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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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STATE OF HAWAI‘I,  
Respondent/Plaintiff-Appellant,

vs.

MANAIAKALANI N.K. KALUA,  
Petitioner/Defendant-Appellee.

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SCWC-12-0000578

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-12-0000578; 3DTC-11-040282)

JANUARY 15, 2019

DISSENT BY RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

I respectfully dissent. Manaiakalani N.K. Kalua’s non-criminal speeding infraction does not bar prosecution of Kalua’s excessive speeding charge under Hawai‘i Revised Statutes (HRS) § 701-109(1). This analysis is consistent with the legislature’s intention in providing for the expeditious resolution of decriminalized traffic infractions in HRS Chapter 291D, while leaving intact the existing system for adjudicating criminal offenses such as excessive speeding. Simply put, HRS § 291D-3(d) states:

In no event shall section 701-109 preclude prosecution for a related criminal offense where a traffic infraction committed in the same course of conduct has been adjudicated pursuant to [HRS Chapter 291D].

Because Kalua's speeding infraction was adjudicated pursuant to HRS Chapter 291D, HRS § 701-109(1) does not bar prosecution of his criminal offense.

The Majority asserts that speeding is an "offense" subject to the Penal Code provisions relating to offenses in HRS § 701-109(1) and (4), even though speeding is a non-criminal violation. This conclusion, however, is directly contrary to the statutory framework of HRS Chapter 291D.

HRS § 291D-3(a) explicitly states that "[n]o traffic infraction shall be classified as a criminal offense." Moreover, subsection (b) provides that "[w]here a defendant is charged with a traffic infraction and the infraction is committed in the same course of conduct as a criminal offense for which the offender is arrested or charged, the traffic infraction shall be adjudicated pursuant to this chapter . . . ." (Emphasis added.)

The legislature, in creating HRS Chapter 291D in 1993, recounted the history of decriminalizing certain traffic offenses. HRS § 291D-1. First, in 1978, Act 222 decriminalized "certain traffic offenses, not of a serious nature, to the status of violations." Id. Then, in 1993, the legislature "further decriminaliz[ed]" certain traffic offenses by making them "infractions." HRS § 291D-1. The legislature specifically found

that "further decriminalization of certain traffic offenses and streamlining of the handling of those traffic cases [would] achieve a more expeditious system for the judicial processing of traffic infractions."<sup>1</sup> Id.

The 1993 amendment is significant because it established a new category of traffic liability: an "infraction," which is distinct from the traffic "violations" that were created by the 1978 legislation.<sup>2</sup> Respectfully, the

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<sup>1</sup> The system of processing traffic infractions established by Chapter 291D was designed to:

- (1) Eliminate the long and tedious arraignment proceeding for a majority of traffic matters;
- (2) Facilitate and encourage the resolution of many traffic infractions through the payment of a monetary assessment;
- (3) Speed the disposition of contested cases through a hearing, similar to small claims proceedings, in which the rules of evidence will not apply and the court will consider as evidence the notice of traffic infraction, applicable police reports, or other written statements by the police officer who issued the notice, any other relevant written material, and any evidence or statements by the person contesting the notice of traffic infraction;
- (4) Dispense in most cases with the need for witnesses, including law enforcement officers, to be present and for the participation of the prosecuting attorney;
- (5) Allow judicial, prosecutorial, and law enforcement resources to be used more efficiently and effectively; and
- (6) Save the taxpayers money and reduce their frustration with the judicial system by simplifying the traffic court process.

<sup>2</sup> HRS § 291D-2 provides the definition of "traffic infraction" to mean "all violations of statutes, ordinances, or rules relating to traffic movement and control, including parking, standing, equipment, and pedestrian offenses, for which the prescribed penalties do not include imprisonment and that are not otherwise specifically excluded from coverage of this chapter."

Majority's analysis obscures this distinction in concluding that a speeding infraction constitutes an "offense" that is subject to the Penal Code. It is true, as the Majority suggests, that the Penal Code recognizes that an "offense" under the Code can be either a crime (which the Code defines as a felony, misdemeanor or petty misdemeanor) or a violation. HRS § 701-102.<sup>3</sup> It is also true, as the Majority notes, that the 1978 legislation provided that it is a "violation" to "violate" a number of provisions of the Statewide Traffic Code. HRS § 291C-161(a).

