

NO. 29393

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
ROBERT B. PORTER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(Cr. No. 06-1-553)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Watanabe, and Fujise, JJ.)

Defendant-Appellant Robert B. Porter (Porter) appeals from the judgment entered by the Circuit Court of the Third Circuit<sup>1</sup> (circuit court) on September 16, 2008, convicting and sentencing him, pursuant to a conditional no-contest plea, of habitually operating a vehicle under the influence of an intoxicant (habitually OVUII) in violation of Hawaii Revised Statutes (HRS) § 291E-61.5 (2007).

It is undisputed in this case that Porter operated or assumed actual physical control of a vehicle on private property<sup>2</sup> while under the influence of an intoxicant. Porter's sole point on appeal is that the circuit court erred in denying his motion to dismiss the charge against him because "[u]nder the relevant provisions of HRS chapter 291E, a person commits the offense of [habitually OVUII] and the offense of [OVUII] only if he or she drives or assumes actual physical control of a vehicle **upon a public way, street, road, or highway** while under the influence of alcohol[.]" (Emphasis in original.)

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<sup>1</sup> The Honorable Greg K. Nakamura presided.

<sup>2</sup> Porter apparently lost control of his vehicle and drove it from his girlfriend's driveway into the fence that separated the driveway and a neighbor's yard.

In light of the Hawai'i Supreme Court's recent opinion in State v. Wheeler, slip op. (No. 29149, Nov. 17, 2009), we agree with Porter.

Accordingly, we vacate the judgment entered by the circuit court on September 16, 2008 and remand this case to the circuit court with instructions to grant Porter's motion to dismiss.

DATED: Honolulu, Hawai'i, December 11, 2009.

On the briefs:

James S. Tabe,  
Deputy Public Defender,  
State of Hawai'i,  
for Defendant-Appellant.

Jefferson R. Malate,  
Deputy Prosecuting Attorney,  
County of Hawai'i,  
for Plaintiff-Appellee.