IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

PETER NEWAL MAHARAJ, Petitioner/Defendant-Appellant.

SCWC-29520

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29520; HPD Traffic NO. 1DTA-08-03393)

November 18, 2013

ACOBA, McKENNA, AND POLLACK, JJ., WITH RECKTENWALD, C.J., DISSENTING, WITH WHOM NAKAYAMA, J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that the charge for Operating a Vehicle Under the Influence of an Intoxicant, (OVUII), HRS § 261E-61(a)(1) (2007) was insufficient because Respondent/Plaintiff-Appellee the State of Hawaiʻi (the State) failed to allege the requisite states of mind of intentional, knowing, or reckless in the

charge, State v. Apollonio, --- P.3d ----, 2013 WL 5574921, at *5 (Haw. Oct. 10, 2013); see also State v. Nesmith, 127 Hawaiʻi 48, 54, 276 P.3d 617, 623 (2012)[1], and because the charge failed to allege an "essential fact[] constituting the offense charged." Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(d). Accordingly, the conviction of Petitioner/Defendant-Appellant Peter Newal Maharaj (Defendant) is dismissed without prejudice. The November 23, 2012 judgment of the Intermediate Court of Appeals (ICA),[2] filed pursuant to its October 25, 2012 Summary Disposition Order (SDO), having been to the contrary in affirming Defendant's conviction, as well as the November 18, 2008 Judgment of conviction of the District Court of the First Circuit (the court)[3] are therefore vacated.

I.

A.

According to Defendant, he "was orally charged on April 10, 2008 with Operating a Vehicle Under the Influence of an Intoxicant, (OVUII), Hawaiʻi Revised Statutes (HRS) §§ 291E-61(a)(1)[4] & (b)(1)[5] (2007)."[6] Defendant states the "oral charge

[1] Nesmith held that a charge alleging a violation HRS § 291E-61(a)(1) was insufficient for failing to state the requisite mens rea. Nesmith, 127 Hawaiʻi at 53, 276 P.3d at 622.

[2] The SDO was filed by Chief Judge Craig H. Nakamura, and Associate Judges Daniel R. Foley and Katherine G. Leonard

[3] The Honorable William A. Cardwell presided.

[4] HRS § 291E-61(a)(1), OVUII, states that "A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes physical control of a vehicle [w]hile under the influence of alcohol in an amount sufficient to impair the person's normal

was reduced to an Order and Notice of Entry of Order [(Order)] on that same date." He maintains "the [Order] does not clearly state in writing the specific allegations of the charge against [Defendant]" and "does not allege the relevant mens rea as there is no reference to an intentional, knowing or reckless state of mind in the charge." Thus, Defendant points out, "the Order merely states that the violation charged is HRS [§] 291E-61[.]" A "Notice of Entry of Judgment and/or Order and Plea/Judgment [(Judgment)] was entered against [Defendant] on November 18, 2008."

B.

Defendant appealed to the ICA on December 11, 2008. On appeal, Defendant argued that "(1) he received ineffective assistance of counsel because his trial counsel failed to introduce [his] medical records into evidence; (2) there was insufficient evidence to support [Defendant's] conviction; and (3) [the court] erred in denying [Defendant's] motion to suppress evidence." State v. Maharaj, No. 29520, 2012 WL 5272227 (Hawaiʻi

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mental faculties or ability to care for the person and guard against casualty[.]"

[5] HRS § 291E-61(b)(1) states that "A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced without possibility of probation or suspension of sentence ... [f]or the first offence, or any offence not preceded within a five-year period by a conviction for an offence under this section or section 291E-4(a)."

[6] In its Answering Brief the State indicates Defendant, "may have been charged with HRS § 291E-61(a)(3) (breath alcohol greater than 0.08)" but "no breath alcohol measurement was taken."

App. Oct. 25, 2012) (SDO).[7] The transcript of the second part of Defendant's trial was made a part of the record on appeal. However, the ICA noted that "[t]he transcript for the September 29, 2008, hearing on the motion to suppress evidence and the beginning of trial was not made part of the record on appeal." Maharaj, 2012 WL 5272227 at *1. The ICA affirmed the court's judgment on October 25, 2012.

