

NO. 23092

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

PAUL J. CUNNEY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CASE NO. 128 OF 12/3/99)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ.
and Acoba, J., Dissenting)

Defendant-appellant Paul J. Cunney (Cunney) appeals from the November 9, 1999 judgment of guilty conviction and sentence, issued by the district court of the first circuit, the Honorable James Dannenberg presiding, entered after Cunney's conditional plea of no contest to driving under the influence (DUI), in violation of Hawai'i Revised Statutes (HRS) § 291-4 (Supp. 1999).¹ On appeal, Cunney argues that: (1) the district court abused its discretion in failing to recuse itself from the case, and (2) the district court erred when it took judicial notice of Cunney's status as an attorney licensed to practice in Hawai'i, specializing in DUI defense.

¹ HRS § 291-4 provides in relevant part that:

- (a) A person commits the offense of driving under the influence of intoxicating liquor if:
- (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
 - (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.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the district court was not required to recuse itself pursuant to HRS § 601-7 (1993)² because the alleged bias was not of a "personal" nature; (2) there was no appearance of impropriety, as set forth by this court in State v. Ross, 89 Hawai'i 371, 974 P.2d 11 (1998), that required recusal, and (3) this court cannot address Cunney's other points of error because he failed to reserve the right to appeal these issues pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 11(a)(2).³ Therefore,

² HRS § 601-7 (1993) governs the disqualification of judges in Hawai'i. HRS § 601-7 provides:

Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice. (a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decisions or judgment rendered by the judge.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

³ HRPP Rule 11(a)(2) provides in relevant part that:

(2) Conditional Pleas. With the approval of the court and the

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 23, 2002.

On the briefs:

Timothy I. Mac Master,
for defendant-appellant

Donn Fudo, Deputy
Prosecuting Attorney,
for plaintiff-appellee

consent of the State, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.