

NO. 22474

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
CHARLOTTE LYMAN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(Case No. TR 41 of 3/24/99 (HPD No. 98461340))

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Charlotte Lyman (Defendant) appeals from the Judgment entered by the District Court of the First Circuit (the district court) on March 24, 1999, convicting and sentencing her for Driving Under the Influence of Intoxicating Liquor (DUI), a violation of Hawai'i Revised Statutes (HRS) § 291-4(a)(1) (Supp. 1999).

Defendant contends that: (1) the district court abused its discretion when it allowed Officer Donald Slattery (Officer Slattery) to testify about the horizontal gaze nystagmus (HGN) test he administered to Defendant because (a) insufficient foundation was laid by Plaintiff-Appellee State of Hawai'i (the State) as to the scientific community's general acceptance of the HGN test as a reliable indicator of DUI, and (b) Officer Slattery was not properly qualified as an expert to testify as to the results of the HGN test; and (2) the district court erred in

relying on Defendant's refusal to complete the field sobriety tests (FSTs) as a substantive basis for convicting her.

With respect to Defendant's contention (1)(a), we conclude, in light of State v. Ito, 90 Hawai'i 225, 978 P.2d 191 (App. 1999), that this court can take judicial notice of the validity of the scientific principles underlying HGN testing and the reliability of properly administered HGN tests. Therefore, the district court's failure to expressly take judicial notice of, and the State's failure to proffer expert scientific evidence on the validity of such principles and the reliability of the test results, do not constitute plain error.

With respect to Defendant's contention (1)(b), we agree with Defendant that the State did not establish the proper foundation for admission of Officer Slattery's testimony as to the HGN test results. See State v. Mitchell, slip op. (No. 22217, App. Dec. 12, 2000). However, as in Mitchell, we conclude that the admission of the HGN test results was harmless error, given the overwhelming evidence that Defendant was indeed DUI.

As to Defendant's final issue, that the district court erred in considering Defendant's failure to take the other FSTs as evidence of Defendant's guilt, we ruled in State v. Ferm, 94 Hawai'i 17, 7 P.3d 193 (App. 2000), that such evidence was admissible.

In light of the foregoing, we affirm the district court's judgment.

DATED: Honolulu, Hawai'i, December 14, 2000.

On the briefs:

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State of Hawai'i, for  
defendant-appellant.

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Deputy Prosecuting Attorney,  
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for plaintiff-appellee.