

NO. 22745

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee,

vs.

MICHAEL WHITFIELD MILNIKEL, Defendant-Appellant.

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD NOS. 97-507509, 97-507671, 97-597672, AND 97-507510)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Ramil, and Acoba, JJ.)

The defendant-appellant Michael Whitfield Milnikel appeals from the judgment of the district court of the first circuit, filed on July 13, 1999, convicting him of and sentencing him for the offenses of driving under the influence of drugs, in violation of Hawai'i Revised Statutes (HRS) § 291-7 (1993), and promoting a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993), as well as the traffic violations of failing to signal, in violation of HRS § 291C-85 (1993), and disregarding traffic lane markings, in violation of HRS § 291C-38 (1993).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold as follows:

First, assuming arguendo, that the district court (1) violated Hawai'i Rules of Penal Procedure Rule 12(e) by refusing to rule prior to trial on Milnikel's motion to suppress any

evidence related to a "drug recognition evaluation" (hereinafter, "DRE motion to suppress"), and/or, alternatively, (2) erred in denying the DRE motion to suppress because (a) in contravention of article I, section 7 of the Hawai'i Constitution (1978) and the fourth amendment to the United States Constitution, (i) the DRE constituted an unlawful warrantless seizure and/or search and (ii) Milnikel did not consent to taking the DRE and (b), under article I, section 10 of the Hawai'i Constitution (1982) and the fifth amendment to the United States Constitution, the DRE violated Milnikel's right against self-incrimination, and/or, alternatively, (3) abused its discretion in admitting the lay opinion testimony of two police officers regarding their observations of Milnikel during the administration of the DRE, as well as their opinions as to the result of the DRE, the errors, if any, were harmless beyond a reasonable doubt. The record reflects that the district court did not rely on any aspect of the administration or result of the DRE in convicting Milnikel of the offense of driving under the influence of drugs. Rather, the district court relied on the facts that the arresting officer detected the odor of marijuana emanating from Milnikel's vehicle as it was moving, detected indicia of intoxication but not of consumption of alcohol in Milnikel's behavior during a legally conducted traffic stop, and subsequently recovered marijuana during the traffic stop.

Second, the traffic stop, the administration of a field sobriety test, and Milnikel's arrest were not tainted by any illegality on the part of police officers. See, e.g., State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984); State v. Powell, 61 Haw. 316, 603 P.2d 143, 148 (1979). Moreover, the consensual encounter paradigm enunciated by this court in State v. Kearns,

75 Haw. 558, 867 P.2d 903 (1994) (police officer's instigation of an encounter with an individual absent probable cause or reasonable suspicion must be consensual), is inapposite to the present matter, in which the traffic stop was supported by reasonable suspicion and the arrest by probable cause.

Third, the district court did not commit plain error in failing to ensure that Milnikel waived his right against self-incrimination before he testified at trial. See State v. Lewis, No. 22901 (Haw. Nov. 28, 2000) (holding that Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), does not require that a trial court conduct a "pre-testimony" colloquy in trials commenced prior to November 28, 2000).

Fourth, Milnikel's conviction of the offense of driving under the influence of drugs was supported by substantial evidence: a police officer detected the odor of marijuana emanating from Milnikel's vehicle as it was being operated; the officer observed that Milnikel's vehicle swerved between lanes without making a lane-change signal and that it was traveling below the minimum speed limit; the officer observed Milnikel exit the vehicle after the officer initiated a traffic stop; the officer further observed indicia of intoxication but not of alcohol consumption; and the officer recovered marijuana from the front grillwork of Milnikel's truck, where the officer had observed Milnikel attempt to hide it. Thus, even absent the opinion testimony of officers that the drug influencing Milnikel was marijuana, ample evidence was adduced to support a reasonable mind in the conclusion that Milnikel's consumption of marijuana impaired his operation of a vehicle.

Fifth, cumulative error did not deprive Milnikel of a fair trial.

Sixth, the district court did not commit a manifest abuse of discretion in denying Milnikel's motion for deferred acceptance of no contest plea to the offense of promoting a detrimental drug in the third degree or err in not ruling upon the motion until after trial on the related charge of driving under the influence of drugs.

Therefore, IT IS HEREBY ORDERED that the judgment of conviction and sentence from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 22, 2001.

On the briefs:

Hayden Aluli, for the  
defendant-appellant,  
Michael Whitfield Milnikel

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State of Hawai'i