

NO. 22689

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DEREK KATO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE SECOND CIRCUIT, WAILUKU DIVISION
(Case No. TR22:6/25/99)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Derek Kato (Defendant) appeals from the Judgment entered by the District Court of the Second Circuit, Wailuku Division (the district court) on June 25, 1999 that convicted and sentenced him for Driving After License Suspended or Revoked for Driving Under the Influence of Intoxicating Liquor (DUI) (Driving After License Suspended), in violation of Hawai'i Revised Statutes (HRS) § 291-4.5 (1993 & Supp. 2000).¹

We affirm.

¹ Defendant-Appellant Derek Kato (Defendant) was also charged in Case No. TR23:6/25/99 with Driving Without No-Fault Insurance, in violation of Hawai'i Revised Statutes (HRS) § 431:10C-104 (Supp. 2000). However, the District Court of the Second Circuit, Wailuku Division (the district court) orally found Defendant "not guilty of that offense" and the district court minutes indicate that the Driving Without No-Fault Insurance charge was dismissed with prejudice.

BACKGROUND

During the prosecution's case at the trial below, Officer Leif Adachi (Officer Adachi) testified that on September 5, 1998, at around 8:15 p.m., he was assigned to police roadblock duty² on Mokulele Highway in the area of the Maui Humane Society Animal Shelter, when he ordered the driver of a white Chevy pick-up truck to pull over to the side of the road. Officer Adachi related that he approached the vehicle and asked the driver, subsequently identified as Defendant, to show proof of license, registration, and insurance. Defendant was able to produce neither his driver's license nor proof of insurance.

With respect to his driver's license, Defendant mentioned that he had been "arrested for DUI and his license was taken away" several months earlier. Defendant also informed Officer Adachi that he had a conditional driving permit, which allowed him "to drive to and from work and in conjunction with his work" and "to and from his home to work and from work." Additionally, Defendant indicated that "he was going to Kihei [Kihei]" because "[h]e had a fight with his girlfriend and was trying to get away from her and was going to Kihei [Kihei] and find a place to sleep."

² At the outset of the trial below, the parties stipulated to the validity of the roadblock.

Plaintiff-Appellee State of Hawai'i (the State) introduced the following documents into evidence, over Defendant's objection that the documents constituted hearsay:

(1) A memorandum signed by Doreen C. Barreras (Barreras), Custodian of Public Records of the County of Maui Department of Finance, Motor Vehicles and Licensing Division (Maui Finance Department), and sealed with the Maui Finance Department embossed seal. In the memorandum, Barreras certified that the listed information that followed had been obtained from the records of the Driver's License Section of the Maui Finance Department. Among the listed information were: Defendant's driver's license and instruction permit number, the date Defendant's license was issued and would expire, the type of license Defendant possessed, Defendant's date of birth, and a notation of Defendant's violation of HRS § 291-4.5 on September 5, 1998. Additionally, the memorandum indicated that "[o]n September 5, 1998 [D]efendant's [driver's license] status was revoked. [The Administrative Driver's License Revocation Office revoked [Defendant's driver's license] for DUI on July 26, 1998 through October 25, 1998. Citation date is within this immediate revocation period."

(2) A computerized printout signed by Rebecca Boteilho, Custodian of Public Records of the Maui Finance Department, and sealed with the Maui Finance Department embossed

seal, that provided information contained in the Maui Finance Department's records regarding the pick-up truck that Defendant was driving on the day he was cited. The printout indicates that the truck was owned by "Tropical Garage Door Serv Inc[.]"

(3) A "Record Card" certified by the Clerk of the district court to be a "full, true and correct copy of the Original" of Defendant's traffic abstract that "has on it that conviction [for which Defendant's license had been suspended], [Defendant's] social security number, and date of birth."

Defendant's defense at trial was the justification defense of choice of evils.³ Two witnesses testified for the defense.

The first defense witness was Chun Mik Kim (Kim), who claimed that Defendant was her "boyfriend for seven years." The essence of Kim's testimony was that she and Defendant "argued plenty" and in prior arguments, she became violent, sometimes

³ HRS § 703-302 (1993) provides, in relevant part:

Choice of evils. (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) Neither the [Penal] Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

hitting Defendant. Kim stated that every time she started getting violent, Defendant would leave, which made her "more mad," and she would usually follow Defendant or try to find him. According to Kim, she and Defendant had argued on the telephone on September 5, 1998, although she could not recall why. Because Defendant hung up on Kim, she called him at his working place again. When Defendant didn't answer the phone, Kim went to Defendant's working place "right away." However, Defendant wasn't there.

