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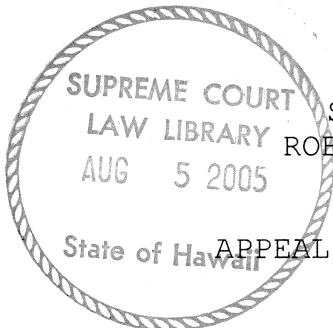
NO. 26402

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

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STATE OF HAWAI'I, Plaintiff-Appellee, v.
ROBERT ANDREW SPRY, JR., Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD TRAFFIC NO. 003221188)

SUMMARY DISPOSITION ORDER

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

The State of Hawai'i (the State) charged Defendant-Appellant Robert Spry (Spry) with driving under the influence of alcohol (DUI), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a)(1) and (a)(3) (Supp. 2004),¹ and with speeding, in violation of HRS § 291C-102(a) (Supp 2004).² After a bench trial, the Honorable Lono J. Lee found Spry guilty of DUI and

¹ Hawaii Revised Statutes (HRS) § 291E-61(a)(1) and (a)(3) (Supp. 2004) provides:

(a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty; [or]
- (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

² HRS § 291C-102(a) (Supp. 2004) provides: "No person shall drive a vehicle at a speed greater than a maximum speed limit and no person shall drive a motor vehicle at a speed less than a minimum speed limit established by county ordinance.

"guilty" of speeding.³ Judge Lee imposed various fines and fees along with requiring Spry to undergo alcohol assessment and counseling. Two Judgments pertaining to Spry's DUI conviction (Citation Report Number 003221188) and his speeding infraction (Citation Report Number 003221189) were filed on February 12, 2004, in the District Court of the First Circuit, Honolulu Division (district court). Spry appeals from these Judgments.

After a careful review of the record and the briefs submitted by the parties, we resolve Spry's points of error as follows:

1. The district court properly denied Spry's motion to suppress the results of his Intoxilyzer test which showed that his alcohol concentration was .163 grams of alcohol per 210 liters of breath. Spry's motion was based on the ground that the certification of the Intoxilyzer's accuracy was dated May 30, 2003, when the accuracy test was actually done on May 31, 2003. The Intoxilyzer supervisor who prepared the certification, however, testified at trial that the May 30, 2003, date on the certification was a "typo" which did not affect the validity of the certification. The Intoxilyzer supervisor's testimony cured any deficiency in the certification and established the reliability of the Intoxilyzer.

³ While driving under the influence of alcohol (DUI) is a criminal offense, speeding is a civil traffic infraction. HRS § 291D-2, -3 (1993 and Supp. 2004).

2. Using a laser gun, Honolulu Police Department Officer Jacob Miyashiro (Officer Miyashiro) obtained two readings that Spry's car was traveling 52 miles per hour in a 25-mile-per-hour zone. Spry argues that the district court's refusal to take judicial notice that 60 miles per hour is the equivalent of 88 feet per second prevented him from effectively cross-examining Officer Miyashiro about the "time, speed, and distance of [the officer's] observations." Although the district court should have taken judicial notice of Spry's proffered fact, we conclude that the court's error was harmless beyond a reasonable doubt. Hawai'i Rules of Penal Procedure Rule 52(a). The court's failure to take judicial notice did not deprive Spry of the opportunity to develop facts on cross-examination that could potentially have been used to impeach Officer Miyashiro's testimony with respect to the time, speed, and distance of his observations. For example, Spry was free to ask Officer Miyashiro on cross-examination: 1) when Officer Miyashiro first saw Spry's car and when the officer fixed the laser gun on Spry's car; 2) how far away Spry's car was from the officer at these times; and 3) how long it took for Officer Miyashiro to obtain the laser gun readings. In addition, while declining to take judicial notice of Spry's proffer that 60 miles per hour equals 88 feet per second, the court stated that Spry could prove that fact through other means. Spry did not attempt to do so.

3. After the State rested its case, Spry orally moved to suppress "anything that happened" after the horizontal gaze nystagmus (HGN) test, which included evidence of Spry's performance on the remainder of the field sobriety tests and the Intoxilyzer test results. Spry contended that because Officer Miyashiro had testified at a prior administrative driver's license revocation hearing that he had decided to arrest Spry after the HGN test, Spry should have been deemed arrested at that point. Spry then argued that because the State had failed to lay a foundation that Officer Miyashiro was qualified to administer the HGN test, the officer's testimony about the HGN test was inadmissible. Spry therefore asserted that there was insufficient evidence to establish probable cause for his arrest and that all evidence obtained after the HGN test should be suppressed.

On appeal, Spry raises the same arguments in claiming that the district court erred in denying his suppression motion. The basic premise of Spry's arguments is false and thus his conclusion is wrong. Even if Officer Miyashiro had decided to arrest Spry after the HGN test, Spry was not actually arrested by Officer Miyashiro until after Spry had also failed the walk-and-turn and one-leg-stand tests. See Hoffa v. United States, 385 U.S. 293, 310 (1966) (concluding that law enforcement officers are not required to arrest a defendant the moment they have probable cause to arrest). Thus, the district court properly

considered evidence of Spry's performance on the walk-and-turn and one-leg-stand tests in determining that there was probable cause for Spry's DUI arrest. Spry also did not make a contemporaneous objection to Officer Miyashiro's testimony regarding the HGN test on a lack-of-foundation ground. He therefore failed to preserve his right to challenge the admissibility of that testimony on appeal. State v. Naeole, 62 Haw. 563, 570-71, 617 P.2d 820, 826 (1980). But even without Officer Miyashiro's testimony on the HGN test, there was ample other evidence to support the district court's finding of probable cause for Spry's arrest and its denial of Spry's suppression motion.

We also reject Spry's argument that there was insufficient evidence to support his DUI conviction. Officer Miyashiro testified, among other things, that he detected a strong smell of alcohol on Spry's breath, that Spry appeared unsteady on his feet, and that Spry had difficulty in performing the walk-and-turn and one-leg stand tests. The Intoxilyzer test results further showed that Spry's alcohol concentration was .163 grams of alcohol per 210 liters of breath.

4. The district court properly overruled Spry's hearsay objection to Officer Miyashiro's testimony regarding the tests that were done on the laser gun to assure that it was functioning properly. Contrary to Spry's claim, the record shows that Officer Miyashiro personally conducted the tests. Officer

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Miyashiro's testimony on the results of the tests was therefore based on his personal knowledge and was not hearsay. Hawaii Rules of Evidence Rule 801.

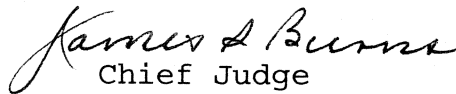
IT IS HEREBY ORDERED that the Judgment (Citation Report Number 003221188) pertaining to Spry's DUI conviction filed by the district court on February 12, 2004, is affirmed. Spry's speeding violation was a civil traffic infraction. Therefore, the February 12, 2004, Judgment (Citation Report Number 003221189) pertaining to the speeding infraction should not have shown that Spry was "found guilty," but rather should have shown that the court entered judgment in favor of the State on the infraction. See HRS § 291D-8(a)(4) (Supp. 2004). Accordingly, we remand the case to the district court and instruct it to file an Amended Judgment regarding the speeding infraction consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, August 3, 2005.


On the briefs:

John R. Remis, Jr.,
for defendant-appellant.

Ryan Yeh,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.


Chief Judge


Associate Judge


Associate Judge