This court filed the decision in Nesmith on April 12, 2012.

Defendant filed a Motion for Reconsideration with the ICA on November 5, 2012, arguing that the charge against him was jurisdictionally defective since it did not "allege the requisite mens rea. . . ." (Citing Nesmith, 127 Hawaiʻi 48, 276 P.3d 617.) In this motion, Defendant contended that the charge was "facially defective" and that the court "lacked subject matter jurisdiction," which was "not waivable." The State did not file a response to Defendant's reconsideration motion contesting Defendant's recitation of the contents of the charge. Nevertheless, the ICA denied Defendant's Motion for Reconsideration on November 14, 2012, citing its decision in State v. Rivera, No. CAAP-11-0000774, 2012 WL 4344185 at *1 (App. Sept. 24, 2012) (SDO). State v. Maharaj, No. 29520, 2102 WL 5272227 at *1 (App. Nov. 14, 2012) (SDO).

[7] Petitioner does not raise any of these points in his Application and so we do not consider them.

In Rivera, the ICA held in pertinent part, "the supreme court's decision in [Nesmith] raises, but does not clearly answer, the question of whether a deficiency in a charge for failing to allege the requisite mens rea is a jurisdictional defect." (Quoting Rivera, 2012 WL 4344185 at *2.) The ICA adopted what it construed as the concurring and dissenting opinion's reading of the majority opinion in Nesmith,

> [i]n Nesmith, the concurring and dissenting opinion by Justice Acoba reads the majority opinion as concluding 'that a state of mind is a 'fact' that must be included in an HRS § 291-E-61(a)(1) charge for due process purposes only, but not an element of HRS § 291E-61(a)(1) that must be included in a charge for purposes of jurisdiction.' Although the Nesmith majority opinion does not state this distinction between the sufficiency of a charge for due process purposes and for jurisdictional purposes in unmistakable terms, pending further clarification, we adopt Justice Acoba's reading of the majority's opinion.

Id. (quoting Nesmith, 127 Hawaiʻi at 66, 276 P.3d at 635 (Acoba, J., concurring and dissenting) (brackets omitted)). In Rivera, the ICA concluded that the State's failure to allege the mens rea was not a jurisdictional defect and because the said "defect" was not previously raised by Defendant, it was waived by Defendant.

> Under this reading, the failure to allege a mens rea in the charge of OVUII with priors against Rivera would not constitute a jurisdictional defect in the charge. We therefore conclude that Rivera waived any challenge to the sufficiency of the charge for failure to allege a mens rea by not objecting on this basis in the Circuit Court and by not asserting this claim on appeal.

Id. (emphasis added). Accordingly, the ICA in Rivera affirmed the defendant's conviction of the charge of OVUII. Relying on Rivera, the ICA denied Defendant's Motion for Reconsideration, apparently because it believed any challenge to the sufficiency of the charge by Defendant was waived. In doing so, the ICA

stated in a single sentence that the motion was denied and cited Rivera.

III.

In his Application, Defendant asks whether "the failure to allege a mens rea in charging the offense of OVUII . . . HRS section 291E-61(a)(1) renders the charge jurisdictionally defective?" No response was filed by the State.

IV.

As noted, a transcript of the first part of trial, which presumably included the reading of the charge, was not in the record. Thus, Defendant in his application cited to the Notice of Entry of Order and the Notice of Judgment in order to establish the specific charges herein. The docket entry indicates Defendant was charged with HRS § 291E-61(a)(1) and (b)(1).[8] None of the parties or the ICA indicated that Defendant raised an objection to the lack of a mens rea allegation in the charge at the beginning of the trial. Defendant's objection to jurisdiction apparently was raised for the first time in the Motion for Reconsideration itself.

