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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII,
Respondent/Plaintiff-Appellee,

vs.

GEORGE VAN BLYENBURG,
Petitioner/Defendant-Appellant

SCWC-20-0000714

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-20-0000714; CASE NO. 1CPC-17-0000902)

NOVEMBER 23, 2022

DISSENTING OPINION BY WILSON, J.,
WITH WHOM MCKENNA, J., JOINS

I dissent to the Majority's holding that Count 1 of the indictment, charging George Van Blyenburg ("Van Blyenburg") with leaving the scene of an accident involving death or serious bodily injury in violation of HRS § 291C-12 (2008),¹ adequately

¹ HRS § 291C-12 (2008) provides:

(a) The driver of any vehicle involved in a collision resulting in serious bodily injury to or death of any person shall

continued...

informed Van Blyenburg of the class B felony² for which he was indicted.

As a person accused of a criminal offense, Van Blyenburg is constitutionally entitled to be adequately informed of the nature and cause of the accusation against him. Haw. Const. art. I, §§ 5, 14. This is a fundamental right ensuring that a defendant is alerted "of precisely what they need[] to defend against to avoid a conviction." State v. Nesmith, 127 Hawai'i 48, 56, 276 P.3d 617, 625 (2012). Because Count 1 of the indictment omitted an attendant circumstance element of the offense, Van Blyenburg was not sufficiently informed of what he must defend against. See State v. Shaw, 150 Hawai'i 56, 63, 497 P.3d 71, 78 (2021). Respectfully, the Majority's interpretation of HRS § 291C-12(a) deprives Van Blyenburg of his right to have the attendant circumstance element (that "[e]very stop shall be made without obstructing traffic more than is necessary") proven

...continued

immediately stop the vehicle at the scene of the collision or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the collision until the driver has fulfilled the requirements of section 291C-14. Every stop shall be made without obstructing traffic more than is necessary.

² A class B felony is subject to ten years of imprisonment. HRS § 706-660(1)(a) (2013).

beyond a reasonable doubt.³ Therefore, his conviction for leaving the scene of an accident involving death or serious bodily injury should be vacated. See id.

- I. Pursuant to HRS § 291C-12, the attendant circumstance element that "[e]very stop shall be made without obstructing traffic more than is necessary" must be proven beyond a reasonable doubt regardless of the State's theory of the offense**

Van Blyenburg was convicted of failing to comply with HRS § 291C-12(a), which reads:

The driver of any vehicle involved in a collision resulting in serious bodily injury to or death of any person shall immediately stop the vehicle at the scene of the collision or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the collision until the driver has fulfilled the requirements of section 291C-14. Every stop shall be made without obstructing traffic more than is necessary.

Count 1 of the indictment did not include the "Traffic Proviso" which states that "[e]very stop shall be made without obstructing traffic more than is necessary."

The Majority holds that it was unnecessary for the State to include the Traffic Proviso in the indictment against Van Blyenburg. The Majority asserts that HRS § 291C-12(a) can be proven in three alternative ways: (1) by "stopping near the scene of the collision, but not near enough[;]" (2) by "altogether fail[ing] to stop in the proximity of the collision

³ I agree, however, with the Majority's holding that Count 2 of the indictment, charging Van Blyenburg with negligent homicide in the second degree in violation of HRS § 707-703(1)(b) (2012), adequately informed Van Blyenburg of the nature and cause of the accusation against him.

scene[;]" and (3) by "fail[ing] to comply with HRS § 291C-14."⁴ The Majority concludes that the Traffic Proviso is irrelevant to the second and third "theories of the offense[.]" Thus, under the Majority's reasoning, the defendant sometimes loses the right to have the Traffic Proviso—an attendant circumstance element of the offense—alleged and proven beyond a reasonable doubt, depending on how the State ultimately proves its case at trial.⁵

The Majority's interpretation of HRS § 291C-12(a) deprives the defendant of the right to have an attendant circumstance element proven beyond a reasonable doubt. As this court correctly explained in State v. Baker, "it is [] apparent that the duty to stop at the accident scene or as close thereto as possible is subject to the statutory requirement that the stop be made without obstructing traffic more than is

⁴ HRS § 291C-14 imposes a duty to give certain information and render aid to the driver of any vehicle involved in a collision resulting in injury to or death of any person or damage to any vehicle or other property.

⁵ State v. Batson, 73 Haw. 236, 831 P.2d 924 (1992) does not stand for the proposition that the Majority asserts. The Majority cites Batson presumably to support its conclusion that where an attendant circumstance element is only relevant to one theory of an offense, the State need not allege it in an indictment if the State intends to proceed based upon a different theory of the offense. However, Batson held that it is sufficient "that one offense allegedly committed in two different ways be charged conjunctively in a single count." Batson, 73 Haw. at 250, 831 P.2d at 932 (emphasis added). Batson did not address the proposition that an attendant circumstance element may only be relevant to one theory of an offense. Batson also does not consider whether an indictment is constitutionally sufficient where it omits an attendant circumstance element that is not relevant to the State's theory of the offense.

necessary.” 146 Hawai‘i 299, 307-08, 463 P.3d 956, 964-65 (2020).⁶ Thus, whenever the driver of a vehicle involved in a collision ultimately stops, the State must prove that the driver could have stopped closer to the accident scene “without obstructing traffic more than is necessary.” HRS § 291C-12(a).

The statutory language provides no support for the Majority’s proposition that the Traffic Proviso is only relevant in certain circumstances. See State v. Alangcas, 134 Hawai‘i 515, 525, 345 P.3d 181, 191 (2015) (“The fundamental starting point of statutory interpretation is the language of the statute itself.”) (internal citation omitted). Notably, the plain text of HRS § 291C-12(a) provides that “[e]very stop shall be made without obstructing traffic more than is necessary.” (emphasis added). This language—and specifically the use of the term “every”—unambiguously indicates that the Traffic Proviso is applicable to all alleged violations of HRS § 291C-12(a).⁷ See State v. Demello, 136 Hawai‘i 193, 195, 361 P.3d 420, 22 (2015)

⁶ As the Majority notes, Baker concerned HRS § 291C-13 (2007 & Supp. 2015), which prohibits leaving the scene of an accident involving vehicle or property damage. Compare HRS § 291C-13 (“Collisions involving damage to vehicle or property”) with HRS § 291C-12 (“Collisions involving death or serious bodily injury”). HRS § 291C-13’s mandates are identical to those of HRS § 291C-12(a).

⁷ The Majority argues that because Van Blyenburg “altogether failed to stop in the proximity of the collision scene” he did not “stop” within the meaning of “[e]very stop shall be made without obstructing traffic more than is necessary.” However, Van Blyenburg did indeed “stop” “a minute or so” away from the accident scene. See infra p. 8.

("[T]his court must presume that the legislature meant what it said and is further barred from rejecting otherwise unambiguous statutory language.").

Moreover, deleting the Traffic Proviso from an indictment charging a violation of HRS § 291C-12(a) contravenes the proviso's purpose to prevent accidents by allowing a stop away from the scene of the accident if an immediate stop would obstruct traffic more than is necessary. Baker, 146 Hawai'i at 307, 463 P.3d at 964. The Baker court explained that "stopping immediately or very close to the accident's location could result in a series of successive accidents, with the subsequent accidents causing" additional harm. Id. (emphasis added). Thus, as the Majority acknowledges, if the defendant demonstrates that "stopping immediately" at the accident's location would have obstructed traffic, the State would be unable to prevail on the theory that the defendant violated HRS § 291C-12(a) by stopping "near the scene of the collision, but not near enough[.]" Likewise, if the defendant demonstrates that stopping "very close" to the accident's location would have also obstructed traffic, the State would be unable to prove a violation of HRS § 291C-12(a) based upon the theory that the defendant "failed to stop in the proximity of the collision scene[.]" In other words, the Majority's argument that the Traffic Proviso is inapplicable when the State's theory of the

case is predicated upon the fact that the defendant failed to stop "in the proximity" of the collision scene is without merit. As this court acknowledged in Baker, the Traffic Proviso may indeed be applicable where the defendant failed to stop "very close" to the accident scene due to traffic conditions. And failing to stop "very close" to the accident scene is synonymous with failing to stop "in proximity" of the accident scene. See Proximity, Merriam-Webster, <https://www.merriam-webster.com/dictionary/proximity> (last visited October 4, 2022) ("the quality or state of being proximate; closeness").

