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)

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

While I concur with the majority's analysis on the suppression issue,[1] the premier question in this case, as in every case, is whether jurisdiction exists. Inasmuch as in the

[1] I read the majority's statement that the situation in which a "police officer attempts to improperly seize a person but observes contraband which the officer would have observed regardless of the attempt to seize[,]" majority opinion at 31 n.6, to be merely a recitation of the inevitable discovery rule, but which, as the majority notes, is inapplicable here. "Under the inevitable discovery exception to the exclusionary rule, evidence recovered from an otherwise illegal search is not suppressed if the evidence would have been 'inevitably discovered' by the police via lawful means." State v. Silva, 91 Hawaiʻi 111, 120, 979 P.2d 1137, 1146 (App. 1999) (quoting State v. Lopez, 78 Hawaiʻi 433, 437, 896 P.2d 889, 893 (1995)). Of course, in such circumstances, the prosecution must "present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means before such evidence may be admitted under the inevitable discovery exception to the exclusionary rule." Lopez, 78 Hawaiʻi at 451, 896 P.2d at 907.

absence of an allegation that operation of the vehicle was on a public way, Count I, charging Operating a Vehicle Under the Influence of an Intoxicant (OVUII), Hawaiʻi Revised Statutes (HRS) § 291E-61(a)(1) and/or (a)(3) (Supp. 2008),[2] cannot be viewed as charging an offense, see State v. Wheeler, 121 Hawaiʻi 383, 219 P.3d 1170 (2009),[3] and accompanying Count III cannot supply the missing element of a public way because it was dismissed prior to trial, the district court of the first circuit (the court) lacked subject matter jurisdiction to hear this case. Accordingly, I would hold that under the liberal construction standard discussed infra, the charge for OVUII in Count I, against Petitioner/Defendant-Appellant Robert N. Tominiko (Petitioner), was "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction [of OVUII] was had." State v. Motta, 66 Haw. 89, 91,

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

> **Operating a vehicle under the influence of an intoxicant.** (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;
>
> . . . .
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

(Emphasis added.)

HRS § 291E-1 (2007 Repl.) defines "[o]perate" in part, as "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway . . . ." (Emphasis added.)

[3] In Wheeler, this court held that the statutory definition of the term "operate," as used in HRS § 291E-61, "establishes an attendant circumstance of the offense of OVUII, i.e., that the defendant's conduct occur 'upon a public way, street, road, or highway[,]'" and was required to be charged. 121 Hawaiʻi at 392, 219 P.3d at 1179 (quoting HRS § 291E-1 (Supp. 2000)).

657 P.2d 1019, 1020 (1983) (internal quotation marks and citation omitted). Hence, the charge contained within it "a substantive jurisdictional defect[,]" rendering the court's December 1, 2008 judgment, convicting Petitioner of Count I, a "nullity." State v. Cummings, 101 Hawaiʻi 139, 143, 63 P.3d 1109, 1113 (2003).

I.

On August 13, 2008, Petitioner was charged by complaint with (1) OVUII (Count I), (2) Operating a Vehicle After License and Privilege Have Been Suspended or Revoked for OVUII, HRS 291E-62(a)(1) and/or (a)(2) (Supp. 2008)[4] (Count II), and (3) Driving Without Motor Vehicle Insurance, HRS § 431:10C-104(a) (2005 Repl.)[5] (Count III). As to Count I, the complaint read in relevant part as follows:

> On or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawaii, [Petitioner] 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,

[4] HRS § 291E-62 provides in relevant part:

> **Operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant; penalties.** (a) No person whose license and privilege to operate a vehicle have been revoke**d**, suspended, or otherwise restricted . . . shall operate or assume actual physical control of any vehicle:
>
> (1) In violation of any restrictions placed on the person's license;
>
> (2) While the person's license or privilege to operate a vehicle remains suspended or revoked[.]

[5] HRS § 431:10C-104(a) provides:

> **Conditions of operation and registration of motor vehicles.** (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.

> thereby committing the offense of [OVUII], in violation of Section 291E-61(a)(1) and/or (a)(3) of the [HRS].

(Emphasis added.) As to Count II, the complaint read in relevant part as follows:

> On or about the 2nd day of August, 2008 in the City and County of Honolulu, State of Hawaii, [Petitioner], a person whose license and privilege to operate a vehicle had been revoked, suspended or otherwise restricted . . . , 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 revoked, thereby committing the offense of Operating a Vehicle After License And Privilege Have Been Suspended or Revoked for [OVUII,] in violation of Section 291E-62(a)(1) and/or (a)(2) of the [HRS].[6]

As to Count III, the complaint read in relevant part as follows:

> On or about the 2nd day of August, 2008, in the City and County of Honolulu, State of Hawaii, [Petitioner] 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 [HRS].

(Emphasis added.)

A bench trial was held on December 1, 2008. Prior to the start of trial, Petitioner orally moved to suppress all evidence sought to be admitted against him on the ground that the officer did not have reasonable suspicion to detain him. The court agreed to entertain the motion to suppress on all counts. Before the court considered the motion to suppress, Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) moved to nolle prosequi Count II, and also Count III based on the good faith defense. The court "dismiss[ed] Count [II] based on [Respondent's] motion" and "Count [III] based on [the] good faith defense."

[6] Inasmuch as Count II does not refer to a public way, it cannot supply that missing element and is not discussed further.

Next, the court heard Petitioner's motion to suppress. At the end of the hearing on the motion to suppress, the court denied Petitioner's motion, concluding that the officer had reasonable suspicion to stop Petitioner.

Following the hearing on the motion to suppress and Counts II and III having been dismissed by the court, Petitioner was arraigned on Count I only. Petitioner was orally charged on that count as follows:

> [O]n August 2nd, 2008, in the City and County of Honolulu, State of Hawaiʻi, you did operate or assume actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair your normal mental faculties or ability to care for yourself and guard against casualty and/or operate or assume actual physical control of a vehicle with .08 or more grams of alcohol per 200 liters of breath, thereby committing the offense of [OVUII], in violation of section 291E-61(a)(1) and/or (a)(3) of the [HRS].

(Emphasis added.) After Petitioner was orally charged, the court stated to Petitioner, "[W]e're gonna start a trial on th[e] case." Petitioner did not object to the sufficiency of the charge. At the close of trial, Petitioner was convicted of Count I. The court reiterated, "Count [II] I'll dismiss . . . based on [Respondent's] motion," "[a]nd Count [III] I'll dismiss based on [the] good faith defense."

II.

With respect to the oral charge, Petitioner argued on appeal that "the prosecution's written and oral charges for OVUII were fatally insufficient because they failed to allege the essential element that [Petitioner] operated or assumed actual physical control of a vehicle upon a public way, street, road, or highway." (Some capitalization omitted.) Inasmuch as both the

complaint and oral charge failed to allege that essential element, Petitioner contended that "the [] court lacked jurisdiction to preside over the charge, and [Petitioner's] conviction based on the charge must be reversed."

Respondent responded that because Petitioner challenged the sufficiency of the charges for the first time on appeal, the liberal construction standard applied. According to Respondent, under that standard, "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." (Citing State v. Elliot, 77 Hawaiʻi 309, 312, 884 P.2d 372, 375 (1994).) Noting that Count III of the "complaint alleged that Petitioner had operated the vehicle in question 'upon a public street, road, or highway' without motor vehicle insurance[,]" Respondent asserted that "when the OVUII charge is read in the context of [Count III,] it must reasonably be construed to allege that [Petitioner's] operation of a motor vehicle occurred 'upon a public way, street, road, or highway.'"

The ICA appeal yielded three separate opinions.[7] The lead opinion stated that most of Hawaiʻi case law had addressed the sufficiency of a charge in terms of due process. State v. Tominiko, No. 29535, 2010 WL 2637771, at *1 (App. June 30, 2010) (mem.). On the other hand, the lead opinion observed that some cases had addressed it as a matter of jurisdiction. Id. at *1-2

[7] The opinion authored by Judge Ginoza is referred to as the "lead opinion," the opinion authored by Chief Judge Nakamura is referred to as the "concurring opinion" and the dissent authored by Judge Fujise is referred to as the "dissenting opinion."

(citing Cummings, 101 Hawaiʻi at 139, 63 P.3d at 1109; Territory v. Goto, 27 Haw. 65, 102-03 (Haw. Terr. 1923)). According to the lead opinion, "[n]otwithstanding the Cummings decision that a defective charge undermines jurisdiction," the lead opinion maintained that Wheeler, 121 Hawaiʻi at 399-400, 219 P.3d at 1186-87, "reconfirmed the view that the Motta[] post-conviction liberal standard applies when an objection to a defective charge is not timely raised in the trial court[,]" Tominiko, 2010 WL 2637771, at *2.

