

NOT FOR PUBLICATION

NO. 26063

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JOHN A. PANETO, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 03-1-0010(2))

NORMA T. YARA
CLERK APPELLATE COURTS
STATE OF HAWAII

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SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Foley and Fujise, JJ.)

Defendant-Appellant John A. Paneto (Paneto) appeals from the Judgment entered on July 31, 2003 in the Circuit Court of the Second Circuit (circuit court).^{1/}

Pursuant to an incident that occurred on or about March 28, 2002, Paneto was charged with and subsequently pled no contest to:

Count One: Promoting a Dangerous Drug in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 712-1243(1) (1993 & Supp. 2001)^{2/};

^{1/} The Honorable Shackley F. Raffetto presided.

^{2/} Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2001) provides:

§712-1243 Promoting a dangerous drug in the third degree.

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony.

(continued...)

Count Two: Prohibited Acts Related to Drug Paraphernalia in violation of HRS § 329-43.5(a) (1993)^{3/};

Count Three: Driving Without a License in violation of HRS § 286-102 (1993 & Supp. 2001)^{4/};

^{2/}(...continued)

(3) Notwithstanding any law to the contrary, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

^{3/} HRS § 329-43.5(a) (1993) provides:

§329-43.5 Prohibited acts related to drug paraphernalia.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

^{4/} HRS § 286-102 (1993 & Supp. 2001) provides in relevant part:

§286-102 Licensing. (a) No person, except one exempted under section 286-105, one who holds an instruction permit under section 286-110, one who holds a commercial driver's license issued under section 286-239, or a commercial driver's license instruction permit issued under section 286-236, shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles.

(b) A person operating the following category or combination of categories of motor vehicles shall be examined as provided in section 286-108 and duly licensed by the examiner of drivers:

- (1) Motor scooters;
 - (2) Motorcycles and motor scooters;
 - (3) Passenger cars of any gross vehicle weight rating,
- (continued...)

Count Four: No No-Fault Insurance in violation of
HRS § 431:10C-104(a) (Supp. 2004)^{5/};

Count Five: Operation of a Vehicle Without a
Certificate of Inspection in violation of HRS § 286-25
(1993)^{6/}; and

^{4/}(...continued)

- buses designed to transport fifteen or fewer
occupants, and trucks and vans having a gross vehicle
weight rating of fifteen thousand pounds or less; and
(4) All of the motor vehicles in category (3) and trucks
having a gross vehicle weight rating of fifteen
thousand one through twenty-six thousand pounds.

^{5/} HRS § 431:10C-104 (Supp. 2004) provides:

**§431:10C-104 Conditions of operation and registration of
motor vehicles.** (a) Except as provided in section 431:10C-105, no
person shall operate or use a motor vehicle upon any public
street, road, or highway of this State at any time unless such
motor vehicle is insured at all times under a motor vehicle
insurance policy.

(b) Every owner of a motor vehicle used or operated at any
time upon any public street, road, or highway of this State shall
obtain a motor vehicle insurance policy upon such vehicle which
provides the coverage required by this article and shall maintain
the motor vehicle insurance policy at all times for the entire
motor vehicle registration period.

(c) Any person who violates the provisions of this section
shall be subject to the provisions of section 431:10C-117(a).

(d) The provisions of this article shall not apply to any
vehicle owned by or registered in the name of any agency of the
federal government, or to any antique motor vehicle as defined in
section 249-1.

^{6/} HRS § 286-25 (1993) provides:

**HRS §286-25 Operation of a vehicle without a certificate of
inspection.** Whoever operates, permits the operation of, causes to
be operated, or parks any vehicle on a public highway without a
current official certificate of inspection, issued under section
286-26, shall be fined not more than \$100.

Count Six: Driving a Motor Vehicle with Delinquent Tax in violation of HRS § 249-11 (2001).^{2/}

The circuit court sentenced Paneto to five years of imprisonment for each of Counts One and Two, with a mandatory minimum of one year and eight months on Count One; one year of imprisonment for Count Three; and thirty days of imprisonment for Count Four, all terms to run concurrently. The circuit court ordered Paneto to pay a \$2,100.00 fine for Counts Four, Five, and Six; the manner of payment was to be determined by the Director of the Department of Public Safety. The circuit court also suspended Paneto's driver's license for one year.

On appeal, Paneto contends the circuit court erred by (1) failing to sentence him pursuant to HRS § 706-622.5 (Supp. 2003) by concluding that Paneto was excluded from sentencing under that statute based on his prior convictions in another

^{2/} HRS § 249-11 (2001) provides:

HRS § 249-11 Fraudulent use of plates, tags, or emblems and other misdemeanors; penalties. Any person who manufactures, sells, or distributes vehicle number plates, tags, or emblems of a design and size similar to the currently issued series of number plates, tags, or emblems authorized by the director of finance, or who attaches to and uses on any vehicle plates, tags, or emblems not furnished in accordance with sections 249-1 to 249-13 or 286-53, or who fraudulently uses such number plates, tags, or emblems upon any vehicle other than the one for which the number plates, tags, or emblems were issued, or who molests or disturbs any vehicle which has been seized pursuant to sections 249-1 to 249-13, or any person who knowingly uses a motor vehicle, the tax upon which is delinquent, upon public highways of this State, or any director of finance who issues a certificate of registration or number plates, tags, or emblems to any person who has not paid the tax required by sections 249-1 to 249-13, or any person who violates any of the provisions of such sections, shall be fined not more than \$500.

jurisdiction; (2) failing to sentence him under HRS § 706-622.5 when the circuit court considered the factual circumstances of the offense and concluded that Paneto was a drug dealer; (3) issuing a \$2,100.00 fine in Counts Five and Six because the fine exceeded the statutory maximum for those offenses and the circuit court failed to follow HRS § 706-641 (1993)^{2/} to determine if Paneto had the ability to pay and failed to specify the manner of payment of the fine.