The Majority's conclusion that the State only sometimes has to allege and prove the Traffic Proviso attendant circumstance element portends insufficient notice to a person accused of violating HRS § 291C-12(a). The Majority asserts that the Traffic Proviso language of HRS § 291C-12(a) may be omitted from an indictment where the State's theory is premised upon an allegation that the defendant "altogether failed to stop in the proximity of the collision scene." However, the Majority acknowledges that the Traffic Proviso is relevant where the State's theory of the case is that the defendant stopped after the collision, but did not stop close enough to the point of collision: "To the extent that Count 1 alleges Van Blyenburg violated HRS § 291C-12(a) by stopping near the scene of the collision, but not near enough, it is inadequate." Because the

State's theory of the case was that Van Blyenburg did not stop near the scene, the Majority concludes he lost the constitutional right to be informed of the Traffic Proviso.

It is unclear how the Majority disqualifies Van Blyenburg from the constitutional right to be informed of the Traffic Proviso attendant circumstance element merely because the State's theory of the offense is that he violated HRS § 291C-12(a) by "altogether failing to stop in proximity of the collision scene." Indeed, evidence presented at trial seems to meet the Majority's test for when the Traffic Proviso must be alleged; it is beyond cavil that the government's proof included evidence that, although Van Blyenburg did not stop his vehicle at the scene, he did stop near to the collision. The Majority posits no discernable rule demarcating between a defendant who stops, as in the instant case, "a minute or so" away from the accident scene—and loses the constitutional right to be informed of the Traffic Proviso—and a different accused who stops closer to the collision, and therefore qualifies to be informed of the Traffic Proviso. Is the line of demarcation 100 yards from the collision? Or is it the distance the government selects, beyond which, according to the government, the accused has clearly failed to stop at the scene and therefore loses the right to be informed of the Traffic Proviso?

The Majority crafts its rule rejecting the accused's due process right to be informed of the Traffic Proviso attendant circumstance element of HRS § 291C-12(a) so as to apply where "the State alleges there was no stop" at all. Accordingly, once the state elects this theory, the Traffic Proviso becomes irrelevant and its significance as an attendant circumstance element of the charge disappears. By applying its no-Traffic Proviso rule, the Majority eliminates the notice necessary for the accused to assert a defense based on the requirement that the government prove the accused could have stopped closer to the accident scene "without obstructing traffic more than is necessary." HRS § 291C-12(a). In other words, under the Majority's no-Traffic Proviso rule, Van Blyenburg loses the right to be put on notice of this attendant circumstance element although he did stop within "a minute or so" of the accident. Despite the Majority's assertion that the State's theory was predicated upon Van Blyenburg's total failure to stop, had the Traffic Proviso been alleged in the indictment, Van Blyenburg could have argued that he did indeed stop in close proximity to the accident scene.

The record in Baker demonstrates that the government proceeded upon the same theory of prosecution as that charged against Van Blyenburg. Based on testimony elicited by the State at trial in Baker, the State's theory of prosecution was that

Baker "altogether failed to stop in the proximity of the collision scene[.]" The complaining witness testified that she and Baker agreed to meet at Anna Miller's after the collision, but when the complaining witness arrived at Anna Miller's, she "drove around [the] parking lot [] three times looking for the [defendant's car]" and "waited there for about half an hour[,]" but the defendant never arrived. The State argued that when Baker did eventually call the police to report the accident, she did so at her home, nowhere near the accident scene. In Baker, this court held that the Traffic Proviso, an attendant circumstance element, must be alleged in the indictment. Baker, 146 Hawai'i at 305, 463 P.3d at 962. In apparent conflict with Baker, the Majority holds that the Traffic Proviso need not be alleged in indictments where the State's theory of the offense is premised on "allegations that [the defendant] [] altogether failed to stop in the proximity of the collision scene[.]"

As in Baker, evidence presented in the instant case is relevant to the attendant circumstance element, including whether Van Blyenburg did indeed "fail[] to stop in proximity" of the accident, as well as whether traffic impeded Van Blyenburg's ability to stop closer to the accident scene. First, Van Blyenburg testified that he ultimately stopped the car at his friends' place, which was "a minute or so" away from where the accident occurred. Further testimony stated that the

friends' house was a "short distance" from the accident scene. Second, testimony was presented that Aiea Heights Road, where the accident occurred, was heavily trafficked. A bystander testified that it was "very dangerous" for him to be in the road rendering aid, and therefore, he asked "some people to stop the traffic or slow the traffic down[.]" Had the Traffic Proviso been alleged in the indictment, Van Blyenburg could have asserted the defense that, given the traffic in the area, his friends' place was the location nearest to the accident scene where he could have stopped "without obstructing traffic more than is necessary." HRS § 291C-12(a).

