FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Electronically Filed
Supreme Court
SCWC-30438
12-APR-2012
08:40 AM

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

NO. SCWC-10-0000072
(ICA No. CAAP-10-0000072, 1DTA-10-01055)

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

KEVIN K. NESMITH, Petitioner/Defendant-Appellant.

NO. SCWC-30438
(ICA No. 30438, 1DTA-09-04944)

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

CHRIS F. YAMAMOTO, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

April 12, 2012

RECKTENWALD, C.J.,NAKAYAMA, DUFFY, AND MCKENNA, JJ.;
WITH ACOBA, J., CONCURRING AND DISSENTING

*****FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER*****

OPINION OF THE COURT BY MCKENNA, J.

In these cases consolidated for disposition, we (1) hold that pursuant to State v. Wheeler, 121 Hawai'i 383, 219 P.3d 1170 (2009), a charge of operating a vehicle under the influence of an intoxicant ("OVUII") under Hawai'i Revised Statutes ("HRS") § 291E-61(a)(1)(2007)[1] must allege the requisite mens rea[2] in order to fully define the offense in unmistakable terms readily comprehensible to persons of common understanding; (2) on the other hand, reaffirm that an OVUII charge under HRS § 291E-61(a)(3)(2007)[3] is an absolute liability offense for which mens rea need not be alleged or proven. We also (3) hold that the ICA erred by relying on general intent cases to hold that mens rea may be inferred from the allegations in an HRS § 291E-61(a)(1) OVUII charge because under State v. Kalama, 94 Hawai'i 60, 65, 8

[1] HRS § 291E-61(a)(1) states, as it did at the time of the alleged offenses:

> 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 . . . [w]hile 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[.]

[2] "Mens rea" is defined as follows: "As an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." Black's Law Dictionary 985 (6th ed. 1990).

[3] HRS § 291E-61(a)(3) states, as it did at the time of the alleged offenses, "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 . . . [w]ith .08 or more grams of alcohol per two hundred ten liters of breath[.]"

P.3d 1224, 1229 (2000), the distinction between general and specific intent has been abandoned; and (4) that in Nesmith, the ICA erred by extending HRS § 806-28 (1993)[4] to the district courts, as the plain language of HRS § 806-2 (1993) limits the application of the criminal procedure provisions of Chapter 806 to the circuit courts. See State v. Nesmith, 125 Hawai'i 232, 237 n.9, 257 P.3d 245, 250 n.9 (App. 2011).

I. Background

Kevin K. Nesmith ("Nesmith") and Chris F. Yamamoto ("Yamamoto") were each charged by Complaint with OVUII, in violation of HRS §§ 291E-61(a)(1) and/or (a)(3).[5] Nesmith's charge read:

[4] HRS § 806-28 states, as it did at the time of the alleged offenses:

> The indictment need not allege that the offense was committed or the act done "feloniously", "unlawfully", "wilfully", "knowingly", "maliciously", "with force and arms", or otherwise except where such characterization is used in the statutory definition of the offense. Where the characterization is so used the indictment may employ the words of the statute or other words substantially of the same import. In alleging the transaction the indictment may use the nounal, adjectival, verbal, or adverbial form of the statutory name of the offense.

[5] Conviction for the single offense of OVUII under HRS § 291E-61 can be based on either (or both) of HRS § 291E-61(a)(1) and/or (a)(3). See State v. Grindles, 70 Haw. 528, 530-31, 777 P.2d 1187, 1189-90 (1989) (stating HRS § 291-4 [the predecessor statute to HRS § 291E-61] "sets forth one offense with alternative methods of proof": proof of driving while under the influence or proof of blood alcohol content exceeding 0.10); see also State v. Caleb, 79 Hawai'i 336, 339, 902 P.2d 971, 974 (1995)("Either method may be applied in the alternative to warrant a conviction."); State v. Mezurashi, 77 Hawai'i 94, 98, 881 P.2d 1240, 1244 (1994) ("HRS § 291-4(a) [the predecessor statute to HRS § 291E-61(a)] provides two separate ways to prove a single offense of DUI, both of which may rely on an intoxilyzer test result as evidence.").

> On or about the 7th day of January, 2010, in the City and County of Honolulu, State of Hawaii, KEVIN K. NESMITH did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway 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 upon a public way, street, road, or highway 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. KEVIN K. NESMITH is subject to sentencing as a first offender in accordance with Section 291E-61(b)(1) of the Hawaii Revised Statutes.

Yamamoto's charge read:

> On or about the 28th day of October, 2009, in the City and County of Honolulu, State of Hawaii, CHRIS F. YAMAMOTO did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway 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 upon a public way, street, road, or highway 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. CHRIS F. YAMAMOTO is subject to sentencing as a first offender in accordance with Section 291E-61(b)(1) of the Hawaii Revised Statutes, and/or CHRIS F. YAMAMOTO is subject to sentencing in accordance with Section 291E-61(b)(2) of the Hawaii Revised Statutes, where CHRIS F. YAMAMOTO committed the instant offense as a highly intoxicated driver, as a first offense. 'Highly intoxicated driver' means a person whose measurable amount of alcohol is 0.15 or more grams of alcohol per one hundred milliliters or cubic centimeters of the person's blood, or 0.15 or more grams of alcohol per two hundred ten liters of the person's breath.

In each case, defense counsel moved to dismiss the Complaint based on the argument that the State failed to allege an essential fact, namely the "mens rea" requirements of HRS §§ 291E-61(a)(1) and (a)(3). The trial court denied the motions to dismiss, and the parties proceeded to stipulated fact trials.