Defendant took the witness stand next. He testified that on September 5, 1998, he went to work. According to Defendant, Kim "needs to know where I am all the time." Because he didn't call Kim that day to let her know where he was, she called him, they argued, and he hung up the phone. Defendant stated that Kim had struck him in the past when they had had face-to-face arguments. Therefore, when Kim starts getting violent or angry, he would usually "[t]ry to get away." On the evening in question, he thought Kim "was coming to find" him at the office. As a result, he got in his employer's pickup and headed for Kihei to find a place to sleep. Defendant admitted that he didn't call a taxi or have a friend pick him up. He also admitted that he wasn't driving for a work-related matter when he was stopped at the roadblock, although he claimed he had a job in Kihei the next morning.

In his closing argument, Defendant's counsel argued in relevant part as follows:

Your Honor, the fact is [Defendant] did what, in our society today, we're trying to teach everybody to do. That when things get hot, you get out of there.

Your Honor, he knew she was going to show up. In fact, she did show up that night. He knew that if he waited too long she'd go -- she'd show up.

He decided he was going to go to Kihei [Kihei] and find a place to sleep. The issue is, is the harm that he was trying to avoid greater than his driving with a suspended license?

Understand, your Honor, that his license was only suspended for the purposes of work -- he could drive to and from work. So they allowed -- it was kind of a partial sanction. To and from his place of -- and in conjunction with his work. From his home to his place of work and, your Honor, if he stayed it was potentially harmful to him. It was potentially a criminal act. It was potentially a misdemeanor by his girlfriend if she struck him again as an abuse, and he decides to leave. And now he's being punished for this.

Your Honor, the second defense that we're going to raise to the [c]ourt is that he had a right to drive to and from his home. And the big issue is where is your home?

I would suggest to the [c]ourt that, your Honor, the home is, at least for the purposes of this statute, is where you sleep or reside and that night he was going to sleep or reside in Kihei [Kihei], because he couldn't sleep or reside at the two places he usually sleeps or resides, which is his girlfriend's house or his warehouse.

Following closing arguments, the district court orally ruled as follows:

On the driving after license suspended for [DUI], [Defendant] was -- license was suspended for [DUI]. That was effective July 27, 1998. At that time he was given a conditional permit to drive to and from work. Defense raises the issue as to whether or not there was a choice of evils and he elected the lesser evil.

The [c]ourt -- I don't believe that choice of evil applies in this case, although he may have been afraid of what may be happening, how his girlfriend -- I really don't know how serious that, the hitting or punching was, whether it was just a -- I don't know anything enough about that previous confrontation to know how much of a harm would -- [D]efendant would have suffered as a result.

But, also, I find that, you know, he had alternative means to avoid, even if that injury was of a serious nature, or he anticipated to be of a serious nature, whether or not I believe that he had an alternative way to avoid that injury other than driving, that kind of confrontation other than driving.

And the law was intended, this law, to prohibit any driving activity by the person whose license was revoked pursuant to a DUI.

So, based on that, I believe the choice of evil, I find the choice of evil defense is not applicable to this case and I'm not persuade [sic] that [Defendant's] guilty beyond a reasonable doubt by that issues raised in that choice of evil defense. It does not raise a reasonable doubt in my mind based on that defense.

On the issue of whether he was driving to and from work, he was driving from home. I find that he was not on conditional permit conditions. He was not driving under those conditions also.

So, based on that, I find [Defendant's] guilty of the offense of driving after license suspended for [DUI].

ISSUES ON APPEAL

On appeal, Defendant argues that: (1) there was insufficient evidence to substantiate the trial court's factual finding that Defendant (a) had a prior conviction, (b) was improperly driving with a suspended driver's license, and (c) had notice that he was subject to an enhanced sentence; (2) the district court abused its discretion in allowing the State to introduce Defendant's traffic abstract as evidence of Defendant's prior conviction; and (3) Defendant received ineffective assistance of counsel at trial because his trial counsel did not move for a judgment of acquittal.

DISCUSSION

A. Sufficiency of the Evidence

Defendant was charged with Driving after License Suspended, in violation of HRS § 291-4.5, which provides, in relevant part, as follows:

Driving after license suspended or revoked for driving under the influence of intoxicating liquor; penalties.

(a) No person whose driver's license has been revoked, suspended, or otherwise restricted pursuant to chapter 286 or section 291-4 or 291-7 shall operate a motor vehicle upon the highways of this State either while the person's license remains suspended or revoked or in violation of the restrictions placed on the person's license. The period of suspension or revocation shall commence upon the release of the person from the period of imprisonment imposed pursuant to this section.

(b) Any person convicted of violating this section shall be sentenced as follows:

- (1) For a first offense, or any offense not preceded within a five-year period by a conviction under this section:
 - (A) A term of imprisonment at least three consecutive days but not more than thirty days;
 - (B) A fine not less than \$250 but not more than \$1,000; and
 - (C) License suspension or revocation for an additional year[.]

Defendant contends that the foregoing statute requires the State to prove his prior license suspension, operation of a vehicle in violation of restrictions placed on the license, and operation of a vehicle in violation of the time periods of the restrictions placed on the license. He further contends that there is insufficient evidence to support his conviction because

[p]roof of a prior conviction is an essential element needed to establish a violation of HRS § 291-4.5. The court's decision was based upon the testimony of [Officer Adachi]

and the introduction of three exhibits (over objection) to include information regarding [Defendant's] license, the vehicle registration, and [Defendant's] driver abstract. A traffic abstract is insufficient evidence to establish a prior conviction.

Additionally, the State did not offer specific evidence regarding the terms and conditions of any conditional permit issued to [Defendant]. Although the court found that [Defendant] was not driving pursuant to the conditional permit conditions, there was an insufficient factual foundation. The State has to show proof of the specific restrictions placed upon [Defendant]. The State also had to prove notice to [Defendant]. The State did not do so. Therefore, the court's finding is clearly erroneous and there is insufficient evidence to support conviction.

(Citations omitted.) In other words, Defendant maintains that the district court improperly allowed his traffic abstract into evidence, and absent the abstract, there is insufficient evidence to convict him. For the following reasons, we should disagree with Defendant.

First, Officer Adachi testified that when Defendant, upon being stopped at the police roadblock, was asked to produce a driver's license, Defendant admitted that his license had been taken away due to a DUI arrest "a few months prior." Defendant also admitted that he had a conditional permit to drive to and from work and his residence and for work-related purposes.

Second, this court has previously concluded that a certified copy of a traffic abstract is adequate to prove a prior conviction. In State v. Nishi, 9 Haw. App. 516, 525, 852 P.2d 476, 481 (1993), the defendant asserted, similar to Defendant in this case, that to prove a prior conviction, the State must submit a certified copy of the judgment, as well as testimony

from a probation officer or other credible source identifying the defendant. We disagreed, stating:

The supreme court has not laid down any rule that a prior conviction may be proved only by a certified copy of a judgment. Rather, the Hawai'i Penal Code provides that a "prior conviction may be proved by *any evidence*, including fingerprint records made in connection with arrest, conviction, or imprisonment, that *reasonably satisfies the court* that the defendant was convicted." HRS § 706-666 (1985) (emphases added). The supreme court has stated that "the fact of the defendant's prior conviction must be established by *satisfactory evidence*." The question we must answer is whether a certified copy of a person's traffic abstract is satisfactory evidence to establish his prior No No-Fault Insurance conviction.

In resolving the question, we consider the following factors. First, a judgment of conviction in a circuit court is different from a judgment of conviction in a district court. While a circuit court judgment generally is a one-page document, a district court judgment consists of the clerk's notation on the court's daily calendar containing numerous cases. See Hawai'i Rules of Penal Procedure Rule 32(c)(2).

Second, Hawai'i's statute authorizes the use of traffic abstracts. The Motor Vehicle Safety Responsibility Act, HRS Chapter 287, requires the traffic violations bureau of a district court to furnish upon request a person's certified abstract "relating to all alleged moving violations, as well as any convictions resulting therefrom, arising from the operation of a motor vehicle." HRS § 287-3 (1985).

Third, we take judicial notice of the fact that a person's certified traffic abstract issued by the traffic violations bureau of the District Court of the First Circuit includes not only the person's name, but also the person's driver's license number, which is identical to the person's social security number, and the person's date of birth. We deem that such information contained in the abstract is adequate to connect a defendant with a prior conviction.

Based on the foregoing factors, we conclude that a certified copy of a person's traffic abstract is satisfactory evidence to establish his prior No No-Fault Insurance conviction.

Id. at 526-27, 852 P.2d at 481-82 (brackets and citations omitted).

Third, we can take judicial notice of court records that demonstrate that Defendant was previously convicted of DUI and had his license suspended for a specified period.

Finally, Defendant relied on a choice of evils defense. In doing so, he admitted that he drove without his driver's license while his license was suspended for DUI, in violation of the conditional permit he received as part of his license suspension, but claimed that he had to drive in order to avoid the potential violence that Kim might inflict upon him.

B. Ineffective Assistance of Counsel

Defendant argues that he was deprived of the effective assistance of trial counsel because his trial counsel failed to move for a judgment of acquittal following the close of the State's case. We have previously held, however, that a defense counsel's failure to move for judgment of acquittal as to a charge does not constitute ineffective assistance of counsel where there was sufficient evidence to convict the defendant of the charge and the motion to acquit would not have succeeded anyway. State v. Brantley, 84 Hawai'i 112, 122-23, 929 P.2d 1362, 1372-73 (App. 1996).

Accordingly, we affirm the Judgment entered by the district court on June 25, 1999 that convicted and sentenced

Defendant for Driving After License Suspended, in violation of
HRS § 291-4.5.

DATED: Honolulu, Hawai'i, April 3, 2001.

On the briefs:

Matthew S. Kohm
for defendant-appellant.

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.