NO. 23498

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

ANTHONY DALE TAVARES, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT[1]
(TRAFFIC NO. 99-328948)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, and Acoba, JJ.;
and Nakayama, J. Dissenting, With Whom Ramil, J. Joins)

On September 21, 1999, Defendant-Appellant Anthony Dale Tavares (Defendant) was arrested for driving under the influence of intoxicating liquor (DUI), Hawai‘i Revised Statutes (HRS) § 291-4 (Supp. 2000).[2] Subsequently, the arresting officer read

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[1] The district court judge in this case was the Honorable James Dannenberg.

[2] HRS § 291-4 provides, in pertinent part, as follows:

> **Driving under the influence of intoxicating liquor.**
> (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.

Defendant was also charged with various other traffic violations. This appeal concerns only his conviction under HRS § 291-4.

to Defendant Honolulu Police Department (HPD) form 396B entitled, "ADMINISTRATIVE DRIVER'S LICENSE REVOCATION LAW[,]" which provided in pertinent part as follows:

> I READ THE FOLLOWING TO THE ARRESTEE: Pursuant to the Administrative Driver's License Revocation Law, I must inform you (arrestee) of the following:
> A. That you make take either a blood test or a breath test or both;
> B. That if you refuse to take any [blood alcohol concentration (BAC)] tests the consequences are as follows:
> 1. If your driving record shows no prior alcohol enforcement contacts during the five years preceding the date of your arrest, your driving privileges will be revoked for one year instead of the three month revocation that would apply if you chose to take a test and failed it[.]
> . . . .

Defendant chose to take a breath test.

On September 27, 1999, Defendant was given an administrative three-month license suspension by the Administrative Drivers License Revocation Office (ADLRO). On November 4, 1999, however, the administrative revocation was rescinded because "[t]he [administrative] hearing was not set within 25 days pursuant to statute."

I.

On October 28, 1999, this court issued State v. Wilson, 92 Hawai'i 45, 987 P.2d 268 (1999), which deemed the advice imparted in HPD form 396B to be faulty and required suppression of any incriminating test result that was obtained following such advice.

On April 5, 2000, Defendant moved to suppress his BAC test result based on Wilson. On April 20, 2000, prior to the hearing on Defendant's motion to suppress, Plaintiff-Appellee State of Hawai'i (the prosecution) filed a memorandum in opposition to the motion. After hearing arguments, the court denied Defendant's motion to suppress, found Defendant guilty under HRS § 291-4(a)(2), and entered judgment thereon.

On May 19, 2000, Defendant filed a notice of appeal.

On June 9, 2000, the court filed written findings of fact, conclusions of law, and an order denying Defendant's motion to suppress. In conclusion No. 3, the court ruled that "Defendant was not misled as to the administrative consequences on his driver's license by consenting to the breath test because the ADLRO ultimately did not impose any administrative suspension of his license."

II.

Defendant contends that the court erred in denying his motion to suppress based on Wilson. The prosecution argues that the court was correct in concluding that Wilson did not apply to Defendant on the ground that the warning given accurately stated the length of the revocation period Defendant received.

We conclude that the court erred in denying Defendant's motion to suppress on the ground that "ultimately" no

administrative suspension took place. The test result was utilized to prove the parallel criminal charge of DUI. Thus, the fact that the test result became a moot matter in the administrative proceeding did not resolve the question of its proper use in Defendant's criminal case:

> [T]he administrative driver's license revocation process under HRS chapter 286 is materially and inextricably related to a criminal prosecution for DUI under HRS § 291-4. . . . [T]he administrative revocation statute and its criminal DUI counterpart are part and parcel of the same statutory scheme to prevent and address drunk driving.
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> . . . It cannot be the intent of the implied consent statute to allow a blood sample to be taken in violation of its terms, to suppress it in the driver's administrative revocation proceeding as being violative of the law, and then to allow its admission in the driver's corresponding criminal DUI prosecution because there was no infirmity in its acquisition. Thus, . . . the arresting officer's failure to inform Wilson of the applicable statutory penalties upon arrest is unquestionably relevant to Wilson's criminal DUI prosecution.

Wilson, 92 Hawai'i at 52, 987 P.2d at 275 (citations omitted). Because "the arresting officer's violation of HRS chapter 286's consent requirement precludes admissibility of Wilson's blood results in his related criminal DUI proceeding," id. at 53-54, 987 P.2d at 276-77, the infirmity of the arresting officer's advice precludes the use of the test result in the criminal case.

III.

With respect to the prosecution's argument, this court ruled in State v. Garcia, No. 23513, slip op. (Haw. Aug. 10, 2001), that "[e]ven if a defendant's ultimate revocation period did not exceed three months, the sanction ultimately imposed

after taking the test has nothing to do with the defendant's right to be properly advised so as to enable the defendant to make an informed decision." Garcia, slip op. at 18 n.7. The fact, then, that a revocation period in excess of three months was not imposed was not determinative of whether the test result could be utilized. Therefore,

IT IS HEREBY ORDERED that the court's June 9, 2000 findings of fact, conclusions of law, and order denying Defendant's motion to suppress and its April 20, 2000 sentence and judgment are vacated and the case is remanded for proceedings in accordance with this order.

DATED: Honolulu, Hawai'i, August 27, 2001.

On the briefs:

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defendant-appellant.

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