal acts and the discovery of the evidence is so attenuated that the taint has been dissipated, the evidence is not a "fruit" and, therefore, is admissible. Wong Sun v. United States, supra.

Id. (emphasis added).

[6] The situation in the instant case is distinguishable from one where a police officer attempts to improperly seize a person but observes contraband which the officer would have observed regardless of the attempt to seize.

This court has also stated that in "other words, the ultimate question that the fruit of the poisonous tree doctrine poses is as follows: Disregarding the prior illegality, would the police nevertheless have discovered the evidence?" Poaipuni, 98 Hawai'i at 393, 49 P.3d at 359.

Under the foregoing standard, the ICA gravely erred by concluding that the evidence obtained after Officer Stuart's seizure of Tominiko was not fruit of the poisonous tree because the evidence was obtained as a result of Officer Stuart's illegal seizure of Tominiko. Officer Stuart did not have reasonable suspicion to stop Tominiko, and after catching up to Tominiko, he discovered probable cause to arrest Tominiko. The evidence obtained after the initial stop is fruit of the poisonous tree because it was discovered by exploiting Officer Stuart's prior illegal seizure.

This court reached a similar conclusion in Quino, 74 Haw. at 168, 840 P.2d at 362. In Quino, the defendant was stopped after arriving at an airport. Id. at 165, 840 P.2d at 360. Police officers requested to pat the defendant down, and the defendant fled. Id. at 166, 840 P.2d at 361. During the chase, the defendant discarded drugs. Id. This court held that the defendant was unlawfully seized by the police officers' interrogation and that the evidence obtained after the defendant

fled was inadmissible as the product of an illegal seizure. Id. at 168, 840 P.2d at 361-62. This court also held that it was unnecessary to decide whether the defendant was "seized" when the police officers pursued him as he ran through the airport terminal. Id. at 163 n.1, 840 P.2d at 359 n.1. As in Quino, the evidence in this case was the product of an illegal seizure because it came to light when Officer Stuart caught up with Tominiko after the initial unlawful stop.

Quino is factually distinguishable because the drugs in Quino were thrown while the police officers chased the defendant, while in this case, Officer Stuart caught up with Tominiko and then acquired probable cause to arrest Tominiko upon observing the bottles in his car. This distinction does not suggest that the evidence is not the product of an illegal seizure because Officer Stuart's observations resulted from his continued pursuit in an attempt to force Tominiko to comply with his unlawful seizure. Therefore, the evidence used to convict Tominiko was fruit of the poisonous tree.

IV. CONCLUSION

Based upon the foregoing analysis, we vacate the ICA's judgment on appeal, vacate the district court's judgment, and remand for a new trial.

On the briefs:

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