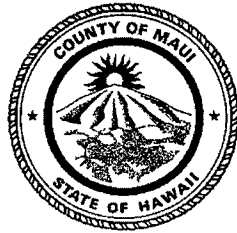


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OFFICE OF THE COUNTY COUNCIL



MICHAEL P. VICTORINO  
Mayor

MOANA M. LUTEY  
Corporation Counsel


EDWARD S. KUSHI, JR.  
First Deputy

LYDIA A. TODA  
Risk Management Officer  
Tel. No. (808) 270-7535  
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DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
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June 27, 2019

MEMO TO: Michael J. Molina, Chair  
Governance, Ethics and Transparency

FROM: Moana M. Lutey, Corporation Counsel 

SUBJECT: LITIGATION MATTERS – Settlement of Claims and Lawsuits  
(GET-1)  
Tommy Russo v. County of Maui, et al.  
Civil No.: 14-00515 JMS-KSC

Our Department respectfully request the opportunity to present information to the Governance, Ethics and Transparency Committee and to discuss settlement options with regard to the above-referenced lawsuit.

Copies of the Resolution authorizing settlement, the Complaint, the Stipulation and Order to Stay All Proceedings and Vacate All Deadlines Pending Outcome of Criminal Appeal and Order, and the Summary Disposition Order are attached.

It is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities and liabilities of the County, the Council, and the Committee.

We request that a representative from Department of Police be in attendance during discussion of this matter.

Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your anticipated assistance in this matter.

cc: Tivoli S. Faamu, Chief of Police

# Resolution

No. \_\_\_\_\_

AUTHORIZING SETTLEMENT OF  
TOMMY RUSSO VS. COUNTY OF MAUI, ET AL.  
CIVIL NO. 14-00515 JMS-KSC

WHEREAS, Plaintiff Tommy Russo filed a lawsuit in the United States District Court for the District of Hawaii on November 17, 2014, Civil No. 14-00515 JMS-KSC, against the County of Maui, et al., claiming unlawful seizure, unlawful arrest, violation of his rights under the First Amendment, false arrest, battery, assault, and seeking special and general damages; and

WHEREAS, the County of Maui filed its Answer on March 24, 2015; and

WHEREAS, this case was stayed on June 3, 2015, pending an appeal in the underlying criminal case;

WHEREAS, on March 31, 2017, an order on the underlying criminal appeal was issued;

WHEREAS, on June 7, 2019, a settlement conference was held in this case;

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

**Resolution No. \_\_\_\_\_**

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Governance, Ethics and Transparency Committee and

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

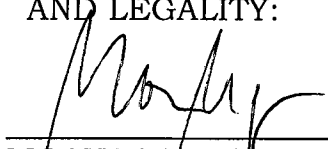
1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics and Transparency Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case; and

3. That it hereby authorizes the Director of Finance of the County of Maui to satisfy said settlement of this case; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Chief of Police and the Corporation Counsel.

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
MOANA M. LUTEY  
Corporation Counsel  
County of Maui  
Lit 5447

Law Office of Philip H. Lowenthal  
By: Samuel G. MacRoberts, 8970  
33 N. Market Street, Suite 101  
Wailuku, Maui 96793  
sgm@lowenthal-hawaii.com  
(808) 242-5000; (808) 242-1500(f)

Attorneys for Plaintiff

United States District Court  
for the  
District of Hawaii

Tommy Russo

Plaintiff,

v.

County of Maui,  
Gary Yabuta,  
Rusty Lawson,  
John Doe 1-20,  
Doe Entities 1-20,  
Defendants.

Civil Action No.

Complaint; Jury Demand; Summons.

**Complaint**

Plaintiff Tommy Russo, through counsel, alleges as follows:

**Parties**

1. Tommy Russo works and resides on Maui.
2. The County of Maui is a Corporation organized under the laws of the state of Hawaii.
3. Defendant Gary Yabuta was chief of police of the Maui County Police Department at the time of the incident and was at all times relevant times acting in his capacity as chief of police.
4. Defendant Rusty Lawson is a police officer for the Maui County Police Department and was at all times relevant acting in his capacity as a police officer.
5. Defendants John Does and John Doe Entities are individuals and/or entities whose true identities and capacities are as yet unknown to Plaintiff and his counsel, despite

diligent inquiry and investigation, and who acted herein as described more particularly below in connection with the breaches of duties and/or violations of law alleged, and who in some manner or form not currently discovered or known to Plaintiff may have contributed to or be responsible for the injuries. The true names and capacities of the Doe Defendants will be substituted as they become known.

6. Defendants are sued in their individual and official capacities.

#### **Nature of Action, Jurisdiction and Venue**

7. This is an action arising out of the events and circumstances leading up to and surrounding the seizure, arrest, harassment, assault, and battery of Tommy Russo, a member of the media, and the seizure of Mr. Russo's property, who was filming news events on Maui.
8. The court has jurisdiction over this action under 28 U.S.C. § 1331 for violations of rights under the Constitution of the United States and 42 U.S.C. § 1983.
9. This court has jurisdiction over all other claims because they arose out of the same case or controversy.
10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because all relevant conduct occurred in this Judicial District.

#### **Factual Background**

11. Tommy Russo is the publisher of Maui Time Publications and a journalist. He reports on current events, the arts, and other news of Maui County. The publication is more than just a newspaper though. For example, Mr. Russo posts video content on the publication's website and utilizes social media like Twitter and Facebook to disseminate news.
12. On November 20, 2012, the Maui Police Department conducted "Operation Recon." The operation caused a severe traffic jam along Haleakala Highway and caused backups to Haili'imaile. Sensing a news story, Mr. Russo stopped on the side of the road, got out of his car, and began filming Police Officers John Fairchild and Rusty Lawson.

13. Officer Lawson immediately approached Mr. Russo and told him to turn on his hazard lights. Mr. Russo complied. When Mr. Russo returned, Officer Fairchild told Mr. Russo to stay on the side of the road. Mr. Russo complied.
14. At the same time Mr. Russo walked along the road, Officer Lawson was conducting a traffic stop. Mr. Russo walked past the traffic stop without saying anything to Officer Lawson. Mr. Russo did absolutely nothing to draw Officer Lawson's attention. Inexplicably, Officer Lawson left the traffic stop. He aggressively approached Mr. Russo and told him he was "obstructing" a traffic stop. Officer Lawson told Mr. Russo to stand back. Mr. Russo complied.
15. As Mr. Russo walked backwards, he told Officer Lawson his name and that he was a member of the media. Officer Lawson immediately arrested Mr. Russo for "obstructing government operations."
16. After the arrest, the prosecution charged Mr. Russo with disorderly conduct and failing to comply with a lawful order in violation of HRS §291C-23.
17. Mr. Russo, through counsel, filed a motion to dismiss, hired an expert witness, and after an evidentiary hearing, the Presiding Judge dismissed the case with prejudice.
18. The prosecution appealed the dismissal.
19. Officer Lawson was acting under the control and direction of Defendant Yabuta at all relevant times.
20. Defendant Yabuta is responsible for the control, management and direction of all officers and employees according to the General Orders.
21. Defendant Yabuta has the responsibility for determining Department policies, according to the General Orders.
22. Defendant Yabuta uses General Orders to train, supervise and/or control his police force.
23. The General Orders govern everything from staff meetings to grooming policies.
24. Acting on information or belief, Defendant Yabuta has failed to prepare and/or approve of a General Order regarding the media's right to film police officers.
25. Defendant Yabuta did not discipline Defendant Lawson for this incident.

26. Defendants were acting under color of law, statute, ordinance, regulations, customs policies, practices, and/or usages at all times in November 2012.
27. Defendants' conduct involved malice or reckless, negligent and/or callous indifference to Mr. Russo's constitutional rights.
28. Defendant Yabuta knew or should have known his customs, policy, persistent practice, indifferent training, deficient supervision, deficient discipline and/or remedial actions, lack of custom, lack of policy, lack of practice and/or lack of training would cause Mr. Russo's injuries.
29. Defendant Yabuta's custom, policy, persistent practice, indifferent training, deficient supervision, deficient discipline and/or remedial actions, lack of custom, lack of policy, lack of practice and/or lack of training caused Mr. Russo's injuries.
30. County of Maui's custom, policy, persistent practice, indifferent training, deficient supervision, deficient discipline and/or remedial actions, lack of custom, lack of policy, lack of practice and/or lack of training caused Mr. Russo's injuries.
31. County of Maui knew or should have known its customs, policy, persistent practice, indifferent training, deficient supervision, deficient discipline and/or remedial actions, lack of custom, lack of policy, lack of practice and/or lack of training would cause Mr. Russo's injuries.
32. Defendant Lawson knew or should have known his actions or omissions would result in injuries and damages to Mr. Russo.
33. In the absence of judicial intervention, these defendants will continue to cause similar constitutional violations by implementing, following, or failing to remedy the illegal pattern or practice in the future.
34. As a direct and proximate result of Defendants' conduct, Mr. Russo suffered the following injuries and damages: violation of his constitutional rights under the United States Constitution, violation of his constitutional rights under the Hawaii Constitution, violation of his statutory rights, emotional distress and fear, embarrassment, fright and shock, psychological and physical injury, humiliation, costs and attorneys' fees.

35. The Defendants' actions subject them to joint and several liability.

**Count 1**  
**Claim under 42 U.S.C. § 1983 for:**  
**Unlawful Seizure**

36. The previous paragraphs are incorporated here by reference.
37. Mr. Russo had a right to be free from unlawful seizures.
38. Mr. Russo was unlawfully seized by Officer Lawson.
39. The unlawful seizure violated Mr. Russo rights under the Fourth Amendment to the Constitution of the United States which is protected by 42 USC § 1983.
40. The acts and omissions described above are the legal and proximate cause of injuries and damages suffered by Mr. Russo.

**Count 2**  
**Claim under 42 U.S.C. § 1983 for:**  
**Unlawful Arrest**

41. The previous paragraphs are incorporated here by reference.
42. Mr. Russo had a right to be free from unlawful arrests.
43. Mr. Russo was detained or restrained against his will by Officer Lawson.
44. The unlawful arrest violated Mr. Russo rights under the Fourth Amendment to the Constitution of the United States which is protected by 42 USC § 1983.
45. The acts and omissions described above are the legal and proximate cause of injuries and damages suffered by Mr. Russo.

**Count 3**  
**Claim under 42 U.S.C. § 1983 for:**  
**Violation of First Amendment Right to Film Public Officials**

46. The previous paragraphs are incorporated here by reference.
47. Mr. Russo had a right to film Officer Rusty Lawson.
48. Mr. Russo was detained or restrained against his will by Officer Lawson because Mr. Russo was filming Officer Lawson. Officer Lawson seized the recording device.



49. Officer Lawson's conducted violated Mr. Russo rights under the First Amendment to the Constitution of the United States which is protected by 42 USC § 1983.
50. The acts and omissions described above are the legal and proximate cause of injuries and damages suffered by Mr. Russo.

**Count 4**

**Claim under 42 U.S.C. § 1983 for:  
Inadequate Supervision / Training / Discipline**

51. The previous paragraphs are incorporated here by reference.
52. Maui County Police Department's policies, practices and/or customs deprived Mr. Russo of his constitutional rights.
53. Officer Lawson was acting under the control and direction of Defendant Gary Yabuta.
54. Acting on information or belief, Defendant Yabuta had, or should have had knowledge of Defendant Lawson's violent and aggressive nature.
55. Defendant Yabuta is liable under 42 USC § 1983 because he established policies, practices and/or customs which proximately caused, or were the moving force behind, the violations of Mr. Russo's constitutional rights.
56. Defendant Yabuta's unlawful policies, practices, and/or customs include but not are not limited to the following: improperly training and/or supervising officers regarding lawful and unlawful seizures, the use of force, improperly training and/or supervising officers regarding lawful and unlawful arrests, improperly training and/or supervising officers regarding the media's right to film.
57. Defendant Yabuta's failure to train, supervise and/or discipline Defendant Lawson amounts to deliberate indifference to the rights of Mr. Russo.
58. Defendant Yabuta's failure to train, supervise and/or discipline Defendant Lawson caused the constitutional deprivations and injuries and damages suffered by Mr. Russo.