On May 2, 2013 we ordered the record on appeal be supplemented with the April 10, 2008 transcript containing the oral charge. The point of error that Defendant raised in his

[8] The docket entries state as follows:

04/10/2008	Oral Motion Entered by the State to specify charge as HRS 291E-61(a)(1), (b)(1).
04/10/2008	Oral Order Motion Granted
04/10/2008	Order & Notice of Entry of Ord

Motion for Reconsideration before the ICA and raised on appeal to this court was only apparent after this court's decision in Nesmith. Inasmuch as the ICA ruled on the applicability of Nesmith to Defendant's case, the record may be supplemented to determine the correctness of that decision. This is true even if there may have been no error under the applicable law at the time of the original appeal to the ICA, prior to this court's decision in Nesmith. See Henderson v. United States, 133 S.Ct. 1121 (2013) (holding that "we conclude that whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be 'plain' at the time of appellate consideration . . . .'").

However, on June 8, 2013, the court filed a letter indicating that "research was conducted, and we were unable to locate the CD recording for the court date of April 10, 2008 as you had requested." Accordingly, a transcript of the charge is not available. Nevertheless, before the ICA and on certiorari none of the parties indicate the state of mind was alleged by the State in the OVUII charge, and the ICA proceeded to decide the reconsideration motion without a transcript of the charge. Accordingly, we proceed to the merits of the Application.

V.

Defendant maintains that the omission of the state of mind in the charge was a jurisdictional defect and "[w]hether a court possesses subject matter jurisdiction is a question of law

reviewable de novo." (Quoting Hawaiʻi Mgmt. Alliance Ass'n v. Ins. Comm'r, 106 Hawaiʻi 21, 26, 100 P.3d 952, 957 (2004).) Consequently, he argues "if the parties do not raise the issue, a court sua sponte will, for unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid." (Quoting Chun v. Employees' Ret. Sys. of the State of Hawaiʻi, 73 Hawaiʻi 9, 14, 828 P.2d 260, 263 (1992).)

A.

Apparently disagreeing with the ICA's denial of reconsideration, Defendant states that this court "has held that a charge of [OVUII] under [HRS §] 291E-61(a)(1) that does not allege the requisite mens rea and/or does not allege in writing a plain, concise and definite statement of essential facts constituting the offense is fatally defective." Referring to the relevant statutory provisions, he declares, "(1) [t]here is no state of mind specified within HRS [§] 291E-61(a)(1) itself, (2) as such, HRS [§] 702-204 applies, and states in relevant part, 'When the state of mind required to establish an element of an offense is not specified by law, that element is established if, with respect thereto, a person acts intentionally, knowingly or recklessly.'" (citing HRS § 702-204); and that (3) "a state of mind with which the defendant acts applies to all elements of the offense, unless otherwise specified in the statute defining the offense[.]" (Quoting State v. Vliet, 95 Hawaiʻi 94, 99, 19 P.3d 42, 47 (2001)(citations omitted).) (Citing HRS § 702-206 (1993).)

B.

Defendant additionally states, "[p]er Nesmith . . . 'the [HRS § 291E-61(a)(1)] charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged.'" (Quoting HRPP Rule 7(d) (2009)). "'A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process.'" (Quoting State v. Mita, 124 Hawaiʻi 385, 390, 245 P.3d 458, 463 (2010).)

Defendant reads Nesmith as holding "that a charge alleging a violation of HRS [§] 291E-61(a)(1) that omits the statutorily incorporated culpable states of mind from HRS [§] 702-204 is not readily comprehensible to persons of common understanding and, as such, a charge omitting the allegation of mens rea is deficient for failing to provide fair notice to the accused." Additionally, "there was never even a plain, concise and definite written statement of the essential facts constituting the offense charged provided to [Defendant] in violation of HRPP [Rules] 7(a) and (d)[.]"

He asserts that because "the essential facts of the OVUII charge against [Defendant] under HRS [§] 261E-61(a)(1) were not provided to [Defendant] and the charge did not allege the requisite mens rea, the charge is fatally defective[.]" In Defendant's view, "[t]he Nesmith [c]ourt clearly held that a

deficiency in a charge for failing to allege the requisite mens rea is a jurisdictional defect."

VI.

A.

In this case, Defendant challenged the sufficiency of the oral charge for the first time on appeal. Therefore, pursuant to State v. Motta, the indictment will be dismissed if "the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983). In the instant case, the oral charge omitted the requisite state of mind. Therefore, based on precedent, the oral charge cannot within reason be construed to charge a crime. State v. Elliot, 77 Hawaiʻi 309, 313, 884 P.2d 372, 376 (1994) (applying the liberal construction standard and holding that "the requisite state of mind was omitted from the charge" and therefore the court "perceive[d] no way . . . [to] reasonably construe [the indictment] to charge resisting arrest or any included offense"). Thus, the charge is "fatally defective." Id.

In Nesmith, the majority cited Elliot with approval. The Nesmith majority acknowledged that "[i]n Elliott, the Defendant challenged the sufficiency of this oral charge for the first time on appeal." 127 Hawaiʻi at 56, 276 P.3d at 625. Nesmith then drew an analogy to Elliot involving an objection to the lack of a state of mind allegation. The majority stated that

"[l]ike Elliott, in this case, the intentional, knowing, or reckless" state of mind requirements . . . needed to be charged . . . to alert the defendants of precisely what they needed to defend against to avoid a conviction." Id. (emphasis added). The concurring and dissenting opinion in Nesmith also cited Elliot with approval, noting that Elliot demonstrates that the requisite state of mind "must be alleged in a charge." Id. at 64, 276 P.3d at 633 (Acoba, J., concurring and dissenting).

Recently, in Apollonio, this court again held that a charge that fails to allege the requisite state of mind is defective, even if the defendant challenges the sufficiency of the charge for the first time on appeal. 2013 WL 5574921 at *5. Apollonio re-affirmed the "core principle" that "[a] charge that fails to charge a requisite state of mind cannot be construed reasonable to state an offense and thus the charge is dismissed without prejudice because it violates due process." Id. at *5.

Even after trial began in this case Defendant was not informed of the "state of mind requirements" of the charges against him due to the defective charge. Nesmith, 127 Hawaiʻi at 56, 276 P.3d at 625 (majority opinion). The failure to inform Defendant persisted to the end of trial due to the defective charge. In the absence of the requisite state of mind, the charge cannot within reason be construed to charge a crime. Apollonio, 2013 WL 5574921 at *5; see also Elliot, 77 Hawaiʻi at 313, 884 P.2d at 376. Therefore, under Nesmith and Apollonio,

the defective complaint in this case is dismissed without prejudice. Apollonio, 2013 WL 5574921 at *5; see also Nesmith, 127 Hawaiʻi at 54, 276 P.3d at 623.

B.

Defendant also argues that the charge is defective for failing to allege the "essential facts" as required by HRPP Rule 7(d). Although Nesmith did not apply HRPP Rule 7(d), the clear import of Nesmith is that state of mind is an "essential fact" that must be pled under HRPP Rule 7(d). Nesmith stated that although "mens rea is not an 'element of an offense,'" more than the failure to allege elements was "fatal to a charge." Id. at 55, 276 P.3d at 624. This court then held that Elliot "provides one illustration of how omission of facts in a charge can render a charge deficient," and concluded that "mens rea must be alleged in a [charge]." Id. at 55-56, 276 P.3d at 624-25 (emphases added). As a "fact" that "must be alleged in a charge," a requisite state of mind is clearly an "essential fact" that must be alleged under HRPP Rule 7(d).

Moreover, Nesmith recognized that if a charge is insufficient under HRPP Rule 7(d), then "'a conviction based upon [the charge] cannot be sustained, for that would constitute a denial of due process.'" Id. at 52, 275 P.3d at 622 (quoting Mita, 124 Hawaiʻi at 390, 245 P.3d at 463). Therefore, the failure to plead an essential fact under HRPP Rule 7(d) provides

an additional basis for the dismissal of the charge without prejudice.

VII.

Accordingly, the ICA's November 23, 2012 judgment and the court's November 18, 2008 judgment of conviction are vacated and the case remanded to the court to enter an order dismissing the case without prejudice.

Leslie C. Maharaj,
for petitioner

Brian R. Vincent,
for respondent

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack