

NO. 23697

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
KENNETH TATSUO YAMAMOTO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(Traffic No. 00-138908)

MEMORANDUM OPINION

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

Defendant-Appellant Kenneth Tatsuo Yamamoto (Defendant) appeals from that part of the August 4, 2000 judgment of the District Court of the First Circuit, per diem District Judge Christopher McKenzie presiding, that convicted and sentenced him for Driving Under the Influence of Intoxicating Liquor (DUI), in violation of Hawaii Revised Statutes § 291-4 (1993).

We affirm.

BACKGROUND

The record on appeal reveals overwhelming evidence that Defendant was DUI on the evening of April 13, 2000, when he was driving west on the H-1 Freeway, near the airport overpass. Police Officer Aaron Bernal (Officer Bernal) testified that he stopped Defendant after observing Defendant's vehicle, which was in the fast lane, passing slower vehicles in the area, weaving

within its lane, crossing "over the dotted white lines of the second lane," and crossing the solid white line into the shoulder lane several times. When Officer Bernal approached Defendant's vehicle, he noticed that Defendant had "red, watery, glassy eyes. Slight slurred speech." In addition, there was "a strong odor of alcohol coming from [Defendant's] vehicle, and from [Defendant's] breath[,] " and when Officer Bernal asked Defendant to produce certain documents, Defendant "fumbled through" the paperwork in his car and trunk, trying to locate these documents. Defendant also had difficulty maintaining his balance and admitted that "he had been drinking that night, and that he was apologetic about it." Finally, Defendant "failed" the three standard field sobriety tests (FSTs) administered to him,<sup>1</sup> and the results of the Intoxilyzer test of Defendant's breath indicated that Defendant had a .117 blood alcohol content.

Defendant's appeal is predicated on a technical evidentiary issue. Officer Bernal testified on direct examination without any notes. When defense counsel began cross-examining Officer Bernal, the first question asked of the officer was: "Now Officer Bernal, you had a chance--what you've testified to today, do you recollect all this from independent recollection?" After Officer Bernal answered, "Yes, I do[,] " the following colloquy ensued:

---

<sup>1</sup> Officer Aaron Bernal testified that Defendant did not perform the one-leg stand test, claiming he would not be able to perform it even when he was sober.

Q Did you get a chance--did you--do you remember all this without having reviewed your report, or did you have to review your report first?

A [I] reviewed my report to jog my memory of what the person did on that occasion, and it sufficed.

[Q] Okay. And when did you review your report?

A About ten minutes ago.

[Q] All right. Now, for example, you testified in the walk and turn test that he took--I think you said nine steps one way, ten steps back. He--at one point, he--one or two points, he stepped off to the side one or two feet. That kind of thing.

[A] Correct.

Q Do you have an independent recollection of that, or do you only recollect that because it's written down on your report?

A I don't have an independent recollection. What I do is I write it down when it's happening, and then I transpire (sic) it to my [FST].

[Q] Okay. So you write an--you write a separate report for that, right? And you note down what happened.

[A] I note down, yes. I note down.

[Q] Okay. So--now, what--you haven't referred to any documents during your testimony, right?

A As--no, I have not.

[Q] Okay. But in testifying today, when you for example said that he did the walk and turn test, and you know, as I said, took nine steps over and ten steps back, took two steps to the side, one foot--one to two feet each time, again, is that based on your reading your report, and then telling yourself, well, I don't remember this directly, but that's what I wrote down in my report, so that must be what happened.

[A] I have an independent recollection of the event. Also by referring to my report, it helps my memory to--for exact specifics like, I remember him stepping off line. And my report indicated he stepped off twice. I only remember it once. So if that's what you mean to narrow it down, yes.

[Q] Okay. So you have an independent recollection of his stepping off line once, without having looked at your report.

A Correct.

[Q] All right. What about the taking nine steps over and ten steps back. Do you have an independent recollection of that, or is that from your report?

A That's from my report.

[Q] Okay. Do you--of the matters that you've testified to today then, can you say how many of those matters are from your report, as opposed to an independent recollection of what happened?

A Most of my independent recollection of the incident, it--by looking at the defendant, I remember him indicating to him [sic] about his medication, and that's not written in my report. I remember indicating that he was manager, I believe, at some gas company or something.

[Q] Okay.

A That's from independent recollection. Just by his face, he's an older gentleman. Usually we--in that area, we catch a lot of military and younger people, so his car was a--it doesn't say in my report, but it's a Ford Thunderbird, two doors. Looks like a police vehicle. And that's from my independent recollection. It's not in my report.

[Q] Okay. Let's go back to the beginning when you observed him driving, and you've done that diagram, and you show him, you know, weaving and so on, and passing a solid white line at least once before he crossed under you.

Now again, is that from your independent recollection, or is that from the details in your report?

A My independent recollection, I recall is that person was weaving really bad. That's what did--drew my attention to his--that--to bring my attention to him. After that point, I would to [sic] refer to my report for the exact details of how many times he crossed over, exactly to the point of one foot, he crossed over, that I can recall. But to my personal recollection is he was weaving badly.

[Q] Okay. So there are some specifics that are--you have to refer to your report for. Some that you might have an independent recollection of.

[A] Correct.

[Q] Okay. What about the horizontal gaze nystagmus test? I think you testified that he failed all six indicators?

A Correct.

[Q] Okay. Now, is that from independent recollection, or is that again from your report?

A That's from my report.

[Q] Okay. What about the--his not taking the--deciding not to take the one leg stand. Is that--do you have an independent recollection of that?

A I have an independent recollection. He--

[Q] So you do remember that.

[A] Yes. He made it clear that he couldn't do it, even if he was sober, and if I was going to attempt him to do it while he's drinking was kind of crazy. So I said that's fine, you don't have to take it.

[Q] Okay. Your Honor, at this point, I'd ask to strike the officer's testimony because it appears to be a strange mixture. I didn't realize this when he was testifying, but it appears to be a mixture. Some details that he'd have to read directly from his report because he can't remember 'em. And some details that he does remember. In fact, some he just mentioned that he didn't even testify on direct.

And I believe the case law in Hawaii is that if he--you know, if he--and the proper way to have past recollection recorded as opposed to present recollection refreshed is to show the officer his report, and go through that procedure. That wasn't done here, and you know, I--it's very difficult to determine which part of his testimony is one, and which is the other. And I think it's so jumbled together that I'd ask that his testimony be stricken.

THE COURT: [Deputy Prosecutor]?

[DEPUTY PROSECUTOR]: Your Honor, I believe what the officer testified to was that there were some things that he could remember independently, and there were some things that he needed to jog his memory by reading the report prior to trial, which is what he did. His memory was jogged enough for his testimony today.

THE COURT: Yeah, that's the way I heard it. He said that there's some things he didn't remember. When he looked at 'em, some things were brought back to memory, and then

some things he did look in his report, and he needed to look at the report in order to refresh his recollection, or jog his memory as he said. So I'm going to overrule the objection.

Relying on this court's decision in State v. Dibenedetto, 80 Hawai'i 138, 906 P.2d 624 (App. 1995), Defendant contends on appeal that (1) the trial court erred in overruling his motion to strike the testimony of Officer Bernal based on past recollection recorded without proper reference to the officer's police report; and (2) without Officer Bernal's testimony, there was insufficient evidence to support Defendant's conviction.

#### DISCUSSION

Hawai'i Rules of Evidence (HRE) Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." HRE Rule 612 provides as follows:

**Writing used to refresh memory.** If a witness uses a writing to refresh the witness' [sic] memory for the purpose of testifying, either:

- (1) While testifying, or
- (2) Before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and

made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

In Dibenedetto, the case upon which Defendant relies for this appeal, the arresting police officer candidly testified that he did not have a clear memory of either the events that led to the defendant's arrest or the facts relevant to the FSTs that he had administered to the defendant. 80 Hawai'i at 141, 906 P.2d at 627. The officer also admitted that his testimony regarding the results of the FSTs was based on his memory of his written police report, which he had reviewed prior to testifying. Id. This court held that because the officer did not have a present recollection of the FSTs when he testified, his testimony regarding the FSTs should have been stricken. Id. at 145, 906 P.2d at 631.

In this case, the testimony of Officer Bernal indicates that he did have a present recollection of the events that led to Defendant's arrest. Indeed, he was able to recall details about the events that he had not bothered to write in his police report; e.g., the type of car Defendant was driving, that Defendant worked as a manager for a gas company, etc. Although the officer could not recall the exact details of the results of

the FSTs administered to Defendant,<sup>2</sup> the officer was able to "jog" his memory about the details by reviewing the written police report. Therefore, HRE Rule 602 was not violated by Defendant's testimony.

Moreover, even if the details about the FSTs for which the officer jogged his memory were excluded from the evidence, there is clearly sufficient evidence--the weaving of Defendant's vehicle, the alcoholic odor, the red and glassy eyes, the slurred speech, the fumbling, Defendant's confession that he'd been drinking--to support the DUI conviction.

Accordingly, we affirm that part of the August 4, 2000 judgment that convicted and sentenced Defendant for DUI.

DATED: Honolulu, Hawai'i, April 25, 2002.

On the briefs:

Samuel P. King, Jr.  
for defendant-appellant.

Loren J. Thomas,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

---

<sup>2</sup> It is difficult to believe that any police officer who is on the traffic detail could ever recall the exact field sobriety test results for every case.