NO. 23607

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee, v.
FRANCES DIAS, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIFTH CIRCUIT,
KOLOA DIVISION
(CITATION NO. 241344MK)

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

Defendant-Appellant Frances Dias (Dias) was convicted of failing to carry motor vehicle insurance,[1] in violation of Hawaii Revised Statutes (HRS) § 431:10C-104 (Supp. 2001).[2] Judgment was entered on June 19, 2000,[3] in the District Court of the Fifth District, Koloa Division (district court).

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[1]Per diem District Court Judge Frank Rothschild presided.

[2]HRS § 431:10C-104 provides, in pertinent part:

> **§431:10C-104 Conditions of operation and registration of motor vehicles.** (a) Except as provided in section 431:10C-105 [allowing self-insurance], no person shall operate or use a motor vehicle upon any public street, road, or highway of this State at any time unless such motor vehicle is insured at all times under a motor vehicle insurance policy.
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> (b) Every owner of a motor vehicle used or operated at any time upon any public street, road, or highway of this State shall obtain a motor vehicle insurance policy upon such vehicle which provides the coverage required by this article and shall maintain the motor vehicle insurance policy at all times for the entire motor vehicle registration period.

[3]The Honorable Clifford L. Nakea presided.

On appeal, Dias contends the district court (1) lacked subject matter jurisdiction because no charge was placed on the record; (2) erred in denying her Motion for Judgment of Acquittal because the court lacked substantial evidence to support a conviction; (3) committed plain error in failing to engage in a Tachibana colloquy with her; and (4) arrived at a guilty verdict prior to considering closing arguments.

Because, as the State concedes, the district court committed plain error in failing to engage Dias in a Tachibana colloquy, we vacate the Judgment of the district court and remand for retrial.

I. BACKGROUND

On April 5, 2000, Police Officer Channing Tada (Officer Tada) issued a citation to Dias when Dias failed to provide verification of motor vehicle insurance for her vehicle. The citation, entitled "Complaint and Summons," was filed with the district court. On May 8, 2000, Dias, who had been served with the citation, pled not guilty and waived reading of the citation.

Trial was held on June 5, 2000. Officer Tada was the sole witness for the State and was not cross-examined. Officer Tada testified that on April 1, 2000, he investigated a report of a traffic accident involving Dias and spoke with her on the

phone. Officer Tada met with Dias on April 4, 2000, and took her statement. According to Officer Tada, Dias stated "she believed she was at or she went to Eleele Big Save and when she came out she had no idea her car was struck." Officer Tada asked Dias to produce paperwork, but she was unable to produce a valid no-fault insurance card. Officer Tada then issued the citation at issue in this appeal.[4]

The State submitted a certified copy of a County of Kauai Department of Finance motor vehicle registration for the vehicle involved in the accident at the Eleele Big Save. The registration indicated Dias was the registered owner of the vehicle on April 1, 2000.

At the conclusion of the evidence, Dias moved for a judgment of acquittal, arguing there was insufficient evidence to prove that she drove on a public street without motor vehicle insurance. Dias's counsel stated, "[t]here was no that proof [Dias] was on a public street. There was just proof of being in Eleele Shopping Center." The State responded that Dias needed to drive her car on a public street in order to get to Big Save.

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[4]Officer Tada testified he met with Dias on April 4, 2000; however, the citation is dated April 5, 2000.

The district court denied the motion, and the following colloquy then occurred:

> [DEFENSE COUNSEL]: Okay. We rest, Your Honor.
>
> THE COURT: All right. So then I find your client guilty of the charge.
>
> [DEFENSE COUNSEL]: Oh, well, well, wait. May we have argument?
>
> THE COURT: Sure.

Dias again argued there was no proof she drove to the shopping center. The State responded by reminding the court of Officer Tada's testimony that Dias remembered going to Big Save on the day of the accident. The court found Dias guilty and imposed a sentence of 75 hours of community service and a $27 fee.

II. STANDARDS OF REVIEW

A. Jurisdiction

> A court has subject matter jurisdiction over a case if it is authorized to take cognizance of, try, and determine a case involving that subject matter. . . . An appellate court always has jurisdiction to determine whether the court appealed from had jurisdiction over the subject matter of the appeal.
>
> With respect to subject matter jurisdiction, the rules of procedure applicable to civil cases and criminal cases are essentially the same.

State v. Alagao, 77 Hawaiʻi 260, 262, 883 P.2d 682, 684 (App. 1994) (citations omitted).

"The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard." Waimanalo Village Residents' Corp. v. Young, 87 Hawai'i 353, 362, 956 P.2d 1285, 1294 (App. 1998) (internal quotation marks omitted).

B. Motion for Judgment of Acquittal

> When reviewing a motion for judgment of acquittal,
>
> > we employ the same standard that a trial court applies to such a motion, namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.
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> State v. Jhun, 83 Hawai'i 472, 481, 927 P.2d 1355, 1364 (1996) (citations and internal quotation marks omitted).

State v. Smith, 97 Hawai'i 166, 169, 34 P.3d 1065, 1068 (App.), cert. denied, 97 Hawai'i 268, 36 P.3d 812 (2001) (ellipsis omitted) (quoting State v. Timoteo, 87 Hawai'i 108, 112-13, 952 P.2d 865, 869-70 (1997)).

C. Plain Error

> The appellate court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights.

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Lewis, 94 Hawai‘i 309, 313, 12 P.3d 1250, 1254 (App.), aff'd, 94 Hawai‘i 292, 12 P.3d 1233 (2000) (internal quotation marks and citations omitted) (quoting State v. Vanstory, 91 Hawai‘i 33, 42, 979 P.2d 1059, 1068 (1999)).

III. DISCUSSION

A. Subject Matter Jurisdiction

Dias contends the district court lacked subject matter jurisdiction because the State failed to place on the record either a written complaint or an oral charge against her.

Dias cites Hawai‘i Rules of Penal Procedure (HRPP) Rule 7(d) to support her contention that the State did not file a written complaint. Hawai‘i Rules of Penal Procedure Rule 7(d) (1983) states:

> A complaint shall be signed by the prosecutor, or it shall be sworn to or affirmed in writing before the prosecutor by the complaining witness and be signed by the prosecutor, except that a complaint alleging a traffic offense may be sworn to or affirmed by a police officer before another police officer as provided by law[.]

Dias relies on State v. Knoeppel, 71 Haw. 168, 785 P.2d 1321 (1990), for the proposition that the signature provisions of HRPP Rule 7(d) are mandatory. Id. at 171, 785 P.2d at 1322.

Knoeppel is distinguishable because the complaint in Knoeppel -- a pre-printed form lacking a signature line for the prosecutor -- was issued for violation of a misdemeanor, not a traffic offense; thus, the signature of the prosecutor was required. Pursuant to HRPP Rule 7(d), a traffic citation "need not be signed by the prosecutor." The citation in this case was given to Dias and was filed with the district court. The district court had jurisdiction in this case.

Furthermore, HRPP Rule 7(d) provides that any "[f]ormal defects, including error in the citation or its omission, shall not be ground for dismissal of the charge or for reversal of a conviction if the defect did not mislead the defendant to his prejudice." The Hawaiʻi Supreme Court held in State v. Kikuchi, 54 Haw. 496, 510 P.2d 781 (1973), that "where it appears from the record that appellant had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution he has suffered no prejudice." Id. at 500, 510 P.2d at 783.

Here, as in Kikuchi, Dias was represented by counsel, was fully aware of the nature and the substance of the accusation, knew what she was being prosecuted for, postured herself as being not guilty of the accusation, and raised no objection during the course of the trial. Therefore, there was no prejudice to Dias.

B. Dias's Motion for Judgment of Acquittal

Dias contends the district court lacked substantial evidence that Dias, or anyone else, operated her uninsured vehicle on a public street, road, or highway as required to convict her of a violation of HRS § 430:10C-104.

Under appellate review, "we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." Smith, 97 Hawai‘i at 169, 34 P.3d at 1068.

In this case, Officer Tada testified that Dias's car was involved in a traffic accident in the parking lot at the Eleele Big Save on April 1, 2000, and that Dias stated "she believed she was at or she went to Eleele Big Save" on that date. In denying Dias's Motion for Acquittal, the trial judge stated:

> And the fact that she had no insurance I think that the law is designed to protect people who are hit by other people to make sure there's some insurance. And to say, well, but it's okay if you're in a shopping center parking lot and who knows how you got there but the only way she could have gotten there with her car would have been to drive on a public street, highway, road, someone else has to say that you have amnesty or protection or call it what you will in the shopping center lot that you're not afforded a few feet away when you're driving into the lot. That's fine with me, but I'm not the one that's going to make that rule.

