NO. 26741

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KEKOA KEKUEWA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(NORTH AND SOUTH HILO DIVISION)
(REPORT NO. H-65396)

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

Kekoa K. Kekuewa (Defendant) appeals the June 30, 2004 judgment upon a bench trial in the District Court of the Third Circuit (district court)[1] that convicted him of driving under the influence of alcohol (DUI).[2] Defendant contends (1) the district court failed to find a material element of the DUI offense beyond a reasonable doubt, and (2) the evidence adduced at trial was not sufficient to convict him of DUI.[3] We disagree, and affirm.

I. Background.

On October 2, 2003, at about 1:23 a.m., Hawai'i County

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[1] The Honorable John P. Moran presided.

[2] Hawaii Revised Statutes (HRS) § 291E-61(a)(1) (Supp. 2004) provides: "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: 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[.]" (Enumeration omitted; format modified.)

[3] Kekoa K. Kekuewa was also charged and found liable for a speeding infraction, but does not challenge that finding on appeal.

Police Department (HCPD) officer Tuckloy Aurello (Officer Aurello) saw Defendant speeding northbound on Route 11 in South Hilo. Officer Aurello clocked Defendant with a laser gun going sixty-one miles per hour in a thirty-five-miles-per-hour zone. Officer Aurello activated his blue lights and pursued. Defendant turned right onto Kamehameha Avenue, then right again into the old airport, where he stopped. Officer Aurello pulled up behind and approached Defendant's car. When Officer Aurello told Defendant why he was being stopped, Defendant said he did not realize he was going that fast. Defendant claimed his dashboard light was out, so he could not see the speedometer. On cross-examination, Officer Aurello acknowledged that, the speeding aside, Defendant did not commit any other driving peccadilloes.

As he was talking to Defendant, Officer Aurello noticed the odor of an alcoholic beverage. He also saw that Defendant's eyes were red and glassy. Officer Aurello ran a license and warrant check, which turned up an outstanding warrant for Defendant. Officer Aurello arrested Defendant and took him down to the police station.

At the station, Officer Aurello confirmed his initial observations of Defendant: "Strong odor of intoxicating liquor and red, glassy, watery eyes." Thus, Officer Aurello believed Defendant was under the influence of alcohol, so he asked Defendant to take the standardized field sobriety tests (FSTs). Defendant was reluctant at first, but ultimately agreed. During

preliminary questioning, it was revealed that Defendant was wearing soft contact lenses and taking penicillin for a toothache. Officer Aurello administered the FSTs in a station hallway set up for that purpose, complete with a strip of masking tape on the floor. With HCPD officer Darrell A. Clinton (Officer Clinton) there to document the results, Officer Aurello conducted the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg-stand tests. The parties stipulated that Officer Aurello was qualified to administer those tests.

During the HGN test, Defendant lacked smooth pursuit in both eyes. Defendant also exhibited nystagmus at maximum deviation in both eyes. Officer Aurello concluded that Defendant exhibited four of the six possible clues on the HGN test that indicate impairment. Hence, Officer Aurello opined that Defendant "showed impairment."

As for the walk-and-turn test, Officer Aurello remembered that Defendant broke his stance twice, mixed his feet up and appeared to sway slightly while he stood in the "instructional position" before the test (heel of his right foot touching the toe of his left foot on the line, with arms at his side). Defendant started the test prematurely and -- moving very slowly with his arms slightly raised -- took thirteen steps forward instead of nine, then performed an "improper" turn and counted twenty-three steps back instead of nine. In addition, Officer Clinton saw Defendant step off the line once, and raise

his arms and momentarily stop walking both coming and going. Officer Clinton also detected "a bit of imbalance." Officer Aurello opined that, here again, Defendant "showed impairment."

With respect to the one-leg-stand test, Officer Aurello related that Defendant raised his right foot and counted to thirteen, then stopped and asked why Officer Aurello was looking at his watch while Defendant was counting. In the meantime, the thirty-second limit of the test elapsed and Officer Aurello stopped the test. Officer Aurello felt that Defendant -- once again -- "showed impairment."

To sum up, the deputy prosecuting attorney sought Officer Aurello's opinion on a number of things:

> Q. Okay. Um, and taking the defendant's performance on the field sobriety tests as a whole what was your evaluation of the defendant's performance?
>
> A. I felt that he showed impairment.
>
> Q. So you felt he showed impairment.
>
> And then based upon your observations of the defendant on that evening, the physical observations which you've already described to us, and based upon your training and experience as a Hawaii County police officer, do you have an opinion as to the defendant's state of sobriety on October 2nd, 2003?
>
> A. I believe he was impaired.
>
> . . . .
>
> Q. Okay. You believe that he was impaired.
>
> How about his state of sobriety?
>
> A. Uh, what you mean by that?
>
> Q. Uh, how 'bout his state of intoxication? Did you believe that the defendant had been drinking?
>
> A. Oh, yes.
>
> Q. And what led you to believe that the defendant had

been drinking?

A. Uh, the performance of the -- the test.

Q. Okay.

A. And the observations that I made.

Q. The physical observations that defendant -- and could you please describe those again?

A. The redness in the eyes and the smell of alcohol.

Q. And did you observe anything else that would lead you to believe that defendant was intoxicated?

. . . .

A. Certain times he was cooperative. Certain times he got little angry at me. So it went up and down, his attitude.

Q. Okay. Was this while you were performing the field sobriety tests?

A. Throughout the whole thing when -- from the test and then afterwards also.

. . . .

Q. Uh, was the defendant able to safely operate his vehicle on October 2nd of 2003, in your opinion?

A. I believe he was borderline.

Q. Well that's --

A. Borderline. I -- I -- I don't think so but -- because of the test, yeah.

Q. Okay.

A. But, again, I don't think so.

Later, on cross-examination, Officer Aurello clarified his last opinion:

Q. You said that his performance was borderline?

A. Not his performance on the [FSTs].

Q. You meant --

A. He might --

Q. -- whether he was able to drive a core -- a car or not, in your opinion it was borderline?

A. Yes.

After the FSTs were completed, Officer Aurello took Defendant into an interview room and arrested him for DUI. Defendant waived his Miranda rights and made a statement. Defendant told Officer Aurello that he owns his own music production business and had organized a "bachelor party" for his boss and his boss's son that night. Defendant also served as disc jockey and bartender. Defendant admitted he had drunk three beers at about 8:30 that night. The party ended at midnight, and Defendant was on his way to meet some other friends when Officer Aurello pulled him over for speeding. Officer Aurello remembered that Defendant was "angry one minute and friendly the next" during the interview. Officer Aurello also recalled that Defendant made a curious admission: "Uh, he told me he didn't wanna answer any more questions, and that, uh, he did some -- something wrong, if anybody was going take the fall, nobody except him would take the fall. Something."

Defendant did not testify nor offer any evidence of his own. The district court shared its ruminations, as follows:

> All right, the matter's been submitted to the court for my decision. Let me just kind of talk what I -- what I think has happened here.
>
> Clearly the police had a right to stop you. You were speeding in the opposite direction. The officer had you on a laser. You doing 61 in a 35. He stops you. All the reason in the world to stop you.
>
> At that point they then detect a clear and strong odor of alcohol. Your eyes appeared to be red. That gives the officers the right to now go ahead and do further investigation as regards to whether or not it's a DUI.

They then discover that you have a bench warrant that's outstanding. Gives them all the right in the world to arrest you, take you to the jail.

At the jail they have all the right in the world, based upon the -- the things that have happened in front of them, to do the field sobriety tests.

So the case here is your performance or lack of performance in the field sobriety tests, does that equal proof beyond a reasonable doubt that you complied -- that you -- that you violated [Hawaii Revised Statutes (HRS) § 291E-61(a)(1) (Supp. 2004)]. It's normally what the lawyers refer to as an (a)(1) case.

And what that says is that:

> "A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assume [sic] actual physical control of a vehicle . . . ."

Well, we know that you were operating the vehicle, so we know that you are, um, certainly qualified or satisfied that portion of the -- of, uh, subsection (a).

And it says:

> " . . . operates or assumes actual physical control of a vehicle:
>
> "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 . . . ."

Well, we don't know what your blood alcohol level was because you refused to take the test, you know, do the blow test, so we go back to Officer Aurello and Officer Clinton.

Both of them have established that, uh, appropriate training. They have established that they conducted the test in a proper manner. They have established, certainly as regards the, uh, horizontal nystagmus test, that although it may have been -- person with more alcohol in their system might have had a more, uh, waver, an earlier waver, as counsel has pointed out in his cross-examination, your eyes, uh, didn't indicate that you were heavily under the influence of alcohol, but when they got to a certain degree or angle of the test it was clear that -- that you did have some impairment, uh, and it was probably alcohol related because you smelled it, your eyes were watery.

And then the other thing is, although, uh, we don't have all of the clues, the fact is that you didn't do -- if you were -- if you were sober you would have taken nine steps, I feel sure you would not have had to raise your arms and put your foot down to maintain your balance. And those are indicative that something was afoot here and the afoot is that you acknowledged that you had been drinking alcohol.

> I frankly do not agree with the State that your comment about -- something about, uh, I'm going to be responsible or I'm taking on -- forgotten the exact wording, um, the idea that somehow that was an admission of guilt. I don't feel that. I -- I didn't consider that. My -- my decision is based solely upon what the officers testified to what happened, and what they observed, and how you did not perform the tests as well as you should have.
>
> So it's my opinion that the State has established beyond a reasonable doubt that you were under influence of -- of alcohol to some extent on the day in question and that you were in operation of a vehicle, and so therefore you're in violation of the statute, therefore I find you guilty.

(Some brackets in the original.)

II. Discussion.

A.

Defendant contends the district court failed to find a material element of the DUI offense beyond a reasonable doubt. This contention has two parts.

First, Defendant points to the conclusion of the district court's ruling:

> So it's my opinion that the State has established beyond a reasonable doubt that you were under influence of -- of alcohol to some extent on the day in question and that you were in operation of a vehicle, and so therefore you're in violation of the statute, therefore I find you guilty.

(Emphasis in the Opening Brief.) Seizing upon the phrase in the emphatic, Defendant argues,

> The Court incorrectly states that a person may be found guilty of [DUI] if they 1) are under the influence of alcohol to some extent; and 2) are in operation of a vehicle. This is not a correct statement of the required elements of the crime, and Mr. Kekuewa's conviction should accordingly be reversed.

Second, Defendant singles out one of the district court's predicate comments:

> . . . as counsel has pointed out in his cross-examination, your eyes, uh, didn't indicate that you were heavily under the influence of alcohol, but when they got to a certain degree or

> angle of the [HGN] test it was clear that -- that you did have some impairment, uh, and it was probably alcohol related because you smelled it, your eyes were watery.

(Emphasis in the Opening Brief.) Citing the underlined words, Defendant avers that "the trial court applied the incorrect standard when it found Mr. Kekuewa guilty of [DUI] in violation of the statute. The trial Court's oral findings indicate that the Court was applying the more-probable-than-not burden of proof."

We disagree with both of Defendant's averments. The district court was well aware of what it had to find before convicting Defendant of DUI, and in fact correctly quoted the material elements of the offense in its oral ruling: ". . . operates or assumes actual physical control of a vehicle: 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 . . . ." (Internal quotation marks and block quote format omitted; ellipses in the original.) Cf. HRS § 291E-61(a)(1) ("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: 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[.]" (Enumeration omitted; format modified.)). And the district court clearly demonstrated its cognizance of the requisite standard of proof,

initially when it set out its assignment -- "does that equal proof beyond a reasonable doubt that you . . . violated the statute" -- and ultimately when it reached its conclusion -- "it's my opinion that the State has established beyond a reasonable doubt that you were under influence of . . . alcohol[.]"

Moreover,

> we are compelled to give full force and effect to the well established rule that "'the burden of showing error is on the plaintiffs in error. We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance.'" Ala Moana Boat Owners v. State, 50 Haw. 156 at 158, 434 P.2d 516 at 518 (1967).

Au-Hoy v. Au-Hoy, 60 Haw. 354, 358, 590 P.2d 80, 83 (1979). In addition, even "where . . . the trial court did not refer to any standard of proof, but merely commented on the nature of the evidence in support of the finding of guilt, a presumption arises that it applied the correct standard." State v. Aplaca, 74 Haw. 54, 66, 837 P.2d 1298, 1305 (1992). Nothing appearing in the record of the proceedings below, nor argued on appeal, rebuts these presumptions.

B.

For his other point of error on appeal, Defendant contends there was insufficient evidence adduced at trial to convict him of DUI. We disagree.

It is well established that

> evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a

> conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.
>
> "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. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996) (brackets, citations, block quote format and some internal quotation marks omitted). "Further, in reviewing whether substantial evidence exists to support a conviction, due deference must be given to the right of the trier of fact to determine credibility, weigh the evidence, and draw justifiable inferences of fact from the evidence adduced." State v. Talifero, 77 Hawai'i 196, 201, 881 P.2d 1264, 1269 (App. 1994) (citation omitted).

On this point, Defendant notes that, except for the speeding, his driving that evening was unremarkable. Defendant also urges an innocent explanation for his demeanor. He attributes his red and glassy eyes and aura of alcohol to the late hour, his party organizing and bartending earlier that evening, and his use of penicillin and soft contact lenses. Finally, Defendant asserts that his performance on the FSTs was, at worst, inconclusive. Defendant cannot comprehend how the district court could find him guilty beyond a reasonable doubt,

when the most Officer Aurello would say was that Defendant's ability to safely operate his vehicle was "borderline."

These are arguments on the weight and credibility of the evidence and justifiable inferences that may be drawn therefrom, matters not meant for us on appeal but best left to the court below. Talifero, 77 Hawai'i at 201, 881 P.2d at 1269. That said, we can easily conclude there was substantial evidence to support Defendant's DUI conviction. Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

III. Conclusion.

Accordingly, the June 30, 2004 judgment of the district court is affirmed.

DATED: Honolulu, Hawai'i, November 21, 2005.

Corinne K.A. Watanabe
Acting Chief Judge

Associate Judge

Associate Judge

On the briefs:

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