The trial court found Nesmith and Yamamoto guilty as charged. Specifically, Nesmith was adjudged guilty of violating "HRS [§] 291E-61(a)(1),(3),(b)(1)," and Yamamoto was adjudged guilty of violating HRS § 291E-61(a)(1)(3)(b)(1)(2)." Both timely appealed.

Before the ICA, Nesmith and Yamamoto each challenged (1) the trial court's denial of their motions to dismiss and (2) their convictions, on the basis that the Complaints were legally deficient for having failed to allege mens rea. The ICA affirmed the judgments of the trial court in a published opinion in the Nesmith case and a summary disposition order in the Yamamoto case, holding that mens rea need not be alleged in a Complaint charging HRS § 291E-61(a)(1) and/or (a)(3). See Nesmith, 125 Hawai'i 232, 257 P.3d 245; and State v. Yamamoto, No. 30438 (App. June 6, 2011) (SDO).

First, in both Nesmith and Yamamoto, the ICA held that mens rea is not an element of the offense of OVUII under HRS § 291E-61(a)(3), which is an absolute liability offense. Nesmith, 125 Hawai'i at 236, 257 P.3d at 249; Yamamoto, SDO at 6. Second, in Yamamoto, the ICA held that mens rea can be inferred from the allegations in the charge of OVUII under HRS § 291E-61(a)(1), which the ICA characterized as a general intent crime. Yamamoto,

SDO at 9. In Nesmith, the ICA did not expressly characterize HRS § 291E-61(a)(1) as a general intent crime; rather, it relied on general intent cases to hold that mens rea can be inferred from the allegations in the charge of OVUII under HRS § 291E-61(a)(1). Nesmith, 125 Hawai'i at 237-39, 257 P.3d at 250-52. Finally, in Nesmith, the ICA expressly extended HRS § 806-28 to the district courts. Nesmith, 125 Hawai'i at 237, n.9, 257 P.3d at 250, n.9. The Yamamoto panel, on the other hand, expressly observed that HRS § 806-28 does not apply to the district courts. Yamamoto, SDO at 8. Both Nesmith and Yamamoto timely filed applications for writ of certiorari, which we granted and hereby consolidate for disposition.

On certiorari, both applications contain the following first five questions presented:

> 1. Was the OVUII charge herein legally sufficient[?]
> 2. Did the OVUII charge herein "fully define" the offense in "unmistakable terms readily comprehensible to persons of common understanding[?]" See State v. Wheeler[,] 121 Hawai'i 383, 219 P.3d 1170 (2009)[.]
> 3. What are the "essential facts" that must be included in an OVUII charge?
> 4. What mens rea, if any, is the State required to prove in an OVUII case?
> 5. What mens rea, if any, is the State required to plead in an OVUII complaint?

Each's sixth question presented can be summarized as follows: Did the ICA gravely err in concluding (1) that OVUII based on blood alcohol content and charged under HRS § 291E-61(a)(3) is an

absolute liability offense; and (2) that the mental state for OVUII under HRS § 291E-61(a)(1) can be inferred without specification in the charge?

Although we agree that HRS § 291E-61(a)(3) is an absolute liability offense for which mens rea need not be alleged or proven, we hold that the ICA erred in its holdings regarding HRS § 291E-61(a)(1) in three ways. First, we hold that the HRS § 291E-61(a)(1) charges as written (omitting mens rea) failed to fully define the HRS § 291E-61(a)(1) offense in unmistakable terms readily comprehensible to persons of common understanding. Second, this holding rejects the ICA's characterization of HRS § 291E-61(a)(1) as a general intent offense for which mens rea may be inferred from the allegations in the charge. Under Kalama, 94 Hawai'i 60, 8 P.3d 1224, the distinction between general and specific intent has been abandoned. Third, we hold that the Nesmith majority erred by extending HRS § 806-28 to the district courts, as the plain language of HRS § 806-2 limits the application of the criminal procedure provisions of Chapter 806 to the circuit courts.

II. Discussion

A criminal charge serves multiple purposes. To initiate the criminal process, a charge must sufficiently state an offense to

establish the court's jurisdiction over a case. State v. Cummings, 101 Hawai'i 139, 142, 63 P.3d 1109, 1112 (2003). The sufficiency of a charge also implicates an accused's rights under the Hawai'i Constitution, article I, sections 5, 10 and 14. First, under article I, section 5, "No person shall be deprived of life, liberty or property without due process of law[.]" Second, under article I, section 14, an accused is entitled to adequate notice of the charges against him or her: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" Third, under article I, section 10, an indictment must be sufficiently specific to protect a person from being charged twice for the same offense: "[N]or shall any person be subject for the same offense to be twice put in jeopardy[.]"

As to the content and form of the charge, the State is required to charge OVUII offenses in writing. See Hawai'i Rules of Penal Procedure ("HRPP") Rule 7(a)(2009). "The charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged." HRPP Rule 7(d)(2009). "[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." State v. Mita,

124 Hawai'i 385, 390, 245 P.3d 458, 463 (2010)(citations omitted).

> In general, "[w]here the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient."

Wheeler, 121 Hawai'i at 393, 219 P.3d at 1180 (citations omitted).

In some cases, however, a charge tracking the language of the statute defining the offense nevertheless violates an accused's due process rights.