**Count 5**

**Claim under 42 U.S.C. § 1983 for:  
Inadequate Supervision / Training / Discipline**

59. The previous paragraphs are incorporated here by reference.
60. Defendant County of Maui's policies, practices, and/or customs deprived Mr. Russo of his constitutional rights.
61. Maui County Police Department's policies practices and/or customs deprived Mr. Russo of his constitutional rights.
62. The Maui County Police Department officers were acting under the control and direction of Defendant Gary Yabuta, a county employee.
63. Defendant County of Maui is liable under 42 USC § 1983 because it established policies, customs and/or practices which proximately caused, or were the moving force behind, the violations of Mr. Russo' constitutional rights.
64. Defendant Yabuta's unlawful policies, practices, and/or customs include but not are not limited to the following: improperly training and/or supervising officers regarding lawful and unlawful seizures, the use of force, improperly training and/or supervising officers regarding lawful and unlawful arrests, improperly training and/or supervising officers regarding the media's right to film.
65. Defendant Yabuta's failure to train, supervise and/or discipline Defendant Lawson amounts to deliberate indifference to the rights of Mr. Russo.
66. Defendant Yabuta's failure to train, supervise and/or discipline Defendant Lawson caused the constitutional deprivations and injuries and damages suffered by Mr. Russo.

**Count 6**

**False Arrest**

67. The previous paragraphs are incorporated here by reference.
68. Mr. Russo was detained or restrained against his will by Defendant Lawson.
69. Defendant arrested Mr. Russo without probable cause.

70. As a direct and proximate result of the false arrest by Officer Lawson, Mr. Russo suffered injuries and damages.

**Count 7  
Battery**

71. The previous paragraphs are incorporated here by reference.
72. Defendant Lawson intentionally caused physical or bodily contact to Mr. Russo.
73. The contact was not justified and was harmful.
74. Mr. Russo did not authorize or consent to the contact.
75. As a direct and proximate result of actions by defendant, Mr. Russo suffered injuries and damages.

**Count 8  
Assault**

76. The previous paragraphs are incorporated here by reference.
77. Officer Lawson intended to cause apprehension and/or harmful and/or offensive contact to Mr. Russo.
78. Officer Lawson's actions caused apprehension in Mr. Russo that harmful and/or offensive contact was imminent.
79. As a direct and proximate result of the conduct by defendants, Mr. Russo suffered injuries and damages.

**Count 9  
Gross Negligence**

80. The previous paragraphs are incorporated here by reference.
81. Defendants acted willfully, wantonly and with gross negligence.
82. The actions of defendants, individually and in concert, subjected them to joint and several liability.
83. As a direct and proximate result of defendants' conduct, Mr. Russo suffered injuries and damages.

**Count 10**

**Respondeat Superior – Defendant Yabuta**

84. The previous paragraphs are incorporated here by reference.
85. Defendant Gary Yabuta is responsible and/or vicariously liable for all actions, inactions, conduct and/or misconduct of Defendant Lawson.
86. As a direct and proximate result, Defendant Yabuta is liable for the injuries and damages caused to Mr. Russo.

**Count 11**

**Respondeat Superior – Defendant County of Maui**

87. The previous paragraphs are incorporated here by reference.
88. Defendant County of Maui is responsible and/or vicariously liable for all actions, inactions, conduct and/or misconduct of Defendants.
89. As a direct and proximate result, Defendant County of Maui is liable for the injuries and damages caused to Mr. Russo.

**Count 12**

**Negligent Training / Supervision / Management / Control**

90. The previous paragraphs are incorporated here by reference.
91. Defendant Yabuta failed to train, supervise, manage and/or control Defendant Lawson. As a direct and proximate result, Defendants Yabuta and County of Maui are liable for the injuries and damages caused to Mr. Russo.

**Count 13**

**Negligence**

92. The previous paragraphs are incorporated here by reference.
93. Defendants owed a duty of care to Mr. Russo.
94. Defendants breached their duty of care as described in the previous paragraphs.
95. As a direct and proximate result of the Defendants' negligence, Mr. Russo suffered injuries and damages.

WHEREFORE, Tommy Russo demands judgment against Defendants, jointly and/or severally, for damages as determined by the jury and further demand judgment against each Defendant, jointly and/or severally, for punitive damages where allowable by law, plus the costs of this action to include attorney fees and for such other relief as the Court deems just and equitable.

**Jury Demand**

Plaintiff demands a jury trial under Federal Rule of Civil Procedure 38(b).

Dated: November 17, 2014

/s/Samuel G. MacRoberts  
Samuel G. MacRoberts

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878  
Corporation Counsel  
MOANA M. LUTEY 6385  
RICHARD B. ROST 7947  
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Attorneys for Defendants COUNTY OF MAUI,  
GARY YABUTA and RUSTY LAWSON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

TOMMY RUSSO, ) CIVIL NO. 14-00515 JMS KSC  
)  
Plaintiff, ) STIPULATION AND ORDER TO STAY  
) ALL PROCEEDINGS AND VACATE  
vs. ) ALL DEADLINES PENDING OUTCOME  
) OF CRIMINAL APPEAL AND ORDER  
)  
COUNTY OF MAUI, GARY YABUTA, )  
RUSTY LAWSON, JOHN DOE 1-20, DOE )  
ENTITIES 1-20, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

**STIPULATION AND ORDER TO STAY ALL PROCEEDINGS AND VACATE ALL DEADLINES PENDING OUTCOME OF CRIMINAL APPEAL AND ORDER**

The parties, by and through their counsel, hereby stipulate to stay all proceedings and vacate all deadlines in this matter. The parties have stipulated to a stay on the basis that there is an appeal pending in the underlying criminal case involving Plaintiff. The outcome of that appeal may eliminate Plaintiff's claims asserted in this civil lawsuit.

DATED: Wailuku, Hawaii, May, 2015.

/s/ Samuel G. MacRoberts  
Philip H. Lowenthal, Esq.  
Benjamin E. Lowenthal, Esq.  
Samuel G. MacRoberts, Esq.  
(Attorneys for Plaintiff)

/s/ Tommy Russo  
Tommy Russo  
Plaintiff

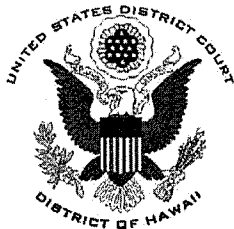
DATED: Wailuku, Maui, Hawaii, June 1, 2015.

PATRICK K. WONG  
Corporation Counsel  
Attorney for Defendants  
COUNTY OF MAUI, GARY YABUTA and  
RUSTY LAWSON

By /s/ Moana M. Lutey  
MOANA M. LUTEY  
Deputy Corporation Counsel

DATED: Honolulu, Hawaii, June 3, 2105.

APPROVED AND SO ORDERED.



[Signature]  
Kevin S.C. Chang  
United States Magistrate Judge

Tommy Russo v. County of Maui, et al., Civ. No. CV14-00515 JMS  
KSC Stipulation to Stay Proceedings and Vacate all Deadlines  
Pending Outcome of Criminal Appeal and Order

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SECOND CIRCUIT  
2DCW-12-0000873  
31-MAR-2017  
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IN THE DISTRICT COURT OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAI'I

STATE OF HAWAI'I,	)	CASE NO. 2DCW-12-0000873
	)	
Plaintiff,	)	
vs.	)	SUMMARY DISPOSITION ORDER
	)	
THOMAS A. RUSSO,	)	
	)	
Defendant.	)	
_____	)	

**SUMMARY DISPOSITION ORDER**



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31-MAR-2017  
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NO. CAAP-14-0000986

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.  
THOMAS A. RUSSO, Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
(2DCW-12-0000873)

SUMMARY DISPOSITION ORDER

(By: Fujise and Ginoza, JJ., with Nakamura, C.J.,  
concurring and dissenting separately.)

Plaintiff-Appellant State of Hawaii (State) charged Defendant-Appellee Thomas A. Russo (Russo) with the wilful failure or refusal to comply with the lawful order of a police officer (Failure to Comply With Lawful Order), in violation of Hawaii Revised Statutes (HRS) § 291C-23 (2007).<sup>1</sup> The District Court of the Second Circuit, Wailuku Division (District Court)<sup>2</sup> dismissed this charge with prejudice on the ground that there was no probable cause to support it. The District Court ruled that HRS § 291C-23 only applies to the operation of vehicles upon a highway, and because the conduct underlying Russo's charge did not involve his operation of a vehicle on a highway, there was no probable cause for the charge.

---

<sup>1</sup> HRS § 291C-23 provides:

It shall be a petty misdemeanor for any person to wilfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control, or regulate traffic.

<sup>2</sup> The Honorable Kelsey T. Kawano presided.

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

The State appeals from the District Court's July 9, 2014 Judgment that dismissed the charge of Failure to Comply With Lawful Order with prejudice.<sup>3</sup> The State argues that the District Court erred in dismissing this charge because the District Court misconstrued the application of HRS § 291C-21 to § 291C-23 in this case. The State also argues that, given the District Court's findings, there was probable cause for this charge.

As explained below, we conclude that the District Court erred in its basis for dismissing this charge. Contrary to the District Court's interpretation, HRS § 291C-23 is not limited to the operation of vehicles on the highway. In addition, based on the District Court's findings of fact, there was probable cause for the offense of Failure to Comply With Lawful Order.

I.

On the date in question, Maui Police Department (MPD) officers were involved in a traffic enforcement operation along Haleakala Highway. As part of this operation, officers standing on the side of the highway were directing vehicles with observed traffic law violations, such as those relating to lifted vehicles or window tints, to pull over. Russo was not directed by the officers to pull over, but did so on his own. Russo parked his car off the road, on a grassy shoulder of Haleakala Highway, got out of the car, and approached two MPD officers who were involved in the traffic enforcement operation. Russo's interaction with the officers was captured on a video recording he took with his cellular phone. The video recording was stipulated by the parties into evidence at the hearing on Russo's motion to dismiss.

II.

The District Court's dismissal of the Failure to Comply With Lawful Order charge against Russo was based on its interpretation of HRS § 291C-21 (2007), which provides:

---

<sup>3</sup> The District Court also dismissed a disorderly conduct charge against Russo arising out of the same incident for lack of probable cause. The State does not challenge the District Court's dismissal of the disorderly conduct charge on appeal, and the State concedes that the District Court "was right" in dismissing that charge.

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

[§ 291C-21] Provisions of Parts III to XIV refer to vehicles upon the highways; exception. The provisions of parts III to XIV relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except, where a different place is specifically referred to in a given section.

The District Court interpreted HRS § 291C-21 to mean that Parts III to XIV of HRS Chapter 291C only apply to the operation of vehicles upon highways, except where a different place is specifically referred to in the particular section. Based on this reading of HRS § 291C-21, the District Court concluded that because HRS § 291C-23 (which defines the Failure to Comply With Lawful Order offense) is in HRS Chapter 291C, Part III, HRS § 291C-23 only applied where the person who failed or refused to comply with a lawful order of a police officer was operating a vehicle upon a highway.

We conclude that the District Court's interpretation of HRS § 291C-21 was wrong. As the State points out, HRS Chapter 291C Parts III to XIV include provisions imposing restrictions on pedestrians, such as numerous provisions in Part VII (Pedestrians' Rights and Duties) and including HRS § 291C-71(a) which requires pedestrians to obey traffic control devices. Reading HRS § 291C-21, as the District Court did, to mean that the provisions in Parts III to XIV only apply to persons involved in the operation of vehicles upon highways would preclude enforcement of provisions imposing restrictions on pedestrians. Viewed in context and in light of the plain meaning of its terms, we conclude that HRS § 291C-21 means that where the provisions of HRS Chapter 291C Parts III to XIV relate to the operation of vehicles, only the operation of vehicles upon highways is covered unless a different place is specifically referred to in the provision.<sup>4</sup>

---

<sup>4</sup> We note that under HRS § 291C-1, the term "highway" is defined broadly to mean

the entire width between the boundary lines of every way publicly maintained and those private streets, as defined in section 46-16, over which the application of this chapter has been extended by ordinance, when any part thereof is open to the use of the public for purposes of vehicular travel.

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

In the context of this case, HRS § 291C-23 applies to Russo as a pedestrian and prohibits the wilful failure or refusal to "comply with any lawful order or direction of any police officer invested by law with authority to direct, control, or regulate traffic." Therefore, the District Court erred in construing HRS § 291C-21 to limit HRS § 291C-23 to persons involved in operating a vehicle on a highway.

Here, the officers were engaged in directing, controlling, or regulating traffic when they interacted with Russo. Accordingly, the District Court erred in dismissing the charge on the basis that HRS § 291C-23 did not apply because Russo was not operating his vehicle on a highway when he interacted with the officers.

III.

The State also argues that there was probable cause for the offense of Failure to Comply With Lawful Order. The District Court found that Russo (1) was informed by the officers involved in traffic enforcement that he was in their area of operations and in danger of being struck by a vehicle; (2) was told multiple times to step back out of the area of operations by two officers; and (3) did not comply with the officers' instructions. Based on these findings, we conclude that there was probable cause to support the charge of Failure to Comply With Lawful Order.

IV.

Based on the foregoing, we vacate the District Court of the Second Circuit, Wailuku Division's July 9, 2014 order of dismissal and remand this case for further proceedings.

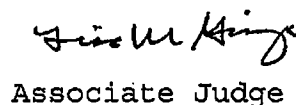
DATED: Honolulu, Hawai'i, March 31, 2017.

On the briefs:

Artemio C. Baxa,  
Deputy Prosecuting Attorney,  
County of Maui,  
for Plaintiff-Appellant.

  
Associate Judge

Benjamin E. Lowenthal and  
Samuel G. MacRoberts,  
for Defendant-Appellee.

  
Associate Judge

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I agree with the majority's interpretation of Hawaii Revised Statutes (HRS) § 291C-21 (2007) and HRS § 291C-23 (2007) and the majority's determination that the District Court's basis for dismissing the Failure to Comply With Lawful Order charge was wrong.

Nevertheless, this court may affirm the District Court on an alternative ground that is apparent from the record, even if it differs from the ground relied upon by the District Court. State v. Fukugawa, 100 Hawai'i 498, 506-07, 60 P.3d 899, 907-08 (2002); Poe v. Hawai'i Labor Relations Board, 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998). Here, the parties do not dispute that the video recording of the incident made by Defendant-Appellee Thomas Anthony Russo (Russo) accurately depicts the encounter between Russo and the police officers. Plaintiff-Appellant State of Hawai'i (State) stipulated to the introduction of the video recording and asserted that the video recording was "the best evidence . . . of what actually occurred that day."

Based on my review of the video recording, I believe that probable cause to support the Failure to Comply With Lawful Order charge was lacking. The video recording shows that Russo did not willfully fail or refuse to comply with the officers' order to stand back or move. Instead, although Russo questioned the officers' authority to order him from the scene, he was complying with the officers' order, retreating and walking backward away from the approaching officers and their area of operation, when the officers arrested him. I conclude that that there was no probable cause to support the charge of Failure to Comply With Lawful Order and that any finding by the District Court that Russo willfully failed or refused to comply with the officers' order was clearly erroneous.

Accordingly, I would affirm the District Court's dismissal of this charge and its Judgment, albeit on a different ground than relied on by the District Court. I therefore respectfully dissent from the majority's decision to vacate the

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order of dismissal and Judgment on the Failure to Comply With Lawful Order charge and to remand this case for further proceedings.

*Craig H. Nakamura*

Chief Judge