According to the lead opinion, under the liberal construction standard in Motta, "the validity of the charge is presumed and the conviction will not be reversed unless the defendant can show: [(1)] prejudice; or [(2)] that the charge cannot within reason be construed to charge a crime." Id. With respect to the first rationale, the lead opinion concluded that, inasmuch as Petitioner did not argue he was prejudiced in any way, Petitioner failed to make any showing of prejudice. With respect to its second rationale, the lead opinion maintained that, under the liberal construction standard, "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. at *3 (quoting Wheeler, 121 Hawaiʻi at 396, 219 P.3d at 1183).

According to the lead opinion, because all three counts stated that the events occurred on or about the same day in the City and County of Honolulu, it was reasonable to construe

Counts I and III as having arisen from the same event, Count III indicating that the events occurred when Petitioner was driving his vehicle on a public way, street, road, or highway. Id. Additionally, the lead opinion pointed out that the police report, which stated that the "PLACE OF OFFENSE" for the OVUII charge was "AHONUI ST/N. SCHOOL ST HONOLULU, HI 96819[,]" was stipulated into evidence. Thus, the lead opinion concluded that based on "the information provided to [Petitioner] in the entirety of the written Complaint, as well as information in the facts stipulated for trial, the Complaint and oral charge can reasonably be construed to charge a crime."[8] Id.

The concurring opinion agreed that under the liberal construction approach, the OVUII charge could be construed with Count III under Elliot, and that Count III did supply the missing element in the OVUII charge. See id. at *11-12 (Nakamura, C.J., concurring). Notably, the concurring opinion did not consider the contents of the police report in construing the charge. It did determine, however, that because "[t]here was undisputed evidence that [Petitioner] drove his car in Honolulu on Ahonui Street, a public street or road[,]" Petitioner "did not meet his burden, under the liberal construction standard, of showing that he was prejudiced by the failure of the OVUII charge to specifically allege the public road requirement." Id. at *12.

[8] With all due respect, in my view the separate functions of a charge discussed infra are to state a charge and to inform the accused of the nature of the accusation, and information outside of the charge may be considered only with respect to the latter function.

Finally, the dissenting opinion "believe[d] the charge in this case [was] fatally defective under [Wheeler] and the district court lacked subject matter jurisdiction over the case[.]" Id. at *13 (Fujise, J., dissenting) (citing Cummings, 101 Hawaiʻi at 145, 63 P.3d at 1115). Based on that determination, the dissenting opinion "would [have] vacate[d] and remand[ed] th[e] case for dismissal without prejudice." Id.

None of the opinions took note of the fact that Counts II and III had been dismissed before trial, and Petitioner was arraigned only on Count I.

III.

On October 13, 2010, Petitioner filed an application for writ of certiorari (Application). The first question Petitioner presented in his Application is "[w]hether the ICA gravely erred in concluding that [Petitioner's] conviction [should] not be reversed due to the insufficiency of the [OVUII] charge[.]" Respondent filed a Response to Petitioner's Application on October 27, 2010. Both Petitioner and Respondent raised the same arguments with respect to the oral charge that were raised on appeal to the ICA.

IV.

There appear to be two primary, yet distinct, functions of a charge. First, because "[t]he criminal process begins when the accused is charged with a criminal offense[,]" State v. Sprattling, 99 Hawaiʻi 312, 317, 55 P.3d 276, 281 (2002), a charge must state an offense in order to establish that the court has jurisdiction over the case. See Cummings, 101 Hawaiʻi at

142, 63 P.3d at 1112 ("[A]n oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity."); see also State v. Israel, 78 Hawaiʻi 66, 73, 890 P.2d 303, 310 (1995) (stating that an "omission of an essential element of the crime charged is a defect in substance rather than of form" (quoting Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374 (quoting State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977))); Territory v. Gora, 37 Haw. 1, 6 (Haw. Terr. 1944) (referring to an alleged failure of the charge to state an offense as a "jurisdictional point"); Goto, 27 Haw. at 102 (Peters, C.J., concurring) ("Failure of an indictment to state facts sufficient to constitute an offense against the law is jurisdictional and is available to the defendant at any time."); HRS § 806-34 (1993) (stating that, in an indictment, "the transaction may be stated with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing (if any) in respect to which the offense was committed," all of which "are necessary to . . . show that the court has jurisdiction, and to give the accused reasonable notice of the facts").

Second, both the Sixth Amendment to the United States Constitution and article I, section 14 of the Hawaiʻi Constitution provide that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" See State v. Corder, 121 Hawaiʻi

451, 458, 220 P.3d 1032, 1039 (2009) (stating that because the "accused shall enjoy the right to be informed of the nature and cause of the accusation[,] . . . a charge must be in a legally sufficient form which correctly advises the defendant about the allegations against him or her") (internal quotation marks, citations, and some ellipsis omitted); State v. Stan's Contracting, Inc., 111 Hawaiʻi 17, 31, 137 P.3d 331, 345 (2006) (stating that HRS § 806-34, which sets forth what an indictment must include, "is grounded in article I, section 14 of the Hawaiʻi Constitution, which requires that 'ʻ[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation'" (brackets and ellipsis in original)); Sprattling, 99 Hawaiʻi at 318, 55 P.3d at 282 (stating that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation" (brackets in original)) (internal quotation marks and citation omitted); accord Israel, 78 Hawaiʻi at 70, 890 P.2d at 307; see also HRS § 806-34 (accused must have reasonable notice of the fact). Thus, a charge must state an offense as a jurisdictional prerequisite and inform the defendant of the nature and cause of the accusation against him or her as a constitutional requirement. See Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 ("Not only does [the charge] fail to state an offense, but it also fails to meet the requirement that an accused must be informed of the nature and cause of the accusation against him.") (Internal quotation marks and citation omitted.) (Emphasis added.)

V.

In determining whether a charge is sufficient for purposes of jurisdiction, we must look to the charge itself. Because the foregoing inquiry is not a question of whether a defendant had adequate notice of the charges against him or her, other information beyond the charge that may have been supplied to the defendant is irrelevant. Cummings, 101 Hawaiʻi at 143, 63 P.3d at 1113 (stating that "a defect in a complaint is not one of mere form, which is waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her," but the defect "is one of substantive subject matter jurisdiction, 'which may not be waived or dispensed with'" (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244)) (emphases added).

Contrastingly, as to the sufficiency of the charge in terms of the constitutional right to be informed of the nature and cause of the accusation against him or her, we may look beyond the four corners of the charge itself. See, e.g., Wheeler, 121 Hawaiʻi at 396, 219 P.3d at 1183 (stating that, because the defendant "immediately objected to the sufficiency of the State's oral charge[,] . . . this court may only consider information supplied to [the defendant] prior to his timely, pre-trial objection in determining whether his right to be informed of the nature and cause of the accusation against him has been violated"); State v. Treat, 67 Haw. 119, 120, 680 P.2d 250, 251 (1984) (concluding that grand jury transcripts fully

informed the defendant of the nature and cause of the accusation against him). In other words,

> in determining whether the accused's right to be informed of the nature and cause of the accusation against him [or her] has been violated, we must look to all of the information supplied to him [or her] by the State to the point where the court passes upon the contention that the right has been violated.

Israel, 78 Hawaiʻi at 70, 890 P.2d at 307 (brackets in original) (internal quotation marks and citations omitted); see also Treat, 67 Haw. at 120, 680 P.2d at 251 (stating that, in deciding whether a defendant's "'right to be informed of the nature and cause of the accusation against him has been violated, we must look to all of the information supplied to him by the State to the point where the court passes upon the contention that his right has been violated'" (quoting State v. Robins, 66 Haw. 312, 317, 660 P.2d 39, 42-43 (1983))). Thus, "if a defendant actually knows the charges against him or her, that defendant's constitutional right to be informed of the nature and cause of the accusation is satisfied[.]" Israel, 78 Hawaiʻi at 71, 890 P.2d at 308 (citing State v. Tuua, 3 Haw. App. 287, 292, 649 P.2d 1180, 1184 (1982)); see also State v. Hitchcock, 123 Hawaiʻi 369, 379, 235 P.3d 365, 375 (2010) (stating that "a defendant's right to be informed of the nature and cause of the accusation can be deemed satisfied if the record clearly demonstrates the defendant's actual knowledge of the charges against him or her") (internal quotation marks and citation omitted).

VI.

Cummings holds that an oral charge, complaint, or indictment that "does not state an offense contains within it a

substantive jurisdictional defect[.]" 101 Hawaiʻi at 143, 63 P.3d at 1113 (emphasis added). But, as noted before, where the sufficiency of a charge was not raised at trial, review of the charge is governed by the liberal construction standard, under which a conviction will not be reversed "unless the defendant can show prejudice or that the [charge] cannot within reason be construed to charge a crime." Motta, 66 Haw. at 91, 657 P.2d at 1020. Under that standard, the complaint and oral charge in the instant case as to Count I, the OVUII charge, cannot be reasonably construed "to charge the offense for which conviction was had." Id. at 92, 657 P.2d at 1021 (internal quotation marks and citation omitted).

A.

The OVUII offense as set forth in the complaint and as orally charged failed to allege that Petitioner had operated his vehicle on a public way, street, road or highway. While Respondent, the lead opinion, and the concurring opinion believed under Elliot, that the OVUII charge was not fatally defective because the omitted element was alleged in Count III, Elliot is not determinative because Elliott involved separate charges that could be construed together, whereas the instant case contained but one charge, Count I, OVUII, upon which Petitioner was arraigned and tried, at the time trial was commenced. In Elliot, Elliot was orally charged on three separate counts: (1) resisting arrest, HRS § 710-1026(1)(a) (1985),[9] (2) assault

[9] At the time, HRS § 707-712.5(1)(a) provided in pertinent part:

(continued...)

against a police officer, HRS § 707-712.5 (Supp. 1992),[10] and (3) disorderly conduct, HRS § 711-1101(1)(b) (1985).[11] Elliott, 77 Hawaiʻi at 309-10, 884 P.2d at 372-73. The charges stemmed from an incident during which Officer Paula Watai (Officer Watai) had attempted to place Elliot under arrest, at which time Officer Belinda Kahiwa (Officer Kahiwa) came to her assistance.

With respect to the resisting arrest count, it was alleged Elliot "attempted to prevent a Peace Officer acting under color of his official authority from effecting an arrest . . . [,] committing the offense of resisting arrest[.]" Id. at 310, 884 P.2d at 373 (some emphasis in original and some added) (brackets omitted). With respect to the assault against a police officer count, it was alleged Elliot "caused bodily injury to Officer Belinda Kahiwa by . . . assault of police office [sic] . . . ." Id. (some emphasis in original and some added)

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[9](...continued)

> **Resisting arrest.** (1) A person commits the offense of resisting arrest if he intentionally prevents a peace officer acting under color of his official authority from effecting an arrest by:
>
> (a) Using or threatening to use physical force against the peace officer or another[.]

Elliott, 77 Hawaiʻi at 310 n.2, 884 P.2d at 373 n.2 (brackets and emphasis in original).

[10] At the time, HRS § 707-712.5 provided in relevant part:

> **Assault against a police officer.** (1) A person commits the offense of assault against a police officer if the person:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to a police officer who is engaged in the performance of duty[.]

Id. at 310 n.3, 884 P.2d at 373 n.3 (brackets and emphasis in original).

[11] The disorderly conduct was not challenged in the State's application and therefore, that charge was not relevant to the appeal. See id. at 310 n.1, 884 P.2d at 373 n.1.

(some brackets omitted and some in original). On appeal, Elliot argued, inter alia that the assault against a police officer charge was defective because it "failed to allege that the assault was against 'a police officer who was engaged in the performance of duty.'" Id. at 311, 884 P.2d at 374.

This court applied the liberal construction standard because Elliot failed to challenge the sufficiency of the charges at trial. See id. It was explained that under that standard, "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." Id. at 312, 884 P.2d at 375. Thus, if it were clear that the "Peace Officer" in the first count (resisting arrest) referred to the officer mentioned by name in the second count (assault), the assault against a police officer charge would be sufficient. Id. However, because it was not evident that this was the case under the language of the charges, "the assault against a police officer conviction [had to] be reversed." Id. at 313, 884 P.2d at 376.

Consequently, Elliot is not determinative because, as previously recounted, in the instant case, Counts II and III were dismissed before trial began and Petitioner was orally arraigned prior to trial solely on Count I. Contrastingly, in Elliott, the possibility of supplying the missing element existed because both counts were actually tried. In the instant case, Count III was not available to supply the missing public way element in Count I because it had been dismissed. Only Count I -- the defective count -- went to trial.

B.