Per the accused's constitutional right to due process⁸ and to be informed of the "nature and cause of the accusation" against them pursuant to the Hawai'i Constitution, article I, sections 5 and 14, all of the elements of an offense must be alleged and proven beyond a reasonable doubt, including attendant circumstances, regardless of the State's theory of the case. See State v. Murray, 116 Hawai'i 3, 10, 169 P.3d 955, 962 (2007) ("The defendant's right to have each element of an offense proven beyond a reasonable doubt is a constitutionally and statutorily protected right.") (citations omitted). Because

⁸ The due process clause of Article I, section 5 of the Hawai'i Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law[.]"

Count 1 of the indictment failed to include an attendant circumstance element of the offense, it cannot be reasonably construed to charge a crime, and Van Blyenburg's conviction should be vacated.

To comply with Article I, sections 5 and 14 of the Hawai'i Constitution, an "accusation must sufficiently allege all of the essential elements of the offense charged[,]" including (1) conduct, (2) attendant circumstances and (3) results of conduct. State v. Pacquing, 139 Hawai'i 302, 308, 389 P.3d 897, 903 (2016); State v. Wheeler, 121 Hawai'i 383, 391, 219 P.3d 1170, 1178; HRS 702-205. An attendant circumstance element is a circumstance that "exist[s] independently of the [actor's conduct]." Baker, 146 Hawai'i at 306, 463 P.2d at 963 (quoting State v. Aiwohi, 109 Hawai'i 115, 127, 123 P.3d 1210, 1222 (2005) (alterations in original)). If an element of an offense is missing, the charge cannot be reasonably construed to charge a crime. Baker, 146 Hawai'i at 308, 463 P.3d at 965, (citing Pacquing, 139 Hawai'i at 308, 389 P.3d at 903; Wheeler, 121 Hawai'i at 394, 219 P.3d at 1181).

In Baker, the defendant was charged with violating HRS § 291C-13⁹ ("Accidents Involving Damage to Vehicle or Property"), and like Van Blyenburg, asserted that the charge was defective because it omitted the language that "every [] stop shall be made without obstructing traffic more than is necessary." Baker, 146 Hawai'i at 305, 463 P.3d at 962. This court explained that to show a violation of HRS § 291C-13, "[t]he State must prove that the defendant, by failing to stop as close to the scene of the accident as possible or forthwith return, could have done so without obstructing traffic more than is necessary[.]" Id. Thus, this court concluded that because the charge omitted this language, it "did not adequately set forth the elements of the offense" and vacated the district court's judgment of conviction. Id.

Baker is on point. As in Baker, the indictment here omitted the language in the statute that "every stop shall be made without obstructing traffic more than is necessary." HRS § 291C-12; HRS § 291C-13. Because that language constitutes an attendant circumstance element of the offense, its omission renders the charging instrument defective. This court has repeatedly vacated convictions based upon indictments that omit

⁹ HRS § 291C-13 is identical to HRS § 291C-12, except the "result of conduct" in HRS § 291C-13 is property damage, whereas the "result of conduct" in HRS § 291C-12 is "serious bodily injury or death."

an element of the offense. See Baker, 146 Hawai'i at 305, 463 P.3d at 962; State v. Shaw, 150 Hawai'i 56, 497 P.3d 71 (2021); State v. Robins, 66 Haw. 312, 314, 317, 660 P.2d 39, 41, 43 (1983) (where there was not "an omission of an element specified in the statute," this court "reverse[d] the order dismissing the indictment"); State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977). Absent the necessary Traffic Proviso attendant circumstance element of the offense of leaving the scene of an accident involving death or serious bodily injury, Van Blyenburg did not receive the notice of the charge required by Article I, sections 5 and 14 of the Hawai'i Constitution.¹⁰

II. Conclusion

Absent notice of the attendant circumstance element of the class B felony for which he was charged, Van Blyenburg's constitutional right to be informed of the charge against him was violated. Accordingly, the ICA's January 10, 2022 Judgment on Appeal and the circuit court's October 28, 2020 Judgment of Conviction should be vacated and the instant case should be remanded for Van Blyenburg to receive a new trial.

Sabrina S. McKenna

Michael D. Wilson



¹⁰ I concur with the analysis in footnote 3 of the Majority opinion as to when courts may look to information outside of the four corners of the charging instrument.