NO. 24919

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

JILL L. NUNOKAWA, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CASE NO. TD6A-TD7A OF 12/19/01)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, JJ., and Circuit Judge Masuoka, Assigned by Reason of Vacancy; Acoba, J., Dissenting)

Defendant-appellant Jill L. Nunokawa appeals from the January 16, 2002 judgment of conviction and sentence of the District Court of the First Circuit, the Honorable George Y. Kimura presiding, adjudging her guilty of driving under the influence of intoxicating liquor, in violation of Hawaiʻi Revised Statutes (HRS) § 291-4(a)(2) (1993 & Supp. 1999). The defense alleges that the trial court erred in admitting the results of Nunokawa's blood alcohol content (BAC) test because: (1) the prosecution failed to establish that Emily Chang was authorized to withdraw Nunokawa's blood as required by Hawaiʻi

Administrative Rules § 11-114-23(a)(1) (1993)[1]; (2) Chang's testimony indicated that the BAC test performed on Nunokawa's blood exceeded the allowable deviation set forth in HAR § 11-114-22 (1993)[2]; (3) the City and County of Honolulu Health

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[1] HAR § 11-114-23(a) provides, inter alia, "The following safeguards shall be observed in the collection of a blood sample from a living individual for determination of its alcohol content . . . [b]lood shall be drawn only by a qualified person as specified in section 286-152, HRS."

[2] HAR § 11-114-22 provides:

> Testing procedure approvals.
> (a) Except as provided in subsection (f), only those blood alcohol testing procedures which have been approved in writing by the DUI coordinator shall be used.
> (b) For each blood alcohol testing procedure for which approval is requested the alcohol testing supervisor shall submit to the DUI coordinator for written approval.
> (1) A detailed description of the laboratory's blood Alcohol testing procedure;
> (2) The laboratory's procedural validation data pursuant to subsection (c); and
> (3) Pertinent documentation such as scientific literature and manufacturer's specifications.
> (c) No blood alcohol testing procedure will be approved unless the following minimum requirements are met:
> (1) An alcohol free sample shall produce a result which is less than 0.005 grams alcohol/100 milliliters;
> (2) The standard deviation of the procedure shall not exceed 0.005 grams alcohol/100 milliliters at any sample concentration; and
> (3) The systematic error shall not exceed plus or minus 0.005 grams alcohol/100 milliliters, or plus or minus five per cent, whichever is greater, of the target value. A minimum of ten measurements of each of three different sample concentrations shall be performed. The samples shall differ by at least 0.004 grams alcohol/100 milliliters in the range of 0.04 to 0.25 grams alcohol/100 milliliters.
> (d) Any modification of a previously approved alcohol testing procedure shall be approved by the DUI coordinator in writing before being put into use.
> (e) Alcohol testing procedures for post mortem sampling of other bodily substances, as they pertain to this chapter, shall be submitted to the DUI coordinator for written approval.
> (f) Procedures approved by the director of health as

(continued...)

Department Laboratory failed to participate in the performance evaluation program set forth in HAR § 11-114-21 (1993)[3]; and (4) the Abott VPSS chemistry analyzer used to test Nunokawa's blood samples was not maintained in strict compliance with the manufacturer's recommendations.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced, the issues raised, and the controlling authority, we hold that: (1) defense counsel waived any challenge to Chang's qualifications to withdraw Nunokawa's blood when he explained to the court that his objection was based upon the maintenance of the VPSS chemistry analyzer and the integrity

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[2](...continued)
of the effective date of this chapter shall continue to be approved and remain in effect unless superseded or revoked by the director of health in writing.

[3] HAR § 11-114-21 provides:

> Performance evaluation samples. (a) At no cost to the department, each laboratory licensed to perform alcohol testing shall participate in a performance evaluation program for alcohol testing which is approved in writing by the DUI coordinator.
>
> (b) The testing procedure used to test the performance evaluation samples shall meet the requirements of section 11-114-22.
>
> (c) For each twelve-month period starting from the laboratory license issue date, the results of a minimum of ten performance evaluation samples tested shall be within plus or minus 0.01 grams alcohol/100 milliliters, or plus or minus ten per cent, whichever is greater, of the target value of each sample.
>
> (d) Results of tests of performance evaluation samples and the corresponding target values should be sent to the DUI coordinator by the alcohol testing supervisor yearly.

of the vials of anticoagulants used in the testing procedure,[4]

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[4] The defense's objection was raised in the following colloquy between defense counsel and the court:

> [Defense counsel]: Well, I maintain my objections. Specifically, I argue to the Court there hasn't been compliance with the provisions ---
> THE COURT: With what, what provisions?
> [Defense counsel]: Title 11 -- Title 11, Chapter 114.
> THE COURT: What does it relate to, [counsel]?
> [Defense Counsel]: It goes to the accuracy of the testing procedures and the safeguards that are required --
> THE COURT: Which one, I mean, you're talking in generalities. Are you saying that because they checked it, don't check it every month, ergo, it's not in strict compliance?
> [Defense Counsel]: First of all, 11-114-23(1) ---
> THE COURT: 11-14 what?
> [Defense Counsel]: -23 subsection(1), subsection(7). 114-23 subsection(a).
> THE COURT: Tell me what they are. I mean, I don't have those sections.
> [Defense Counsel]: As to the reliability of the machine, you know, we elicited testimony that the manufacturer recommends monthly maintenance, and since it's the State's responsibility to affirmatively adduce the proper foundation, I would argue to the Court that strict compliance hasn't been met in this case because the State failed to adduce sufficient evidence to show the manufacturer's recommendations were complied with strictly.
> THE COURT: Vis-a-vis the ---
> [Defense Counsel]: Yeah, the monthly checking as recommended by the manufacturer which is in evidence. Implicit in this argument is, of course, is the fact that the department of health approved this machine with the understanding or requirement that the manufacturer's recommendations be complied with, okay.
> The other thing is the procedure or requirements that I set forth earlier as to withdrawing by a blood of certain qualified personnel with certain procedural safeguards. I don't feel I have to label exactly what's missing, but I alluded to the precise subsections that I'm contending have not been complied with strictly, and all of these arguments go to the reliability and accuracy of the ultimate test results that are obtained.
> THE COURT: You mean as the vials that she buys from Abott?
> [Defense Counsel]: It has to do with the vials, the coagulants.
> THE COURT: She's supposed to check those?
> [Defense Counsel]: Right. At some point, it's never been checked. We're only assuming that they are what they ---

(continued...)

State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976); (2) HAR § 11-114-22 governs approval by the State Department of Health of alcohol testing procedures and is not applicable to the testing of individual samples; (3) Chang testified that the BAC test was performed in accordance with HAR title 11 and the defense fails to provide any authority indicating that the prosecution is required to establish compliance with HAR § 11-114-21; and (4) the current version of HAR title 11 does not require compliance with manufacturer's recommendations. Therefore,

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[4](...continued)

> THE COURT: Does the Title 11 say they gotta be checked?
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> [Defense Counsel]: Well, the Title 11 says there has to be, you know, certain precise amounts of anticoagulants in the vials, and to assume that these vials have what they have without ever having checked them themselves when they're required to check ---
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> THE COURT: These are vials set by the manufacturer who manufactured the instrument which is used by the department?
>
> [Defense Counsel]: Yeah, and the manufacturer recommends monthly maintenance to make sure the machines are accurate, every component thereof, therefore, which include these vials, and the anticoagulants has to be maintained somehow periodically, and then there's never been any certification or validation of what's in the vials.

IT IS HEREBY ORDERED that the January 16, 2002 judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai‘i, January 31, 2003.

On the briefs:

Mitsuhiro Murakawa,
Deputy Public Defender,
for defendant-appellant

Alexa D. M. Fujise,
Deputy Prosecuting Attorney,
for plaintif-appellee