Elliot cited to State v. Schroeder, 76 Hawaiʻi 517, 880 P2d 192 (1994) [hereinafter Schroeder II], affirming State v. Schroder, 10 Haw. App. 535, 880 P.2d 208 (1992) [hereinafter Schroder I]. Elliot, 77 Hawaiʻi at 312, 884 P.2d at 375. In Schroeder II, 76 Hawaiʻi at 518-19, 880 P.2d at 193-94, an Oahu grand jury returned a two-count indictment charging Schroeder with Robbery in the First Degree, HRS § 708-840(1)(b)(ii),[12] and Kidnapping,[13] HRS § 707-720(1)(c). Both counts alleged the events took place on April 13, 1985, in Honolulu, Hawaiʻi. See id. On appeal, this court considered, among other things, whether the ICA correctly vacated the court's imposition, sua sponte, of two mandatory prison terms of ten years' for the Kidnapping count, as opposed to one mandatory term, on the ground that the kidnapping charge failed to allege the aggravating

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[12] HRS § 708-840 (1985) provided in relevant part:

> **Robbery in the first degree**. (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
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> (b) [The person] is armed with a dangerous instrument and . . . threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.
>
> (2) As used in this section, "dangerous instrument" means any firearm.

Schroeder II, 76 Hawaiʻi at 519 n.1, 880 P.2d at 194 n.1.

[13] HRS § 707-720 (1985) provided in relevant part:

> **Kidnapping**. (1) A person commits the offense of kidnapping if [the person] intentionally restrains another person with intent to:
>
> . . . .
>
> (c) Facilitate the commission of a felony or flight thereafter[.]

Id. at 519 n.2, 880 P.2d at 194 n.2.

circumstance, i.e. the use of a handgun, in violation of State v. Estrada, 69 Haw. 204, 738 P.2d 812 (1987).[14] Schroeder II, 76 Hawaiʻi at 529, 880 P.2d at 205. Schroeder II concluded that although the Kidnapping count did not allege the use of a handgun, the Robbery count did. Id. Thus, viewing the indictment as a whole, the aggravating circumstance necessary for the court to impose an additional mandatory term in connection with the Kidnapping count had been alleged. Id.

In Schroeder II, as in Elliot, Schroeder had been indicted, tried, and convicted on two counts. Thus, those counts could be construed with reference to one another. Again, Schroeder II is inapposite because in this case there were no other counts with which Count I could be construed inasmuch as Count III was dismissed prior to trial and Petitioner was orally charged on Count I alone.

VII.

Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(d) provides in part that "[a]llegations made in one count may be incorporated by reference in another count." However, if one count does not contain language incorporating or referring to another count, it cannot be deemed to have incorporated that other count by reference. See Schroeder I, 10 Haw. App. at 545, 880 P.2d at 212-13 ("We reject the State's argument that the allegation in Count I that a gun was used in the robbery can be deemed as incorporated by reference in Count II pursuant to

[14] Estrada, 69 Haw. at 229, 738 P.2d at 829, held that any aggravating circumstance, which, if proved, would result in the application of enhanced sentencing under HRS § 706-606.1, must be included in the indictment.

Rule 7(d), [HRPP] (1983)" since "Count II contains no language incorporating or referring to Count I.").

Here, Count III was the only count of the three original counts that could be construed to have alleged that Petitioner operated his vehicle on a public way, street, road, or highway, as should have been alleged under Count I. However, nothing in Count I may be construed to have incorporated the allegations under Count III. Count III could not have been incorporated by reference inasmuch as it was dismissed prior to trial. Thus, Count I, standing alone, cannot be reasonably construed to charge the crime of OUVII. See Wheeler, 121 Hawaiʻi at 392, 219 P.3d at 1179.

VIII.

The majority maintains that because Counts I and III "refer to operating a motor vehicle on the same day in Honolulu, Hawaiʻi, it can be reasonably inferred that they refer to the same incident[,]" majority opinion at 18, and, thus, "the charge was not defective[,]" id. Although the majority concedes that Count III "was dismissed prior to trial," id. at 19, it maintains that Petitioner "did not raise any argument concerning the dismissal[,]" id., and "assum[es] arguendo" that such an argument was "preserved[,]" id.

A.

Respectfully, the majority erroneously "assum[es]" that Petitioner had to have raised the argument before the court to "preserve[]" it on appeal. But the lack of subject matter jurisdiction is not an issue that must be "preserved." It is

established that, "under Hawaiʻi precedent, the sufficiency of a charge is regarded as "'jurisdictional.'" State v. Bryan, 124 Hawaiʻi 404, 410, 245 P.3d 477, 483 (App. 2011) (quoting Cummings, 101 Hawaiʻi at 142–43, 63 P.3d at 1112–13). "A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process." Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374 (internal quotation marks and citation omitted). "In other words, [to reiterate,] an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity." Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112; see State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318 (1990) (stating that, while "a guilty plea made voluntarily and intelligently precludes a defendant from later asserting any nonjurisdictional claims, . . . the defendant may still challenge the sufficiency of the indictment or other like defects bearing directly upon the government's authority to compel the defendant to answer to charges in court") (citations omitted). Because Count III was dismissed, the charge in Count I was insufficient to charge an offense.