> This is so because although "some statutes in our criminal laws so clearly and specifically define[] the offense that nothing more is required in [a charge] than the adoption of language of the statute, other statutes fail to sufficiently describe the crime and [a charge] couched merely in the language of such a statute would violate due process."

State v. Israel, 78 Hawai'i 66, 73, 890 P.2d 303, 310 (1995)(quoting Territory v. Yoshimura, 35 Haw. 324, 328 (1940)).

Nesmith and Yamamoto allege that their OVUII charges were deficient for failing to allege mens rea. We agree as to the HRS § 291E-61(a)(1) charge, but disagree as to the HRS § 291E-61(a)(3) charge. First, an HRS § 291E-61(a)(1) charge omitting mens rea does not fully define the offense in unmistakable terms readily comprehensible to persons of common understanding. As such, Nesmith's and Yamamoto's HRS § 291E-61(a)(1) charges

violated their right to be informed of the nature and cause of the accusation. Second, the omission of mens rea in an HRS § 291E-61(a)(3) charge comports with the legislature's intent to make that type of OVUII offense a strict liability offense. As such, those charges were sufficient.

A. An "intentional, knowing, or reckless" mens rea must be included in a Complaint alleging violation of HRS § 291E-61(a)(1).

HRS § 291E-61(a)(1) states:

> **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[.]

In order to convict a person of any criminal offense, the burden is on the prosecution to prove the following, beyond a reasonable doubt:

> **Proof beyond a reasonable doubt.** (1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:
> (a) Each element of the offense;
> (b) The state of mind required to establish each element of the offense;
> (c) Facts establishing jurisdiction;
> (d) Facts establishing venue; and
> (e) Facts establishing that the offense was committed within the time period specified in section 701-108.
> (2) In the absence of the proof required by subsection (1), the innocence of the defendant is presumed.

HRS § 701-114 (1993). The "elements of an offense" are further defined by statute as "such (1) conduct, (2) attendant

circumstances, and (3) results of conduct, as: (a) Are specified by the definition of the offense, and (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction)." HRS § 702-205 (1993).

There is no state of mind specified within HRS § 291E-61(a)(1) itself. As such, HRS § 702-204 applies. It states, in relevant part, "When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." Further, "a state of mind with which the defendant acts applies to all elements of the offense, unless otherwise specified in the statute defining the offense." State v. Vliet, 95 Hawai'i 94, 99, 19 P.3d 42, 47 (2001)(citations omitted); see also HRS § 702-206 (1993). Thus, in order to convict a person of violating HRS § 291E-61(a)(1), the State must prove, beyond a reasonable doubt, (1) conduct, (2) attendant circumstances, and the (3) results of conduct, and an intentional, knowing, or reckless state of mind as to each of these three elements (and prove the rest of the items listed in HRS § 701-114).

Nesmith and Yamamoto's overarching argument is that if mens rea need be proven beyond a reasonable doubt to convict a person

of an HRS § 291E-61(a)(1) offense, then mens rea is an essential fact under HRPP Rule 7(d) that must be alleged in the charge, in unmistakable and readily comprehensible terms to persons of common understanding, in order to provide the defendant fair notice. In other words, the argument is that the "essential facts" requirement is broader than the "essential elements" required to be charged. No direct authority is cited for this proposition. In any event, we do not decide this case on the basis that HRPP Rule 7(d) requires the allegation of mens rea as an essential fact. Rather, under Wheeler, 121 Hawai'i 383, 219 P.3d 1170, we decide this case on the more fundamental question of whether the HRS § 291E-61(a)(1) charges provided fair notice to Nesmith and Yamamoto of the nature and cause of the accusation.

In Wheeler, a defendant was charged with OVUII in violation of HRS § 291E-61(a)(1). 121 Hawai'i at 385, 219 P.3d at 1172. Defense counsel argued that the charge was insufficient because it did not allege an essential element: that the defendant had operated a vehicle on "a public way, street, road, or highway." 121 Hawai'i at 386, 219 P.3d at 1173. This court agreed. 121 Hawai'i at 391, 219 P.3d at 1178.

At that time, as it does now, in order to commit the offense of OVUII under HRS § 291E-61(a)(1), a person must have operated or assumed actual physical control of a vehicle 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. Id. Although HRS § 291E-61(a)(1) itself did not define "operate," HRS § 291E-1 did, as follows: "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway[.]" Id. (emphasis omitted).

This court held, "Although the oral charge here tracked the language of HRS § 291E-61, the failure of the charge to allege that Wheeler was driving his vehicle upon a public way, street, road, or highway at the time of the offense rendered the charge deficient." 121 Hawai'i at 393, 219 P.3d at 1180. This was because the term "'operate' has been statutorily defined in HRS § 291E-61 in a manner that does not comport with its commonly understood definition." 121 Hawai'i at 394, 219 P.3d at 1181. Compared to the dictionary meaning of "operate," the definition of "operate" in HRS § 291E-1 contained a "geographical limit" that is "neither 'unmistakable' nor 'readily comprehensible to persons of common understanding.'" Id. Such a deficient charge

would not provide fair notice. 121 Hawai'i at 395, 219 P.3d at 1182. Thus, this court affirmed the ICA's judgment, which vacated and remanded the case to the district court with instructions to dismiss the charge without prejudice. 121 Hawai'i at 386, 219 P.3d at 1173.

