NO. 23454

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CARL K. ZABLAN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NO. TR88-89:4/19/00)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Carl K. Zablan (Zablan) appeals the district court's April 19, 2000 judgment, based upon his conditional no contest plea, Hawaiʻi Rules of Penal Procedure Rule 11(a)(2), convicting and sentencing him as follows:

Count One, Driving Under the Influence of Intoxicating Liquor, Hawaiʻi Revised Statutes (HRS) § 291-4: 14-hour alcohol abuse rehabilitation program; 90-day license suspension (thirty days absolute and a sixty-day permit to/from work); fine of $250.00; $107.00 driver education assessment; $25.00 criminal injuries compensation fee; $20.00 administrative fee; and 72 hours of community service.

Count Two, Disregarding Longitudinal Traffic Lane Markings, HRS § 291C-38: fine of $75.00; $7.00 driver education assessment; and $20.00 administrative fee.

The sentence was stayed pending appeal.

Specifically, Zablan challenges the May 17, 2000 Order Denying his April 7, 2000 Motion to Suppress. We affirm.

RELEVANT STATUTES

HRS § 286-255(a) (Supp. 1999) states, in relevant part, as follows:

> Whenever a person is arrested for a violation of section 291-4 [driving under the influence of intoxicating liquor (DUI)] or 291-4.4 [habitually driving under the influence of intoxicating liquor or drugs], . . . [t]he arresting officer shall inform the person that the person has the option to take a breath test, a blood test, or both. The arresting officer also shall inform the person of the sanctions under this part, including the sanction for refusing to take a breath or a blood test.

HRS § 286-260 (1993 and Supp. 1999) states, in relevant part, as follows:

> **Judicial review; procedure.** (a) If the director sustains the administrative revocation after administrative hearing, the arrestee may file a petition for judicial review within thirty days after the administrative hearing decision is mailed. . . .
>
> (b) The court shall schedule the judicial review as quickly as practicable, and the review shall be on the record of the administrative hearing without taking of additional testimony or evidence. . . .
>
> (c) The sole issues before the court shall be whether the director exceeded constitutional or statutory authority, erroneously interpreted the law, acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence in the record.
>
> (d) The court shall not remand the matter back to the director for further proceedings consistent with its order.

RELEVANT PRECEDENT

1.

> **[The] [p]roponent of a motion to suppress has [the] burden of establishing** not only that the evidence sought to be excluded was unlawfully secured, but also, **that his [or her] own Fourth Amendment rights were violated by the search and seizure sought to be challenged.**

State v. Aboard, 61 Haw. 117, 120-21, 596 P.2d 773, 775 (1979) (citation and footnote omitted) (emphases added). The proponent

> of the motion to suppress must satisfy this "burden of proof **by a preponderance of the evidence[.]**" [State v.]Pattioay, 78 Hawai'i[455,] at 466, 896 P.2d[911,] at 922[1995] (emphasis added) (citation omitted).

State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997).

2.

In State v. Wilson, 92 Hawai'i 45, 987 P.2d 268 (1999), the Hawai'i Supreme Court affirmed the district court's order granting the defendant's motion to suppress the blood test results in his criminal DUI prosecution. The defendant had consented to a blood test after he was misinformed by the arresting officer

> [t]hat if you refuse to take any tests the consequences are as follows: (1) if your driving record shows no prior alcohol enforcement contacts during the five years preceeding [sic] the date of arrest, your driving privileges will be revoked for one year *instead of the three month revocation that would apply if you chose to take the test and failed it*[.]

Id. at 47, 987 P.2d at 270 (emphasis in original). The misinformation was that "your driving privileges will be revoked for one year instead of the three month revocation that would apply if you chose to take the test and failed it[.]" In truth, the Hawai'i Supreme Court said, a defendant who is a first-time offender who chooses to take the test and fails it faces the possibility of license revocation for a period anywhere from three months to one year. The Hawai'i Supreme Court decided that because the arresting officer relevantly and materially misinformed the defendant of the administrative penalties

applicable upon choosing to take the blood test and failing it, the defendant did not knowingly and intelligently consent to a blood test. According to the Hawai'i Supreme Court,

> [t]he statutory scheme, however, also protects the rights of the driver in that he or she may withdraw his or her consent before a test is administered. To this end, Hawaii's implied consent scheme *mandates* accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test.
>
> . . . .
>
> . . . Not only was the information given to Wilson misleading, it was relevant to his decision whether to agree to or refuse the blood alcohol test. Thus, although Wilson elected to take the test, he did not make a knowing and intelligent decision whether to exercise his statutory right of consent or refusal.

Id. at 49-51, 987 P.2d at 274 (footnote and citations omitted) (emphasis in original).

BACKGROUND

Zablan was arrested on January 14, 2000. The police officer read him the "Administrative Revocation of Driver's License," MPD Form No. 332 (MPD Form No. 332), stating, in relevant part, as follows:

> 4.___ If you refuse to take any tests, these are the consequences:
>
> A.___ If your driving record shows no prior alcohol enforcement contact during the five years preceding the date of arrest, your driving privileges will be revoked for one year; whereas, if you choose to take a test and fail it, your driving privileges will be revoked for three months up to one year.
>
> B.___ If your driving record shows one prior alcohol enforcement contact during the five years preceding the date of arrest, your driving privileges will be revoked for two years; whereas, if you choose to take a test and fail it, your driving privileges will be revoked for one year up to two years.
>
> C.___ If your driving record shows two prior alcohol enforcement contacts during the seven years preceding the date of arrest, your driving privileges will be

> revoked for four years; whereas, if you choose to take a test and fail it, your driving privileges will be revoked for two years up to four years.
>
> D.___ If your driving record shows three or more prior alcohol enforcement contacts during the ten years preceding the date of arrest, your driving privileges will be revoked for life; which is the same period of revocation that would apply if you choose to take a test and fail it.

Zablan decided to take a breath test. The breath test gave a reading of .112. The Complaint was filed on February 9, 2000. In his April 7, 2000 Motion to Suppress, Zablan argued:

> 1. [Zablan] was not advised of the sanctions required by law to be provided him under H.R.S. Section 286-251 et. seq.
>
> 2. [Zablan] did not knowingly and voluntarily consent to the breath test.
>
> 3. Taking [Zablan's] breath was a seizure under the Constitution of the State of Hawaii and because that seizure was unreasonable and without [Zablan's] consent the test result may not be used as evidence against him.

In a declaration accompanying his motion, Zablan stated, in relevant part, that "[a]t no time was I advised what the term 'prior alcohol enforcement contact' meant. I did not know what the term meant. I did not know where I fit with respect to the possible penalties because no one told me what 'alcohol enforcement contact' meant."

HRS § 286-251 (Supp. 1999) defines "alcohol enforcement contact" as follows:

> "Alcohol enforcement contact" means any administrative revocation ordered pursuant to this part; any driver's license suspension or revocation imposed by this or any other state or federal jurisdiction for refusing to submit to a test for alcohol concentration in the person's blood; or any conviction in this or any other state or federal jurisdiction for driving, operating, or being in physical control of a motor vehicle while having an unlawful concentration of alcohol in the blood, or while under the influence of alcohol.

At the April 19, 2000 hearing on his motion to suppress, Zablan established that although he did not ask the arresting officer for a definition of "alcohol enforcement contacts," had he done so, the arresting officer would not have been able to give him an accurate definition. At the conclusion of the hearing, the court ruled, in relevant part, as follows:

> In this case the information given to the defendant was accurate. I mean if the officer had testified -- if the officer told him what the -- if the defendant asked what was meant by prior alcohol enforcement contact and the officer gave him inaccurate information, Wilson may apply. But that's not the case in this situation. The defendant did not ask, and the officer did not give any information or a definition of the alcohol enforcement contact.

DISCUSSION

As noted above, the Hawai'i Supreme Court stated in Wilson that "Hawaii's implied consent scheme mandates accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test." Id. at 49, 987 P.2d at 272 (citations omitted) (emphasis in original). HRS § 286-255(a) requires that "[t]he arresting officer also shall inform the person of the sanctions under this part, including the sanction for refusing to take a breath or a blood test."

We agree that the arresting officer satisfies the HRS § 286-255(a) duty by reading the relevant part of the statute to the person arrested. The question Zablan wants answered is whether, when the arresting officer informed Zablan of the consequences of refusing to take any tests "[i]f your driving record shows [no, one, two, or three or more] prior alcohol

enforcement contacts during the [five, five, seven, or ten] years preceding the date of arrest[,]" the arresting officer also was required to inform Zablan of the HRS § 286-251 definition of the phrase "alcohol enforcement contact." Zablan argues that absent the HRS § 286-251 definition, the phrase "alcohol enforcement contact" is insufficient because the word "contacts" does not communicate the inclusion of only those contacts that resulted in a "suspension," "revocation," and/or "conviction."

In Wilson, supra, the dissenting opinion noted that "[the defendant] has *never* asserted that he would have refused the test had he received a full explanation of the penalties under Gray[v. Administrative Director of the Court, 84 Hawai‘i 138, 931 P.2d 580 (1997)]." Wilson, 92 Hawai‘i at 60, 987 P.2d at 283. The majority opinion was silent on the question of the defendant's reliance on and prejudice from the relevant and material insufficient information/misinformation and concluded that the relevant misinformation and/or insufficient information resulted in the absence of a knowing and intelligent consent.

In light of Wilson, we conclude that, in this context, the question of the arrestee's reliance is objective, not subjective. Based on the relevant statutes and Wilson, we conclude that the arrestee's reliance on misinformation and/or insufficient information from the arresting officer is

conclusively presumed when the following conditions are satisfied:

1. Misinformation was given and/or a statute required the information to be given and the information was not given.

2. Misinformation and/or insufficient information was relevant and material to the arrestee's decision.

3. The arrestee has not admitted that he or she did not rely on the misinformation and/or insufficient information.

4. If given, the correct and/or sufficient information reasonably may have influenced a reasonable person to decide opposite of how the arrestee decided.

In his declaration in support of his motion, Zablan stated, "I did not know where I fit with respect to the possible penalties because no one told me what 'alcohol enforcement contact' meant." We conclude that Zablan did not satisfy his burden of proof. Zablan was required to show how the lack of the accurate definition of the phrase "alcohol enforcement contacts" reasonably misled him into taking the breath test. Zablan failed to do this. All there is in the record is the court's statement at the time of sentencing as follows: "Okay, this will be [Zablan's] first conviction[.]" Therefore, we conclude that Zablan failed to satisfy conditions "2" and "4" stated above and that, in his case, the lack of the accurate definition of the phrase "alcohol enforcement contacts" was harmless.

Zablan also contends that MPD Form No. 332

> did not advise [Zablan] that there must be a lawful arrest before the Arrestee would be subject to sanctions for refusing to take a test. The form did not advise [Zablan] that he could challenge a license revocation even if he is over the legal limit based on a challenge to the validity of the stop on probable cause or reasonable suspicion grounds as required under H.R.S. Section 286-258(d). The form further did not tell an arrestee what the legal limit or standard for passing the test is and the form did not advise an arrestee what the arrestee could or could not qualify for with respect to a conditional permit even if a test is taken.

We conclude that HRS § 286-255(a) does not require the arresting officer to provide the above information to Zablan.

CONCLUSION

Accordingly, we affirm the district court's April 19, 2000 judgment convicting Defendant-Appellant Carl K. Zablan of Driving Under the Influence of Intoxicating Liquor, HRS § 291-4, and Disregarding Longitudinal Traffic Lane Markings, HRS § 291C-38.

DATED: Honolulu, Hawai‘i, March 14, 2001.

On the briefs:

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