In that regard, it is well-established that challenges involving a court's jurisdiction, such as to the insufficiency of a charge, need not be preserved by the parties. The requirement that the charge be sufficient "may not be waived or dispensed with, and the defect is ground for reversal, even when raised for

the first time on appeal." Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374 (internal quotation marks and citations omitted). The "[f]ailure of an indictment . . . to constitute an offense against the law is jurisdictional and is available to the defendant at any time." Territory v. Goto, 27 Haw. 65, 102 (Haw. Terr. 1923) (Peters, C.J., concurring). Thus, questions of "substantive subject matter jurisdiction . . . may not be waived or dispensed with[.]" Cummings, 101 Hawaiʻi at 143, 63 P.3d at 1113 (internal quotation marks and citation omitted); see also State v. Miyahira, 98 Hawaiʻi 287, 290, 47 P.3d 754, 757 (App. 2002) (stating that an "objection for want of jurisdiction" cannot be denied appellate review merely because the issue was "raised . . . for the first time on appeal") (internal quotation marks and citation omitted). Hence, the majority plainly contravenes our precedent in indicating that Petitioner had to have "preserve[d]" the insufficiency of the charge.

B.

Moreover, separate and apart from the waiver issue, we as an appellate court, must independently ascertain that jurisdiction in a case exists. With respect to questions involving jurisdiction, "[a]n appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal sua sponte if a jurisdictional defect exits." State v. Graybeard, 93 Hawaiʻi 513, 516, 6 P.3d 385, 388 (App. 2000) (emphasis added); see Ditto v. McCurdy, 103 Hawaiʻi 153, 157, 80 P.3d 974, 978 (2003) ("[I]t is well settled that an appellate court is under an obligation to ensure that it has

jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction."); see also State v. Moniz, 69 Haw. 370, 372, 742 P.2d 373, 375 (1987) ("Although the matter of jurisdiction was not raised by the parties, appellate courts are under an obligation to insure that they have jurisdiction to hear and determine each case."). Hence, contrary to the majority's implicit position, it is irrelevant whether "the parties d[id or did] not raise the issue of jurisdiction[]" at this level or at the courts below, In re Doe, 107 Hawaiʻi 12, 15, 108 P.3d 966, 969 (2005), insofar as it is this court's obligation to ensure jurisdiction exists.

Nevertheless, the majority maintains that "[a]lthough [Count III] was dismissed, [the OVUII charge (Count I)], when read as a whole, apprised [Petitioner] that he was being charged for conduct that occurred on a public roadway." Majority opinion at 19 (citing Wheeler, 121 Hawaiʻi at 394, 219 P.3d at 1181 ("This court's analysis of charges under the Hawaiʻi constitution has focused on whether the language actually used in the charge provides fair notice to the defendant.")) (Emphasis added.).[15]

[15] By relying on Wheeler and emphasizing throughout the opinion that Petitioner was "apprised" that he was "charged for conduct that occurred on a public roadway[,]" majority opinion at 19, see also id. at 19 n.5 (noting that the charging document provided Petitioner with notice), the majority ignores the fact that a court has jurisdiction only when the charge states all the elements of an offense. See Cummings, 101 Hawaiʻi at 143, 63 P.3d at 1113 (stating that "a defect in a complaint is not one of mere form, which is waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her," but the defect "is one of substantive subject matter jurisdiction, which may not be waived or dispensed with" (internal quotation marks and citation omitted) (emphases added). To reiterate, contrary to the majority, whether Petitioner had "notice" of the charge is not at issue, but what is, is whether the court had subject matter jurisdiction.

But, to reiterate, "a defect in a complaint is not . . . simply one of notice," but "one of substantive subject matter jurisdiction[.]" Cummings, 101 Hawaiʻi at 143, 630 P.3d at 1113 (internal quotation marks and citation omitted).

Even under the liberal construction standard, "by no reasonable construction can [Count I] be said to charge the offense for which conviction was had." Motta, 66 Haw. at 94, 657 P.2d at 1022 (internal quotation marks and citation omitted). Here "conviction was had" for operating a vehicle under the influence of an intoxicant "upon a public way." HRS § 291E-61, HRS § 291E-1. Nothing can be discerned in Count I that can be construed reasonably as charging that the vehicle was operated only on a public way. Indeed, Respondent did not contend that Count I alone could reasonably be construed as the OVUII offense, but maintained only that the charge in Count I would be sufficient if construed with Count III, impliedly agreeing, as would seem evident, that Count I alone could not be read to charge an offense for which the conviction in this case was had. Cf. State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (noting that, because the prosecution offered only one theory, this court would not review new, alternative theories on appeal).

Nevertheless, the majority insists that Count III can be read together with Count I, despite the dismissal of Count III. Majority opinion at 17-18 (distinguishing Wheeler).[16]

[16] In any event, the majority's attempt to distinguish Wheeler is "not persuasive" insofar as there, this court, "consider[ing] information (continued...)

Respectfully, the majority fails to explain how, under the liberal construction standard, it is "within reason[,]" Motta, 66 Haw. at 91, 657 P.2d at 1020, to supply the defective Count I with an "essential element" by referring to the dismissed Count III that was nonexistent at the time Petitioner was arraigned.

The majority asserts that neither Elliot nor Schroeder II held that counts "could only be construed together if they were not dismissed prior to trial." Majority opinion at 19 n.5. But nothing in those cases implies or suggests that a count dismissed prior to trial and prior to arraignment can be used to remedy a defective count on which the defendant was arraigned. To reiterate, each defendant in Elliott and Schroeder II was charged with more than one count, convicted on those counts, and on appeal, this court determined whether those counts could be referred to each other to remedy a purported defect in one count. Elliott, 77 Hawaiʻi at 309, 884 P.2d at 372 (stating that the defendant was charged with and convicted of resisting arrest, assault against a police officer, and disorderly conduct); Schroeder II, 76 Hawaiʻi at 519, 880 P.2d at 194 (noting that the defendant was charged with and convicted of robbery in the first degree and kidnapping). Inasmuch as Elliott and Schroeder II involved this court's in pari materia reading of counts for which

[16](...continued)
supplied to [the defendant,]" 121 Hawaiʻi at 396, 219 P.3d at 1183, consisting of the "record[,]" the charge, and the defendant's presence at Administrative Drivers License Revocation Office proceedings, did "not establish that [the defendant] was in fact fully informed of the nature and cause of the accusation against him[.]" (Internal quotation marks and citation omitted). If the entire record did not provide the defendant with notice of the charge in Wheeler, then it cannot be maintained, as the majority appears to do, that a complaint containing one count can give a court jurisdiction over the proceeding by referring to dismissed counts.

the defendant was charged and convicted, they plainly do not suggest, as the majority implies, that a charge dismissed prior to trial can be used to supply a missing element in an offense for which the defendant was charged and convicted in a count.

It would appear axiomatic that Count I cannot be "construed" with Count III, which was dismissed. When a charge is dismissed, it can no longer be utilized by the factfinder or a court. See United States v. Holmes, 672 F. Supp. 2d 739, 745 (E.D. Va. 2009) ("[I]t seems impossible that a charge which was once dismissed and, therefore, nonexistent, can then be later withdrawn, for that would defy logic."); People v. Harvey, 602 P.2d 396, 398 (Cal. 1979) (noting that where count III was dismissed in consideration for the defendant's guilty plea to counts I and II, "it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing defendant's sentence"); State v. Johnson, No. 18703, 2011 WL 2685606, at *6 (Conn. July 19, 2011) ("[T]he trial court's dismissal of the misdemeanor charges had the effect of immediately and permanently barring the state from prosecuting those charges."). Obviously, if a charge is dismissed, it can no longer be "construed" to supply a defective charge with an essential element. By establishing that a dismissed charge can supply a missing element in a remaining charge, the majority calls into question the status of dismissed charges. If a dismissed charge is utilized as the majority proposes, the effect of a dismissal of a count is unclear and ambiguous. This result

has enormous consequences for criminal procedure in this state inasmuch as it abrogates our case law requiring that the elements of a charge be stated as a requirement of jurisdiction.

IX.

Accordingly, I would hold that the OVUII charge in Count I cannot within reason be construed to charge the crime for which conviction was had. Motta, 66 Haw. at 91, 94, 657 P.2d at 1020, 1022. Thus, in my view, the court lacked subject matter jurisdiction over the instant case. I would vacate and remand to the court to enter an order dismissing without prejudice.

/s/ Simeon R. Acoba, Jr.