Similarly, in this case, at oral argument, the State argued that any person on the street would know a charge of "operating a vehicle under the influence of an intoxicant" to mean drunk driving. However, that common understanding is not reflected in the statutory framework creating the offense of OVUII under HRS § 291E-61(a)(1), under which it is a crime only if one intentionally, knowingly, or recklessly (not negligently) "operates or assumes actual physical control of a vehicle . . . [w]hile 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." As in Wheeler, the OVUII offense in this case is statutorily defined as narrower than what is commonly understood to constitute "drunk driving." In that sense, a charge alleging a violation of HRS § 291E-61(a)(1) that omits the statutorily incorporated culpable states of mind from HRS § 702-204 is not readily comprehensible to persons of common understanding. As such, a charge omitting the

allegation of mens rea is deficient for failing to provide fair notice to the accused.

We are cognizant that our case law, statutes, and court rules have complicated the issue of just what must be included in a charge. On one hand, the State argues that the charge need only contain the "essential elements" of an offense, and the "elements of an offense" are defined under HRS § 702-205 as "such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as: (a) Are specified by the definition of the offense, and (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction)." Missing from the recitation of "elements of an offense" is mens rea, which the State acknowledges applies to each element of the offense, pursuant to HRS § 702-206, and must be proven in order to convict a person of violating HRS § 291E-61(a)(1). On the other hand, Petitioners argue that the charge must contain "a plain, concise and definite statement of the essential facts constituting the offense charged," pursuant to HRPP Rule 7(d), which must include mens rea, because the State must prove that fact beyond a reasonable doubt to convict a person of the offense of HRS § 291E-61(a)(1).

Complicating the issue further is our case precedent holding that the omission of mens rea in a charge rendered the charge deficient. We note that even after the adoption of the Hawai‘i Penal Code and HRS § 702-205, we struck down charges for failing to include mens rea, characterizing mens rea as an "element" of the offense. See State v. Jendrusch, 58 Haw. 279, 282, 567 P.2d 1242, 1244 (1977)("The failure of the complaint to set forth this essential element [of intent] as defined by the statute or to describe it with sufficient specificity so as to establish penal liability rendered it fatally defective."); State v. Faulkner, 61 Haw. 177, 178, 599 P.2d 285, 286 (1979)("Intent is an essential element of the crime of criminal attempt. . . No allegation of intent was made."); State v. Yonaha, 68 Haw. 586, 586, 723 P.2d 185, 185-86 (1986)("[The charge] omitted the element of intent which is expressly included in the statute."). These cases are in tension with the statutory definition of "elements of an offense" in HRS § 702-205, which does not include mens rea.

Given our statutory framework, it seems clear that mens rea is not an "element of an offense" under HRS § 702-205. See also State v. Klinge, 92 Hawai‘i 577, 584, n.3, 994 P.2d 509, 516, n.3 (2000)("[U]nder [the statute defining the offense], state of mind is not an 'element' of the criminal offense.") That conclusion

does not end our inquiry, however. In resolving the issue of whether mens rea must nonetheless be alleged in an HRS § 291E-61(a)(1) charge, we note that we have previously held that failure to allege more than just "essential elements" can be fatal to a charge. See, e.g., Territory v. Goto, 27 Haw. 65, 102 (1923)(Peters, J., concurring)("Failure of an indictment to state facts sufficient to constitute an offense against the law is jurisdictional. . . ."))(emphasis added); see also State v. Vanstory, 91 Hawai'i 33, 44, 979 P.2d 1059, 1070 (1999)("It is well settled that 'the material parts which constitute the offense charged must be stated in the indictment, and they must be proved in evidence[,]' by the State beyond a reasonable doubt.") (emphasis added; citations omitted)(superseded by statute on other grounds).

State v. Elliott provides one illustration of how omission of facts in a charge can render a charge deficient. 77 Hawai'i 309, 884 P.2d 372 (1994). In that case, this court examined the following charge alleging resisting arrest:

> On or about the 28th day of June, 1991 in Kona, County and State of [Hawaii], Marian Lois Elliot attempted to prevent a Peace Officer acting under color of his official authority from effecting an arrest by using or threatening to use physical force against the peace officer or another thereby committing the offense of resisting arrest in violation of Section 710-1026(1)(a) [Hawaii] Revised Statutes as amended.

77 Hawai‘i at 310, 884 P.2d at 373 (emphasis omitted). The charge stemmed from an incident in which Elliot allegedly attempted to bite one police officer and successfully bit another. See id. At the time of the offense, the resisting arrest statute read:

> **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[.]"

77 Hawai‘i at 310 n.2, 884 P.2d at 371 n.2 (emphasis omitted).

In Elliott, the petitioner challenged the sufficiency of this oral charge for the first time on appeal, so this court liberally reviewed the oral charge in favor of its validity pursuant to State v. Motta, 66 Haw. 89, 657 P.2d 1019 (1983). 77 Hawai‘i at 311, 884 P.2d at 374. Even under a liberal review, we held that the charge could not be reasonably construed to state the offense of resisting arrest. 77 Hawai‘i at 313, 884 P.2d at 376. First, the oral charge was deficient because it was unclear which "peace officer" it referenced. 77 Hawai‘i at 312, 884 P.2d at 375. Second, the charge was also unclear as to whether the phrase "using or threatening to use physical force" related to the petitioner's alleged act of trying to bite one officer or her alleged act of successfully biting the other officer. Id. Third, this court held, "the requisite state of mind was omitted

from the charge and we perceive no way in which we could reasonably construe it to charge resisting arrest or any included offense." 77 Hawai'i at 313, 884 P.2d at 376.