However, it does not follow, as the Majority suggests, that "infractions" are therefore necessarily "offenses" because they are not "crimes," which are punished by criminal penalties. The reason is simple: in 1993, the legislature decided to "further decriminaliz[e]" traffic liability. HRS § 291D-1. One key element of that effort was to establish a new category of liability called traffic "infractions" and to explicitly provide that "no traffic infraction shall be classified as a criminal offense." HRS § 291D-3. Contrary to the suggestion of the Majority, the legislature did not create an "offense" subject to the Penal Code called a "non-criminal violation." Rather, it established a new category of liability that was outside of the scope of the Penal Code altogether.

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<sup>3</sup> Consistent with that provision, section 701-107(5) explicitly provides that a violation does not constitute a crime. HRS § 701-107(5) and Commentary ("Subsection (5) creates a class of non-criminal offenses, called violations").

The Majority also cites State v. Fitzwater, 122 Hawai'i 354, 227 P.3d 520 (2010), as amended (Apr. 5, 2010), to support its contention that "[w]e have previously ruled that speeding is a lesser included offense of excessive speeding." Respectfully, the Majority's reference to Fitzwater and its citation to State v. Line, 121 Hawai'i 74, 214 P.3d 613 (2009), is misplaced.

In Fitzwater, we cited Line as follows:

Accordingly, we remand for entry of a judgment that Fitzwater violated HRS § 291C-102(a)(1), in accordance with the applicable statutes governing non-criminal traffic infractions. Cf. State v. Line, 121 Hawai'i 74, 90, 214 P.3d 613, 629 (2009) ("It is established that 'if an appellate court determines that the evidence presented at trial was insufficient to support a conviction of a greater offense but sufficient to support a conviction of a lesser included offense, the court may remand for entry of judgment of conviction on the lesser included offense[.]'" (citation omitted)).

Fitzwater, 122 Hawai'i at 378, 227 P.3d at 544.

Fitzwater's citation to Line was preceded by the "cf." signal. Id. The "cf." signal introduces "authority that supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, "cf." means 'compare.'" The Bluebook: A Uniform System of Citation R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th edition 2010) (emphasis added). Thus, Fitzwater cited to Line's proposition regarding a "lesser included offense" to compare and differentiate Fitzwater's recognition of a "lesser included non-criminal traffic infraction," and the Majority's contention that the citation to Line is "essential to the disposition of

[Fitzwater]” is incorrect. Fitzwater, 122 Hawai‘i at 378, 227 P.3d at 544 (emphasis added).

Accordingly, I respectfully believe that the Majority’s reliance on Fitzwater is misplaced, and that this court has not recognized speeding as a lesser included “offense” of excessive speeding.

In addition to HRS § 291D-3(d)’s plain language, HRS § 291D-2 defines “related criminal offense” broadly as “any criminal violation or crime, committed in the same course of conduct as a traffic infraction, for which the defendant is arrested or charged.” Id. Thus, the plain language of HRS §§ 291D-1, 291D-2 and 291D-3 demonstrates that the legislature did not intend to include non-criminal traffic infractions as “offenses” under the Penal Code. Further, the plain language of HRS §§ 291D-2 and 291D-3 allows for prosecution of a related criminal offense, even if the criminal offense arises out of the same course of conduct as the non-criminal violation adjudicated pursuant to HRS Chapter 291D.

In sum, the purpose of HRS § 291D-3 is to clarify that the adjudication of non-criminal infractions pursuant to HRS Chapter 291D’s streamlined, expeditious system will not adversely affect the State’s ability to prosecute related criminal offenses that arise from the same conduct as the non-criminal traffic infractions. HRS § 291D-3’s plain language and the legislature’s

intent in creating Chapter 291D demonstrate that a speeding infraction is not an "offense" of any kind, and thus HRS § 701-109(1) is not applicable here.

The Majority asserts that HRS § 291D-3(d) negates only the prosecution-related provisions of HRS § 701-109, not its conviction-related provisions. However, because a non-criminal traffic infraction is not an offense, it falls outside the scope of HRS § 701-109. Thus, HRS § 291D-3 need not be read in concert with HRS § 701-109, and the meaning of "prosecution" under HRS § 701-109 should not be imported into HRS § 291D-3.

Moreover, HRS § 701-109(1) protects a defendant from being "convicted of more than one offense" under certain circumstances. HRS § 701-109(1) (emphasis added). Kalua's non-criminal speeding infraction resulted in a civil judgment, not a conviction. See HRS § 291D-3(c)(1) (distinguishing "a civil judgment as to [a] traffic infraction" from "a judgment of conviction or acquittal as to [a] . . . criminal offense"). Because Kalua could only be "convicted" of one offense under these circumstances, HRS § 701-109(1) does not apply.

For these reasons, I respectfully disagree with the Majority's interpretation of HRS § 291D-3, and I would affirm the ICA's judgment.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