The trial judge thus reasonably inferred that Dias drove on a public street, highway, or road on order to get to the Eleele Big Save. There was sufficient evidence to find that Dias violated HRS § 431:10C-104.

C. Dias's Right to Testify

Dias contends, and the State concedes, that this case must be vacated because the district court judge failed to obtain an on-the-record-waiver of Dias's constitutional right[5] to testify.

In Tachibana v. State, 79 Hawaiʻi 226, 900 P.2d 1293 (1995), the Hawaiʻi Supreme Court held that "in order to protect the right to testify under the Hawaiʻi Constitution, trial courts must advise criminal defendants of their right to testify and

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[5] A defendant's right to testify in his or her own defense is guaranteed by the constitutions of the United States and Hawaiʻi and by a Hawaiʻi statute.

> The right to testify in one's own behalf arises independently from three separate amendments to the United States Constitution. It is one of the rights guaranteed by the due process clause of the fourteenth amendment as essential to due process of law in a fair adversary process.
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> The right to testify is also guaranteed to state defendants by the compulsory process clause of the sixth amendment as applied through the fourteenth amendment.
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> Lastly, the opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony, since every criminal defendant is privileged to testify in his or her own defense, or to refuse to do so.
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> Because the texts of sections 5, 14, and 10 of article I of the Hawaiʻi Constitution parallel fourteenth, fifth, and sixth amendments to the United States Constitution, the right to testify is also guaranteed by these parallel provisions of the Hawaiʻi Constitution.
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> There is also a statutory protection for the right to testify. HRS § 801-2 (1985) states:
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> > In the trial of any person on the charge of any offense, he or she shall have a right to be heard in his or her defense.

Tachibana v. State, 79 Hawaiʻi 226, 231-32, 900 P.2d 1293, 1298-99 (1995) (ellipses and brackets omitted) (quoting State v. Silva, 78 Hawaiʻi 115, 122-23, 890 P.2d 702, 709-10 (App. 1995).

must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." Id. at 236, 900 P.2d at 1303 (footnotes omitted). The Tachibana court suggested that trial courts engage in what is now referred to as the "Tachibana colloquy." Id. at 236 n.7, 900 P.2d 1303 n.7.

In this case, the district court did not obtain an on-the-record waiver of Dias's right to testify. Nothing in the record indicates whether Dias personally chose not to testify or whether such decision was voluntary, knowing and intentional.

"Once a violation of the constitutional right to testify is established, the conviction must be vacated unless the State can prove the violation was harmless beyond a reasonable doubt." Id. at 240, 900 P.2d at 1307.

Here, Officer Tada testified that "[Dias] told me that she believed she was at or she went to Eleele Big Save and when she came out she had no idea that her car was struck." Dias's testimony may have provided a good faith defense, as suggested in her counsel's closing argument.[6] Thus, the court's error was

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[6]Dias's counsel argued:

> The prosecutor has to show proof beyond a reasonable doubt that my client drove upon the highway to get to the shopping center. All we have in evidence is that she was in the shopping center. There's no proof she drove it to the shopping center; for example, the court clerk his [sic] here. She went to court but she didn't drive. The court bailiff probably drove as she usually does, and yet she's here in the courtroom. It's too equivocal.
>
> We're not asking amnesty for being in a shopping center or being on the road. What we're saying is there's no proof beyond a reasonable doubt that she drove the car to the shopping center. She may be the owner of the car.

not harmless beyond a reasonable doubt. We therefore vacate the Judgment of the district court and remand for retrial.

D. Dias's Right to Closing Argument

Dias contends the trial judge, in ruling against her prior to closing argument, denied her the rights to assistance of counsel and fair trial. Because we vacate the Judgment and remand this case for retrial, we need not address this issue.

IV. CONCLUSION

We vacate the June 19, 2000, Judgment and remand this case for a new trial.

DATED: Honolulu, Hawaiʻi, March 14, 2002.

On the briefs:

David A. Fisher,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for plaintiff-appellee.

Associate Judge

Associate Judge

. . . .

But non-owners can also drive cars too. So it's too equivocal to say beyond a reasonable doubt that she was the actual driver.