Like Elliott, in this case, the "intentional, knowing, or reckless" state of mind requirements, though not an "element of an offense" under HRS § 702-205, needed to be charged in an HRS § 291E-61(a)(1) Complaint to alert the defendants of precisely what they needed to defend against to avoid a conviction. A charge omitting the mens rea requirements would not alert the Petitioners that negligently operating a vehicle under the influence of an intoxicant in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty, for instance, is not an offense recognized under HRS § 291E-61(a)(1). In short, mens rea must be alleged in an HRS § 291E-61(a)(1) charge.

Lastly, we take note of two other errors in the ICA's HRS § 291E-61(a)(1) holding. In affirming Nesmith's and Yamamoto's convictions, the ICA characterized HRS § 291E-61(a)(1) as a general intent offense (or relied on general intent cases) for which intent may be inferred from the allegations in the charge; and (2) the Nesmith majority extended HRS § 806-28 to the district courts. Yamamoto, SDO at 9; Nesmith, 125 Hawai'i at

237, n.9, 257 P.3d at 250, n.9. Each of these holdings was erroneous.

1. The General Intent Holding

The Yamamoto panel held, "[I]n a charge of OVUII under HRS § 291E-61(a)(1), a general intent crime, the state of mind can be inferred without specification in the charge." Yamamoto, SDO at 9 (footnoting citations to State v. Kane, 3 Haw. App. 450, 457, 652 P.2d 642, 647-48 (1982); State v. Bull, 61 Haw. 62, 66, 597 P.2d 10, 13 (1979); Territory v. Tacuban, 40 Haw. 208, 212 (1953); and State v. McDowell, 66 Haw. 650, 651, 672 P.2d 554, 555 (1983)).

The distinction between "general intent" and "specific intent" crimes, however, no longer applies. This court noted in 2000 that, upon the adoption of the Hawai'i Penal Code in 1973, the only relevant states of mind are intentional, knowing, reckless, and negligent states of mind.

> [A]rguments concerning specific and general intent are no longer relevant. Hawai'i has adopted the [Model Penal Code's] state of mind requirements, which have abandoned the common law concepts of "specific intent" and "general intent," in favor of four defined culpable states of mind. . . . In that regard, this court, in applying the [Hawai'i Penal Code], has indicated that a state of mind with which the defendant acts applies to all elements of the offense, unless otherwise specified in the statute defining the offense.

Kalama, 94 Hawai'i at 65, 8 P.3d at 1229 (citations omitted). See also State v. Pesentheiner, 95 Hawai'i 290, 300, n.10, 22

P.3d 86, 96, n.10 (Haw. App. 2001) ("By clearly articulating the mens rea elements utilized by the penal code, HRS § 702-206 extirpates from any analysis of guilt or innocence reference to general or specific intent.").

The Nesmith majority, unlike the Yamamoto panel, did not explicitly use the term "general intent" when it held that an intentional, knowing, or reckless state of mind can be inferred from the conduct alleged in an HRS § 291E-61(a)(1) charge. 125 Hawai'i at 238, 257 P.3d at 251. However, in reaching this holding, the Nesmith majority favorably cited Kane, McDowell, Tacuban, and State v. Torres, 66 Haw. 281, 660 P.2d 522 (1983). 125 Hawai'i at 237-38, 257 P.3d at 250-51.

Kane and McDowell are cases in which our appellate courts have specifically held that intent can be inferred from the allegations in the charge for general intent crimes. Kane held, "With a general intent crime, the statement of the act itself implies the requisite intent." 3 Haw. App. at 457-58, 652 P.2d at 647 (citing Tacuban). McDowell held that possession of a sawed-off rifle is a general intent crime; further, under HRS § 806-28, a particularized allegation of general intent in the indictment is not required. 66 Haw. at 651, 672 P.2d at 555 (citing Kane).

We note, however, that Torres and Tacuban are not explicitly general intent cases. Torres held, without addressing whether incest was a general intent crime, "Incest as charged here is an offense where intent can be inferred because 'sexual intercourse' under the circumstances alleged could only be a willful act." 66 Haw. at 289, 660 P.2d at 527. Similarly, Tacuban held, without any discussion on general intent, "An essential ingredient of an offense [in this case, gambling] may be alleged inferentially as well as directly and when so alleged is sufficient[.]" 40 Haw. at 212 (citation omitted).

In light of the clear abrogation of the general/specific intent distinction in Kalama, it was erroneous for the Yamamoto panel to hold that HRS § 291E-61(a)(1) is a general intent offense for which mens rea can be inferred from the allegations in the charge. To the extent the Nesmith majority may have relied on the distinction between general and specific intent in reaching its holding, it also erred.

2. The Extension of HRS § 806-28 to the District Courts

In further support of its holding that intent can be inferred from the allegations in an HRS § 291E-61(a)(1) charge, the Nesmith majority noted that HRS § 806-28[6] does not require an

[6] See n.4, supra.

indictment to allege a mental state, if none is specified in the statute defining the offense. 125 Hawai'i at 237, 257 P.3d at 250. It then footnoted its extension of HRS § 806-28 to district court proceedings (like OVUII) as follows: "Although HRS § 806-28 refers to an 'indictment,' which is used to charge a felony offense, we see no logical reason why its provisions would not also apply to a complaint used to charge a petty misdemeanor offense." 125 Hawai'i at 237, n.9, 257 P.3d at 250, n.9. The Yamamoto panel arrived at a contrary conclusion, to hold, "[T]he provisions of HRS § 806-28 are not applicable to district court proceedings[.]" Yamamoto, SDO at 8. Although neither Petitioner has briefed the HRS § 806-28 issue, and although the State concluded at oral argument that HRS § 806-28 does not apply to district court proceedings, we address it in light of the inconsistency it has created in the ICA's own decisions.

HRS § 806-2 expressly provides, "Notwithstanding any provision of this chapter [Chapter 806: Criminal Procedure: Circuit Courts] that the same applies to courts of record, such provision shall not, without more, apply to district courts." "[T]he starting point for interpreting a statute is the language of the statute itself." State v. Moniz, 69 Haw. 370, 374, 742 P.2d 373, 376 (1987)(citation omitted). Here, the plain language

of HRS § 806-2 counsels against the extension of circuit court criminal procedure to the district courts "without more." The Nesmith majority did not provide a reason to apply HRS § 806-28 to the district courts beyond its observation that there was "no logical reason" not to.

An extension of circuit court criminal procedure to the district courts is a result contrary to the intent of the legislative body that drafted the statute. Legislative history behind HRS § 806-2's identically worded predecessor (HRS § 711-2) reveals that criminal procedure for circuit courts was generally not intended to apply to the district courts, when district courts became courts of record in 1972:

> Chapter 711, "criminal procedure; circuit courts", contains several provisions tying the application thereof to courts of record. Upon the taking effect of Act 188, Laws 1970, district courts will be courts of record as provided in section 604-17. Section 31B presents a proposed new section 711-2 providing that the mere use of the term courts of record does not itself make a provision contained in chapter 711 applicable to district courts. The title has been amended to include chapter 711.

H. Stand. Comm. Rep. No. 333, in 1971 House Journal, at 845. Consequently, the Nesmith majority erred in extending HRS § 806-28 to the district courts. We now turn to the issue of whether mens rea must be alleged in an HRS § 291E-61(a)(3) charge.

B. An HRS § 291E-61(a)(3) offense is an absolute liability offense, for which mens rea need not be alleged in the charge (or proven).

As a preliminary matter, we note that the mens rea requirements found in the Hawai‘i Penal Code are not automatically applicable to offenses defined by statutes outside the penal code, like HRS § 291E-61. See HRS § 701-102(3)(1993) ("The provisions of [the Hawai‘i Penal Code] are applicable to offenses defined by other statutes, unless the [Hawai‘i Penal] Code otherwise provides.") The Hawai‘i Penal Code "otherwise provides" in HRS § 702-212(2)(1993), which sets forth an exception to the Code's mens rea requirement where "a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears." As further discussed below, it is well established that a legislative purpose to make HRS § 291E-61(a)(3) an absolute liability offense plainly appears. Mens rea need not be alleged or proven to convict a person under HRS § 291E-61(a)(3).[7]

Petitioners' argument that mens rea must be alleged in a complaint charging OVUII under HRS § 291E-61(a)(3) is unpersuasive. It is well established that the legislature

[7] There is no similar legislative purpose to impose absolute liability for an HRS § 291E-61(a)(1) offense that plainly appears; therefore, the mens rea requirements in HRS § 702-204 apply to an HRS § 291E-61(a)(1) offense, as discussed supra.

plainly intended to make this type of OVUII, based on blood alcohol content, a "per se" or "absolute liability" offense, for which no mens rea element need be proven or even alleged. "Since 1983, DUI [Driving under the Influence] has been a per se offense under Hawaii Revised Statutes (HRS) § 291-4(a)(2) (1985) [the predecessor statute to HRS § 291E-61(a)(3)] requiring the mere proof of 0.10 percent or more by weight of alcohol in the driver's blood." State v. Christie, 7 Haw. App. 368, 370, 764 P.2d 1245, 1246 (1988). See also Mezurashi, 77 Hawai'i at 96, 881 P.2d at 1242; State v. Young, 8 Haw. App. 145, 153-54, 795 P.2d 285, 291 (1990); State v. Wetzel, 7 Haw. App. 532, 539 n.8, 782 P.2d 891, 895 n.8 (1989).

The "per se" addition to Hawai'i's drunk driving laws was prompted after Congress enacted the Alcohol Traffic Safety-National Driver Register Act (the "Act"), which amended 23 U.S.C. § 408 to make available incentive grants to states that "adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol." Alcohol Traffic Safety- National Driver Register Act of 1982, Pub. L. No. 97-364, § 101, 96 Stat. 1738, 1738 (1982). The Act provided that a state would be "eligible for a basic grant if such State provides. . . . (C) that any person

with a blood alcohol concentration of 0.10 percent or greater when driving a motor vehicle shall be deemed to be driving while intoxicated[.]" Id. at 1739 (emphasis added).

In 1983, the Hawai'i State Legislature signaled its clear intent to qualify for these federal funds in amending chapter 291. See S. Conf. Com. Rep. No. 999, in 1983 Senate Journal, at 1478 ("[The Joint Senate Committees on Transportation and the Judiciary] are aware that certain federal funds are available to the State, provided that the State's drunk driving laws conform to federal standards. Your Committees find that this measure would enhance qualification for such federal funds."); see also H. Stand. Com. Rep. 591, in 1983 House Journal, at 1105 ("Furthermore, your Committee has received testimony from the Department of Transportation that the state must comply with certain federal requirements to qualify for federal grants. These requirements and funding were enacted by Congress in an effort to provide an incentive for states to reduce alcohol[-]related traffic accidents."). The House recorded its understanding of the amendment to HRS § 291 in language tracking the federal Act's goals: "The defendant shall be deemed under the influence of intoxicating liquor if he has ten-hundredths per cent or more by weight of alcohol in his blood." H. Stand. Com.

Rep. No. 591, in 1983 House Journal, at 1105 (emphasis added). The legislature then amended chapter 291 to provide: "A person commits the offense of driving under the influence of intoxicating liquor if: . . . (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more by weight of alcohol in the person's blood." 1983 Haw. Sess. Laws Act 117, § 1 at 208.

Subsequent case law supports this interpretation. See Wetzel, 7 Haw. App. 532, 782 P.2d 891; Mezurashi, 77 Haw. 94, 881 P.2d 1240; Christie, 7 Haw. App. 368, 764 P.2d 1245. Significantly, in reaffirming that driving under the influence of alcohol, as measured by blood alcohol content, was a per se offense, this court discussed the legislative history of Act 117 as follows:

> In 1983, the Legislature proposed to "establish more effective sanctions for driving under the influence of intoxicating liquor." Sen. Conf. Comm. Rep. No. 999, in 1983 Senate Journal, at 1477. Specifically, the Legislature intended that a defendant in any criminal prosecution for the offense of driving under the influence of intoxicating liquor, "shall be deemed under the influence of intoxicating liquor if he has ten-hundredths per cent or more by weight of alcohol in his blood." Hse. Stand. Comm. Rep. No. 591, in 1983 House Journal, at 1105. Consequently, a vehicle operator whose blood alcohol level exceeds 0.10 per cent is in violation of the DUI statute.
>
> We have long held that DUI is a per se offense under HRS § 291-4(a)(2). State v. Mezurashi, 77 Haw. 94, 96, 881 P.2d 1240, 1242 (1994); State v. Christie, 7 Haw. App. 368, 370, 764 P.2d 1245, 1246, aff'd, 70 Haw. 158, 766 P.2d 1198 (1988), reconsideration denied, 70 Haw. 661, 796 P.2d 1004, cert. denied, 490 U.S. 1067 (1989).

Caleb, 79 Hawai'i at 339, 902 P.2d at 974 (emphasis added).

In the context of jury instructions, the ICA once again reaffirmed that the legislative history indicated that driving under the influence based on blood alcohol content was a per se offense, with reference to the absolute liability framework set forth in HRS § 702-212:

> Defendant contends that regarding the elements of the HRS § 291-4(a)(2) offense, the trial court incorrectly refused to instruct the jury that a "finding of a mens rea as to the element of operating a vehicle [was required]." We disagree.
>
> HRS § 702-204 (1985) provides that when a statute is silent as to the state of mind required to establish an element of an offense, the element is established by proving that "a person acts intentionally, knowingly, or recklessly." However, HRS § 702-212(2) (1985) states that the state of mind requirements do not apply to:
>
> A crime defined by statute other than [the Hawai'i Penal] Code, insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears.
>
> By enacting HRS § 291-4(a)(2), "the legislature permitted proof of DUI by merely showing that a defendant drove a vehicle with a BAC of 0.10 percent or more." State v. Wetzel, 7 Haw. App. [532, 539], 782 P.2d 891, 895 (1989) (footnote omitted). Thus, the legislative purpose of HRS § 291-4(a)(2) was "to impose absolute liability for such offense or with respect to any element thereof," as provided in HRS § 702-212(2). Accordingly, we stated in State v. Christie, 7 Haw. App. [368, 370], 764 P.2d 1245, 1246, aff'd, 70 Haw. 158, 766 P.2d 1198 (1988), cert denied, [490 U.S. 1067], 109 S. Ct. 2068, 104 L. Ed. 2d 633 (1989), that DUI has been "a per se offense" under HRS § 291-4(a)(2) since 1983.
>
> The trial court did not err in refusing to instruct the jury that a finding of mens rea was required under HRS § 291-4(a)(2).

Young, 8 Haw. App. at 153-54, 795 P.2d at 290-91.

There are no substantial differences between HRS § 291-4 and HRS § 291E-61 that would limit the current application of this line of case law. Further, the statutory offense of DUI/OVUII, from Territorial days to the present, has not changed much. When the Territory of Hawai‘i first established a DUI law in 1949, the act read:

> **Sec. 11721. Driving under the influence of intoxicating liquor.** Whoever operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both.
>
> **Sec. 11722. Evidence of intoxication.** In any criminal prosecution for a violation of section 11721, the amount of alcohol in the defendant's blood within three hours after the time of the alleged violation as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance shall be competent evidence that the defendant was under the influence of intoxicating liquor at the time of the alleged violation and shall give rise [to the presumption of intoxication at the time of the alleged violation if the defendant's blood alcohol content was 0.15 per cent or more, by weight of alcohol.]

Laws of the Territory of Hawaii Passed by the Twenty-Fifth Legislature, Regular Session 1949, Act 283, § 1 at 602.

As explained supra, in 1983, Hawai‘i's DUI law was amended to state:

> A person commits the offense of driving under the influence of intoxicating liquor if: . . . (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

1983 Haw. Sess. Laws Act 117, § 1 at 208. Immediately before HRS

§ 291-4 was recodified as HRS § 291E-61 (in 2000), it read as follows:

> § 291-4 Driving under the influence of intoxicating liquor.
> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
> . . . .
> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath.

Except for the consolidation of language concerning driving under the influence of drugs, the current HRS § 291E-61(a) is nearly identical to its predecessor:

> **§291E-61 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:
> . . . .
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

As such, the line of cases holding HRS § 291-4(a)(2) to be an absolute liability offense continues to apply with the same force to the instant appeals. The legislature is presumed to be aware of judicial constructions of HRS § 291-4(a)(2), and it has had abundant opportunities to amend the statute if it intended for HRS § 291-4(a)(2) and its successor, HRS § 291E-61(a)(3), not to constitute absolute liability offenses. See Territory v. Makaaa, 43 Haw. 237, 240 (1959). In light of the legislature's inaction,

we conclude that HRS § 291E-61(a)(3) remains an absolute liability offense.[8]

[8] We take a moment to respond to some of assertions raised in the Concurrence/Dissent. First, the Concurrence/Dissent states, "HRS § 291E-61(a)(1) is not merely a regulatory statute and conviction thereunder can result 'in the possibility of imprisonment and condemnation[,]' to reiterate, construing it as a strict liability offense under these circumstances is 'indefensible.'" Concurrence/Dissent, Section VII. The Commentary does state, "Subsection (2) provides for an extremely limited situation. The Code takes the general position that absolute or strict liability in the penal law is indefensible in principle if conviction results in the possibility of imprisonment and condemnation." The Commentary continues, however, as follows:

> Therefore, within the immediate context of the Penal Code, criminal liability must be based on culpability. However, it is recognized that the scope of the Penal Code is finite. In other codes or Titles penal statutes exist which prima facie impose absolute criminal liability. Subsection (2) allows for the imposition of such criminal liability in the case of crimes defined by statutes other than the Penal Code -- when and only when -- "a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears."

Commentary to HRS § 702-212 (emphasis added; footnotes omitted). HRS § 291E-61(a)(3) is an offense found outside of the penal code. We believe that a legislative purpose to impose absolute liability for HRS § 291E-61(a)(3) plainly appears, when the legislature amended that statute to "deem" operating a vehicle with a certain blood alcohol content to constitute driving while under the influence.

Second, the Concurrence/Dissent posits that, in light of the existence of the defense of pathological intoxication found in HRS § 702-230, "it would appear inconsistent to treat HRS § 291E-61(a)(3) as a strict liability offense." Concurrence/Dissent at Section VI.D. It appears that other jurisdictions are split on this issue. State v. Gurule, 149 N.M. 599, 604, 252 P.3d 823, 828 (App. 2011)(noting jurisdictional split). Compare, e.g., State v. Hammond, 118 N.J. 306, 307, 314, 571 A.2d 942, 946 (1990)(holding that the involuntary intoxication defense is not available as to the strict liability offense of driving under the influence); State v. West, 416 A.2d 5, 7, 9 (Me. 1980)(same); People v. Teschner, 76 Ill. App. 3d 124, 126, 394 N.E.2d 893, 895 (1979)(same); with Carter v. State, 710 So.2d 110, 113 (Fla. App. 1998)("The fact that involuntary intoxication is available as a defense, however, is not inconsistent with the fact that a .10 [blood alcohol] reading means that there is impairment" based on strict liability). As such, it remains an open question whether HRS § 702-230 is a defense available to a defendant charged with violating HRS § 291E-61(a)(3). We do not decide the issue here.

There is no mens rea requirement in HRS § 291E-61(a)(3). Proof of mens rea is not necessary to support a conviction under that statute. An allegation of mens rea is not necessary in the charge. The ICA did not gravely err in so concluding.

III. Conclusion

We hold that the ICA correctly concluded that HRS § 291E-61(a)(3) is an absolute liability offense for which no mens rea need be alleged or proven, but that the ICA erred by (1) holding that mens rea need not be alleged in an HRS § 291E-61(a)(1) charge, as without such an allegation, the Complaint fails to fully define the offense in unmistakable terms readily comprehensible to persons of common understanding; (2) characterizing HRS § 291E-61(a)(1) as a general intent offense (or relying on general intent cases) to hold that mens rea may be inferred from the allegations in the charge; and (3) by extending HRS § 806-28 to the district courts.

Consequently, we affirm the ICA's judgments, which affirmed the district court's judgments of conviction and sentence under HRS § 291E-61. The district court adjudged Nesmith and Yamamoto guilty of violating both HRS § 291E-61(a)(1) and (a)(3). Subsections (a)(1) and (a)(3) can each serve as the basis for a conviction under HRS § 291E-61. See Grindles, 70 Haw. 528, 530-

31, 777 P.2d 1187, 1189-90; Caleb, 79 Hawai'i 336, 339, 902 P.2d 971, 974; Mezurashi, 77 Hawai'i 94, 98, 881 P.2d 1240, 1244. Insofar as the (a)(3) charge was sufficient, and insofar as neither Nesmith nor Yamamoto challenges the sufficiency of the evidence as to that basis, each's conviction still stands.

Timothy I. MacMaster for Petitioners/Defendants-Appellants.	/s/ Mark E. Recktenwald
	/s/ Paula A. Nakayama
Keith M. Kaneshiro, Delanie Prescott-Tate, Stephen K. Tsushima, and Sonja P. McCullen for Respondent/Plaintiff-Appellee.	/s/ James E. Duffy, Jr.
	/s/ Sabrina S. McKenna