

NOT FOR PUBLICATION

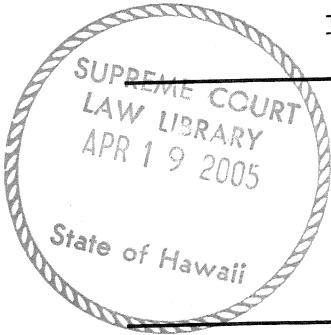
NO. 26343

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant

vs.

FRED DOUGLAS ZERK, Defendant-Appellee



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STATE OF HAWAII
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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD TRAFFIC NOS. 001452897 & 001452899)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Duffy, JJ.;
and Acoba, J., Dissenting in Part and
Concurring in Part, With Whom Nakayama, J., Joins)

By its January 14, 2004 notice, Plaintiff-Appellant State of Hawai'i (the prosecution) appeals from the December 18, 2003 "Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss" of the district court of the first circuit (the court)¹ dismissing, without prejudice, Count II of the September 12, 2002 indictment charging Defendant-Appellee Fred Douglas Zerk (Defendant) with Count I, habitually driving under the influence of intoxicating liquor or drugs (habitual DUI), Hawai'i Revised Statutes (HRS) §§ 291-4.4(a)(1) (Supp. 2000); Count II, driving after license suspended or revoked for driving under the influence of intoxicating liquor (suspended license for DUI), (HRS) § 291-4.5 (Supp. 2000); and Count III, driving without no-fault insurance, HRS § 431:10C-104 (no no-

¹ The Honorable Clarence A. Pacarro presided.

fault).² On appeal the prosecution argues, inter alia, that "the trial court abused its discretion when it dismissed the indictment as the [prosecution] properly charged Defendant under the statute that was in effect at the time Defendant committed the offense" and "assuming arguendo, that the indictment incorrectly cited to HRS § 291-4.5, the dismissal of the indictment was improper as such alleged error was a 'formal defect' that did not mislead Defendant to his prejudice." State v. Young, No. 25610, slip op. at 3-4 (Mar. 30, 2005), held that HRS § 291-4.5 (2003 & Supp. 2000) was substantially re-enacted in HRS § 291E-62 (Supp. 2004) and is dispositive of Count II.³

Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

² On October 25, 2002, the circuit court of the first circuit dismissed the habitually driving under the influence offense charged in Count I. Count I is not a subject of this appeal.

³ Defendant's arguments that (1) "prosecution is barred by the general rule prohibiting post-repeal prosecutions," (2) "prosecution is barred by the plain meaning of Act 189's repeal of HRS § 291-4.5," and (3) "prosecution is barred because HRS § 291E-62 is not a 'substantial re-enactment' of HRS § 291-4.5" are addressed or subsumed in the analyses of the majority and dissenting opinions in Young. Defendant further argues that "[u]nder the 'rule of lenity,' an ambiguity, if any, attendant to the Legislature's repeal of HRS § 291-4.5 should be resolved in [Defendant's] favor." However, no ambiguity is discerned in the repeal of HRS § 291-4.5.

IT IS HEREBY ORDERED that the court's order with respect to Count II is vacated, along with Count III,⁴ and the case remanded to the court in accordance with the order.

DATED: Honolulu, Hawai'i, April 18, 2005.

On the briefs:

Mark Yuen, Deputy Prosecuting Attorney, City & County of Honolulu, for plaintiff-appellant.

R. Patrick McPherson (Law Office of Paul J. Cunney), for defendant-appellee.



Samuel E. Duggan, Jr.

⁴ Apparently the court did not specifically rule as to Count III, but dismissed the indictment in its entirety. Therefore, the court's December 18, 2003 order, insofar as it pertains to Count III, is also vacated.