Upon careful review of the record and the briefs submitted by the parties, we hold:

^{2/} HRS § 706-641 (1993) provides:

§706-641 Criteria for imposing fines. (1) The court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, except in misdemeanor and petty misdemeanor cases.

(2) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

- (a) The defendant has derived a pecuniary gain from the crime; or
- (b) The court is of the opinion that a fine is specially adapted to the deterrence of the crime involved or to the correction of the defendant.

(3) The court shall not sentence a defendant to pay a fine unless:

- (a) The defendant is or will be able to pay the fine; and
- (b) The fine will not prevent the defendant from making restitution to the victim of the offense.

(4) In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

(1) The circuit court did not err in determining Paneto was ineligible for sentencing under HRS § 706-622.5^{2/} because Paneto had a prior felony conviction in California and

defendants with prior felony convictions of drug offenses are disqualified from sentencing pursuant to HRS § 706-622.5, as presently written, even if the convictions occurred in other jurisdictions and therefore not "under part IV of [HRS] chapter 712," so long as the offenses would implicate part IV of HRS chapter 712 if committed in Hawai'i.

^{2/} HRS § 706-622.5 (Supp. 2003) provides in relevant part:

§706-622.5 Sentencing for first-time drug offenders; expungement. (1) Notwithstanding any penalty or sentencing provision under part IV of chapter 712, a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5, who is nonviolent, as determined by the court after reviewing the:

- (a) Criminal history of the defendant;
- (b) Factual circumstances of the offense for which the defendant is being sentenced; and
- (c) Other information deemed relevant by the court;

shall be sentenced in accordance with subsection (2); provided that the person does not have a conviction for any violent felony for five years immediately preceding the date of the commission of the offense for which the defendant is being sentenced.

(2) A person eligible under subsection (1) shall be sentenced to probation to undergo and complete a drug treatment program. If the person fails to complete the drug treatment program and if no other suitable treatment is amenable to the offender, the person shall be returned to court and subject to sentencing under the applicable section under this part. As a condition of probation under this subsection, the court shall require an assessment as to the treatment needs of the defendant, conducted by a person certified by the department of health to conduct the assessments. The drug treatment program for the defendant shall be based upon the assessment. The court may require the person to contribute to the cost of the drug treatment program.

State v. Haugen, 104 Hawai'i 71, 73, 85 P.3d 178, 180 (2004) (emphasis added). Paneto's prior convictions, if committed in Hawai'i, would be in violation of part IV of HRS Chapter 712.

(2) The circuit court did not err in imposing the \$2,100.00 fine without going through the inquiry of HRS § 706-641 because HRS § 706-641(3)(a) and (b) and (4) is inapplicable to HRS § 431:10C-104 under State v. Gray, 77 Hawai'i 476, 478, 888 P.2d 376, 379 (App. 1995), overruled in part by State v. Bolosan, 78 Hawai'i 86, 890 P.2d 673 (1995). Additionally, the penalties for committing the offenses of operating a vehicle without a current safety inspection in violation of HRS § 286-25 and driving a vehicle with delinquent tax in violation of HRS § 249-11 do not include imprisonment. Therefore, the offenses are not criminal in nature, and HRS § 706-641 is inapplicable to these statutes.

(3) The circuit court did not err in imposing a fine of \$2,100.00. Paneto contends the statutory maximum for Counts Five and Six would be a total of \$600.00. However, the Judgment indicates the fine is for Counts Four (\$1,500.00 fine), Five (\$100.00 fine), and Six (\$500.00 fine) that, when added together, equal a \$2,100.00 fine. Hawaii Revised Statutes § 431:10C-117 (Supp. 2004) defines the penalty for HRS § 431:10C-104(a) (Count Four, No No-Fault Insurance) and states in relevant part:

§431:10C-117 Penalties.

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[(a) (2)] (B) If the person is convicted of not having had a motor vehicle insurance policy in effect at the time the citation was issued, the fine shall be \$500 for the first offense and a minimum of \$1,500 for each subsequent offense that occurs within a five-year period from any prior offense[.]

(Emphasis added.)

The circuit court was required under the statute to impose at least a \$1,500.00 fine for Count Four because the fine was "unconditionally mandatory" since it was Paneto's second offense^{10/} within five years.

Therefore,

IT IS HEREBY ORDERED that the Judgment entered on July 31, 2003 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 24, 2005.

On the briefs:

John M. Tonaki,
Deputy Public Defender,
for defendant-appellant.

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.


Chief Judge


Associate Judge


Associate Judge

^{10/} Paneto was stopped on November 8, 2001 and charged with, among other things, No No-Fault Insurance. On March 21, 2003, he was given 75 hours of community service and a three-month license suspension. The administrative fee/CIC fee/Driver Education fund assessment was waived for the No No-Fault charge. Paneto was also sentenced to twelve days of jail for not having a driver's license.