NO. 23276

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
LANA KAOHELAULII, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIFTH CIRCUIT
(REPORT #9926487K)

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

Defendant-Appellant Lana Kaohelaulii (Kaohelaulii) appeals the district court's February 28, 2000 judgment convicting her of Driving After Consuming a Measurable Amount of Alcohol; Persons Under the Age of Twenty-One, Hawaiʻi Revised Statutes (HRS) § 291-4.3 (Supp. 1999).[1] We vacate and remand for further proceedings consistent with this opinion.

BACKGROUND

At the February 3, 2000 hearing on Kaohelaulii's January 24, 2000 Motion to Suppress Evidence of the Intoxilyzer test results, defense counsel stated, in relevant part, as follows:

> My offer of proof is this.
>
> On December 12th, 1999, at about 10:18 P.M. [Kaohelaulii] was driving down Koloa Road . . . . The road was curved. It was down hill and very wet from several days of constant rain. The shoulders of the road were saturated. That's verified by the police report. The area was dark. That's also verified.

[1] Act 189, § 31 (2000) repealed Hawaiʻi Revised Statutes § 291-4.3 (Supp. 1999) effective January 1, 2002.

> [Kaohelaulii] lost control of her car and was unable to steer out of the slide. She went into a slide and her car then slid sideways down a muddy embankment.
>
> And, according to the officer, there was a history of numerous vehicles going off the road in that area when the road was slick.
>
> Police officer saw her in his rear view mirror as she was sliding off the road and stopped and went to her vehicle and assisted her in opening the door to her vehicle. When he was there, he detected an odor of alcohol from her facial area. She was emotionally shook up from the accident and was crying and was rubbing her tears from her eyes and her cheeks.
>
> Another officer . . . arrived at the scene and had [Kaohelaulii] perform a field sobriety test which he recorded on the police video.
>
> And although [Kaohelaulii] . . . performed the test well as the videotape will demonstrate, she was arrested for DUI and she was informed of the right to take or refuse a blood and/or breath test by the use of that form KPD 544 which is Defense Exhibit 1 in evidence.

The tests that Kaohelaulii performed were the "walk and turn," the "one-legged stand," and the Horizontal Gaze Nystagmus (HGN).

Form KPD 544 entitled "Kauai Police Department Sanctions of §286-151.5 H.R.S. Refusal to Submit to Testing for Measurable Amount of Alcohol" (Form KPD 544) states, in relevant part, as follows:

> B. If . . . after being informed of the sanctions of this section you refused to submit to a breath or blood test, the judge will suspend your license, . . . as follows:
>
> 1. One year, if your driving record shows no prior suspensions under this section, instead of up to six months if you choose to take a test and failed it[.]

Kaohelaulii was age 19 at the time of the alleged offense. The result of Kaohelaulii's breath test was .056%.

RELEVANT STATUTES

HRS § 291-4.3 states, in relevant part, as follows:

> **Driving after consuming a measurable amount of alcohol; persons under the age of twenty-one.** (a) It shall be unlawful for any person under the age of twenty-one years to drive, operate, or assume actual physical control of the operation of any vehicle with a measurable amount of alcohol concentration. . . . For purposes of this section, "measurable amount of alcohol" means a test result equal to or greater than .02 but less than .08 grams of alcohol per one hundred milliliters or cubic centimeters of blood or equal to or greater than .02 but less than .08 grams of alcohol per two hundred ten liters of breath.
>
> (b) A person who violates this section shall be sentenced as follows:
>
> (1) For a first violation . . . :
>
> (A) The court shall impose:
>
> (i) A requirement that the person . . . attend an alcohol abuse education and counseling program for not more than ten hours; and
>
> (ii) One hundred eighty-day prompt suspension of license with absolute prohibition from operating a motor vehicle during suspension of license, or in the case of a person eighteen years of age or older, the court may impose, in lieu of the one hundred eighty-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a motor vehicle and, for the remainder of the one hundred eighty-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in alcohol abuse education and treatment programs[.]

HRS § 286-151 (Supp. 1999) states, in relevant part, as follows:

> **Implied consent of driver of motor vehicle or moped to submit to testing to determine alcohol concentration and drug content.** . . .
>
> . . . .
>
> (c) If there is probable cause to believe that a person is in violation of . . . section 291-4.3, then the person shall have the option to take a breath or blood test, or both, for purpose of determining the alcohol concentration.

HRS § 286-151.5 (Supp. 1999) states, in relevant part, as follows:

> **Refusal to submit to testing for measurable amount of alcohol; district court hearing; sanctions; appeals; admissibility.** (a) If a person under arrest . . . pursuant to section 291-4.3, refuses to submit to a breath or blood test, . . . the arresting officer, as soon as practicable, shall submit an affidavit . . . stating:
>
> . . . .
>
> (2) That the arrested person had been informed of the sanctions of this section[.]

RELEVANT PRECEDENT

In State v. Wilson, 92 Hawai'i 45, 987 P.2d 268 (1999), the Hawai'i Supreme Court affirmed the district court's order granting the defendant's motion to suppress the blood test results in his criminal DUI (driving under the influence of intoxicating liquor) prosecution. The defendant had consented to a blood test after he was misinformed by the arresting officer

> [t]hat if you refuse to take any tests the consequences are as follows: (1) if your driving record shows no prior alcohol enforcement contacts during the five years preceeding [sic] the date of arrest, your driving privileges will be revoked for one year *instead of the three month revocation that would apply if you chose to take the test and failed it*[.]

Id. at 47, 987 P.2d at 270 (emphasis in original). The misinformation was that "your driving privileges will be revoked for one year instead of the three month revocation that would apply if you chose to take the test and failed it[.]" In contrast, the correct information was that an arrestee who is a first-time offender who chooses to take the test and fails it faces the possibility of license revocation for a period anywhere

from three months to one year. The Hawai‘i Supreme Court decided that because the arresting officer relevantly and materially misinformed the defendant of the administrative penalties applicable upon choosing to take the blood test and failing it, the arrestee did not knowingly and intelligently consent to a blood test. According to the Hawai‘i Supreme Court,

> The statutory scheme, however, also protects the rights of the driver in that he or she may withdraw his or her consent before a test is administered. To this end, Hawaii's implied consent scheme mandates accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test.
>
> . . . .
>
> . . . Not only was the information given to Wilson misleading, it was relevant to his decision whether to agree to or refuse the blood alcohol test. Thus, although Wilson elected to take the test, he did not make a knowing and intelligent decision whether to exercise his statutory right of consent or refusal.

Id. at 49-51, 987 P.2d at 272-74 (footnotes and citations omitted; emphasis in original).

MOTION TO SUPPRESS EVIDENCE

In her January 24, 2000 Motion to Suppress Evidence of the Intoxilyzer test results, Kaohelaulii argued that (1) the rule of Wilson applied because the arresting officer gave her misleading information regarding the penalty she faced if she consented to an Intoxilyzer test and failed it and (2) the arresting officer did not have probable cause to subject her to an Intoxilyzer test.

The court decided, in relevant part, as follows:

THE COURT: . . .

. . . .

I agree with Mr. Jung that the officer moved the stylus rather quickly. But I only noticed that on the first passing of the stylus. Thereafter, the officer slowed down noticeably.

The officer did apparently properly conduct the test after he had instructed the defendant not to turn her head. So I believe he had ample opportunity to make an observation of the movement of her eyes.

The walk and turn and the one legged stand test, as I observed it, offers very little information. It appears that the defendant performed both tests very well.

In trying to decide what evidence there is to support the conclusion that there was probable cause or not to find a measurable amount of alcohol, I believe that the odor of alcohol certainly is a clear indicia of -- one of indicia of the presence of alcohol.

The red watery eyes, although, may -- those observations may be explained by other causes, are consistent with the consumption of alcohol. And, for the purpose of probable cause, the Court believes that they could be used to support that conclusion.

The loss of control of the vehicle thereby resulting in an accident, not using the judgment -- the best judgment under the weather conditions might also be considered and one of the indicia of the presence of alcohol.

And, finally, the Horizontal Gaze Nystagmus could also be considered one of the indicia of the measurable amount of alcohol concentration.

I don't find, as I mentioned earlier, much to support that conclusion with the walk and turn and the one leg stand test.

Accordingly, the Court finds that there was probable cause to arrest the defendant for the offense of driving after consuming a measurable amount of alcohol which is clearly a lesser standard than probable cause for arresting an individual for the offense of Driving under the Influence of Intoxicating Liquor. And, accordingly, the Motion to Suppress is denied.

Thank you.

[DEFENSE COUNSEL]: On the other issue, Your Honor.

THE COURT: The other issue the Court finds that unlike the Wilson case the defendant was advised of the worse possible and the only possible outcome of a six month suspension in the event that she took the test and failed.

> So, the Court does not find misleading the statement up to six months, although, not accurate, not misleading to the extent as discussed in the Wilson case.

TRIAL UPON STIPULATED FACTS

The trial was based on stipulated facts essentially the same as the facts presented at the hearing on Kaohelaulii's motion to suppress.

POINTS ON APPEAL

Kaohelaulii contends the court reversibly erred (1) in failing to exclude the results of the breath test because she did not make a knowing, voluntary, and intelligent waiver of her right to refuse that test and (2) in finding probable cause to arrest because (a) the HGN test results were improperly relied upon because the HGN test was improperly administered and (b) the remaining evidence was insufficient.

DISCUSSION

1.

Although HRS § 286-151(c) does not expressly require informing the arrestee of the sanctions for refusing to take the test, HRS § 286-151.5(a)(2) requires that if and when the arrestee refuses to take the test, the arresting officer shall submit an affidavit "[t]hat the arrested person had been informed of the sanctions of this section[.]"

No statute requires the arresting officer to inform the arrestee of the sanctions for taking a test and failing it. Nevertheless, Form KPD 544 advises that if the person refuses to

submit to a breath or blood test, the judge will suspend the person's license for one year "instead of up to six months if you choose to take a test and failed [sic] it[.]" The information that the penalty in Kaohelaulii's case for taking a test and failing it is "up to six months" is wrong. As specified in HRS § 291-4.3(b)(1)(A)(ii), the penalty in Kaohelaulii's case for taking a test and failing it is a "one hundred eighty-day prompt suspension of license" or "a minimum thirty-day prompt suspension with absolute prohibition from operating a motor vehicle and, for the remainder of the one hundred eighty-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in alcohol abuse education and treatment programs[.]"

Plaintiff-Appellee State of Hawai‘i (the State) contends that

> [a]lthough [Kaohelaulii] is correct that pursuant to HRS 291-4.3, the 180-day driver's license suspension is mandatory, HRS [§] 291-4.3[(b)](1)(A)(ii) enables the sentencing court to permit a person between ages 18 and 21 to drive to and from work and alcohol education classes for all but the first month of the license suspension. In fact, [Kaohelaulii] was granted that conditional permit for all but the first month of her six-month license suspension because she was 19 at the time of the offense. Thus, the warning that her license, upon conviction, would be suspended for "up to six months" is accurate to the extent that her driver's license would have been absolutely suspended for between one and six months.
>
> In addition, as the trial court correctly concluded, the facts of this case are distinguishable from those in Wilson because in Wilson, the defendant actually faced administrative driver's license suspension for a longer period than that of which he was advised. In contrast, in this case, [Kaohelaulii] was informed of the greatest possible criminal suspension period - six months.

(Record citations omitted; citation omitted.)

In other words, it is the State's view that there is no relevant and material difference between (a) an "up to six months suspension" of license and (b) a six-month suspension of license with a thirty-day complete suspension and thereafter a limited exception to the suspension "that allows the person to drive for limited work-related purposes and to participate in alcohol abuse education and treatment programs[.]" We disagree. Kaohelaulii was told that she would be given a suspension for a period of up to six months. In fact, she would be given either a six-month suspension or a six-month suspension coupled with a five-month severely restricted permit.

In Wilson, Wilson was told that the consequences of taking a test and failing were less than they actually were. Kaohelaulii was told that the consequences of taking a test and failing were possibly less than they actually were. We conclude that the arresting officer relevantly and materially misinformed Kaohelaulii of the penalty applicable upon choosing to take the breath test and failing it and, therefore, Kaohelaulii did not knowingly and intelligently consent to a breath test. Therefore, the evidence of the breath test should have been suppressed.

2.

We conclude that without the evidence of the breath test, the evidence other than the police officer's assessment of

the results of the HGN, *see* State v. Toyomura, 80 Hawai‘i 8, 26, 904 P.2d 893, 911 (1995), was sufficient to support a finding of probable cause to arrest.

CONCLUSION

Accordingly, we reverse the district court's February 3, 2000 oral order denying Kaohelaulii's January 24, 2000 Motion to Suppress Evidence, vacate the district court's February 28, 2000 judgment convicting her of Driving After Consuming a Measurable Amount of Alcohol; Persons Under the Age of Twenty-One, Hawai‘i Revised Statutes (HRS) § 291-4.3 (Supp. 1999), and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai‘i, March 16, 2001.

On the briefs:

John M. Tonaki,
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Chief Judge

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Associate Judge

Associate Judge