

NO. 27813

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

STATE OF HAWAI'I, Plaintiff-Appellee,

v.

PAUL THURSTON, Defendant-Appellant

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LEONARDO
INTERMEDIATE COURT
OF THE STATE OF HAWAII

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NOS. 05-1-1270, 05-1-1389, 05-1-1546)

MEMORANDUM OPINION

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

Defendant-Appellant Paul Thurston (Thurston) appeals from the February 16, 2006 Judgment of Conviction and Sentence entered in each of three cases in the Circuit Court of the First Circuit.¹ We affirm.

On November 7, 2005, Thurston pled guilty to various charges including the following: (1) in Cr. No. 05-1-1546, for Operating a Vehicle after License and Privilege Have Been Suspended or Revoked For Operating a Vehicle Under the Influence of an Intoxicant, Hawaii Revised Statutes (HRS) § 291E-62(a)(1) & (2) (Supp. 2006), on May 14, 2005; (2) in Cr. No. 05-1-1270, for Operating a Vehicle After License and Privilege Have Been Suspended or Revoked For Operating a Vehicle Under the Influence of an Intoxicant, HRS § 291E-62(a)(2), on May 16, 2005; and (3)

¹

The Honorable Rhonda A. Nishimura presided.

in Cr. 05-1-1389, for Operating a Vehicle After License and Privilege Have Been Suspended or Revoked for Operating a Vehicle Under the Influence of an Intoxicant, HRS § 291E-62(a)(2), on May 21, 2005.

HRS § 291E-62 (Supp. 2006) states, in relevant part:

Operating a vehicle after license and privilege have been suspended or revoked for operating a vehicle under the influence of an intoxicant. (a) No person whose license and privilege to operate a vehicle have been revoked, suspended, or otherwise restricted pursuant to this section . . . , shall operate or assume actual physical control of any vehicle:

- (1) In violation of any restrictions placed on the person's license; or
- (2) While the person's license or privilege to operate a vehicle remains suspended or revoked.
- (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 conviction for an offense under this section . . . :
 - (A) A term of imprisonment of not less than three consecutive days but not more than thirty days;
 - (B) A fine of not less than \$250 but not more than \$1,000; and
 - (C) Revocation of license and privilege to operate a vehicle for an additional year;
 - (2) For an offense that occurs within five years of a prior conviction for an offense under this section . . . :
 - (A) Thirty days imprisonment;
 - (B) A \$1,000 fine; and
 - (C) Revocation of license and privilege to operate a vehicle for an additional two years; and
 - (3) For an offense that occurs within five years of two or more prior convictions for offenses under this section . . . :
 - (A) One year imprisonment;
 - (B) A \$2,000 fine; and
 - (C) Permanent revocation of the person's license and privilege to operate a vehicle.

For the violation of HRS § 291E-62(a), each of the three judgments sentenced Thurston to (1) 365 days incarceration, suspended 200 days^{2/}, and gave credit for time served; (2)

^{2/} The question whether Hawaii Revised Statutes § 291E-62 (Supp. 2006) permits this 200-day suspension of incarceration is not an issue in this appeal.

permanently revoked Thurston's driver's license; and (3) ordered Thurston to pay (a) a fine of \$2,000.00 and (b) a Crime Victim Compensation Fee of \$55.00. The incarcerations were ordered to run concurrently with each other and with any other incarcerations Thurston is serving. Mittimus was stayed pending filing of a notice of appeal. On March 13, 2006, Thurston filed the notices of appeal. On March 20, 2006, the court entered orders staying the sentences pending appeal, subject to terms and conditions.

Thurston did not cause the transcripts of the sentencing hearing to be a part of the record on appeal. His counsel states in the opening brief that:³

defense counsel did not order the sentencing hearing transcripts given the fact that the arguments advanced to the Court were contained in the sentencing memorandum and the Court conducted at least two pretrial hearings in chambers going over the various points raised by the sentencing memorandum, such that at sentencing, [Thurston's] counsel incorporated his sentencing memorandum as part of [Thurston's] position at sentencing[.]

Thurston does not contend that one or more of the three HRS § 291E-62(a) offenses did not occur within five years of two or more prior convictions for offenses under HRS § 291E-62(a).

³ The citation of the court's minutes in the reply brief filed by Defendant-Appellant Paul Thurston (Thurston) violates court rules because the cited minutes are not a part of the record on appeal and cannot be mentioned when arguing or deciding this appeal. Webb v. Harvey, 103 Haw. 63, 79 P.3d 681 (App. 2003). Hawai'i Rules of Appellate Procedure Rule 10(a) (2006) lists what is in the record on appeal, and the minutes prepared by the court clerk may or may not be included within that list. In this case, the minutes prepared by the court clerk are not included within that list. In this case, this rule violation is harmless because Thurston cited the minutes to show that Thurston submitted a sentencing memorandum and the State did not and the record proves these facts.

In his sentencing memorandum filed on December 12, 2005, Thurston argued:

1. That given the gradation and present grammatical format of the penalties of *HRS, § 291E-62(a)(2) & (b)(3)* that the Court may sentence a defendant to a term of imprisonment OR the Court may impose a fine and a license revocation, but [not] both; and

2. That the revocation of license in *sub-section (b)(3)* is vague and ambiguous, in that it does not provide for any length of time with respect to the revocation, rather, it simply says "permanent", as opposed to "lifetime".

. . . .

Subsection (b)(3) . . . simply says one year imprisonment. The words "without possibility of probation or suspension of sentence" are noticeably absent. See, comparable language in the operating a motor vehicle while under the influence of an intoxicant in *HRS, § 291E-61*. Accordingly, this Court is free to impose any sentence that it may wish to follow. By that, it is meant that the Court has full discretion to sentence in accordance with *Chapter 706* of the *Hawaii Penal Code*, namely, suspension of sentence, some jail, terms and conditions of probation, etc.

In the opening brief, Thurston argues:

Regarding the . . . sentence of 365 days incarceration with a suspension of 200 days and credit for time served, [Thurston] recognizes that the Court exercised its inherent discretion set forth in *Chapter 706* of the *Hawaii Revised Statutes* on disposition of defendants in that the Court suspended 200 days of confinement and the Court allowed credit for time served where none of this language appears in the statutory provision of *HRS, § 291E-62(b)(3)*. However, because of the absence of legislative guidance and no previous Appellate Court decisions as to the discretionary powers of the Court, the Court felt that it could only exercise its discretion to a certain point whereas in [Thurston's] sentencing memorandum he pointed out that the whole range of sentencing options in *Chapter 706, HRS*, was available to the Court. The point being that even though the Court exercised its discretion, it did not do so as much as it probably could have had the Court had guidance.

With respect to the next portion of the sentence of permanent revocation of license, this portion of judgment tracks the statutory language verbatim. Unfortunately, there is no *temporal* disposition with respect to the "permanent" revocation of license. In other words, does permanent mean for *lifetime* or does it mean permanent *revocation* as opposed to a *suspension* of license? In its present form, the judgment of conviction and statutory language in *HRS, § 291E-62(b)(3)* is vague and ambiguous regarding the duration of the permanent revocation of license. In short, it is an illegal sentence.

We will, for purposes of this appeal, assume the validity of the alleged factual basis supporting Thurston's argument that

because of the absence of legislative guidance and no previous Appellate Court decisions as to the discretionary powers of the Court, the Court felt that it could only exercise its discretion to a certain point whereas in [Thurston's] sentencing memorandum he pointed out that the whole range of sentencing options in *Chapter 706, HRS*, was available to the Court. The point being that even though the Court exercised its discretion, it did not do so as much as it probably could have had the Court had guidance.

Did the circuit court have "full discretion to sentence in accordance with *Chapter 706* of the *Hawaii Penal Code*, namely, suspension of sentence, some jail, terms and conditions of probation, etc. [?]" The answer is no.

Are the judgments of conviction and the language of HRS § 291E-62(b)(3) vague and ambiguous regarding the duration of the permanent revocation of license? The answer is no. As noted by the State, HRS § 1-14 (1993) provides:

Words have usual meaning. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.

We agree with the State that the phrase "permanent revocation" "is exactly what it states."

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

Accordingly, we affirm the February 16, 2006 Judgment of Conviction and Sentence entered in Cr. No. 05-1-1270, Cr. No. 05-1-1389, and Cr. No. 05-1-1546.

DATED: Honolulu, Hawai'i, March 2, 2007.

On the briefs:

Christopher R. Evans
for Defendant-Appellant

Anne K. Clarkin,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge