

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27706

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KEVIN R. MACARTHUR, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NOS. 00523854M, 0523854AM, 00523849M)

K. HAMAKAADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2007 FEB 14 AM 7:49

FILED

SUMMARY DISPOSITION ORDER

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

Kevin Roger MacArthur (Defendant) appeals the three December 9, 2005 judgments of the District Court of the Second Circuit (district court)¹ that convicted him of driving under the influence of alcohol (DUI) (count one), reckless driving (count two), and inattention to driving (count three), respectively.

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Defendant's points of error on appeal as follows:

1. Given the prerogative of the finder of fact to determine the credibility of the witnesses and the weight of the evidence, State v. Taliferro, 77 Hawai'i 196, 201, 881 P.2d 1264, 1269 (App. 1994), and 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), we conclude there was substantial evidence to support the

¹ The Honorable Reinette W. Cooper presided.

material element of operation as to all three charges. Id.

2. There was sufficient foundation for the arresting officer to testify whether he had determined the identity of the driver of the vehicle, Rule 602, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes (HRS) (1993); Rule 602 Commentary, and even if there was not, any error was decidedly nugatory. State v. Mitchell, 94 Hawai'i 388, 398, 15 P.3d 314, 324 (App. 2000).

3. Defendant's contention -- that the district court erred when it confirmed for the record that the arresting officer had correctly identified the driver of the truck -- is faulty. The district court stated for the record a simple tautology -- that the witness had identified Defendant, driver or not. At any rate, Defendant was offered the opportunity to subject the arresting officer to "testing in the crucible of cross-examination[,]". Crawford v. Washington, 541 U.S. 36, 61 (2004), and though he declined, his right to confrontation thereby remained, nonetheless, unsullied and fully sustained.

4. We decide that the district court erred in convicting in both count two and count three because the district court's decision failed the test articulated in State v. Matias, 102 Hawai'i 300, 305, 75 P.3d 1191, 1196 (2003), for applying HRS § 701-109(1)(e) (1993).

Therefore,

IT IS HEREBY ORDERED that the two December 9, 2005

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judgments of the district court that convicted Defendant of DUI (count one) and reckless driving (count two), respectively, are affirmed, and the judgment of even date convicting him of inattention to driving (count three) is reversed.

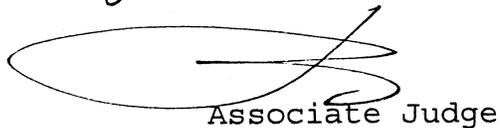
DATED: Honolulu, Hawai'i, February 14, 2007.

On the briefs:

Matthew S. Kohm,
for Defendant-Appellant.

Gerald K. Enriques,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge