

NO. 27782

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
EMILY LOUISE BOOTH, Defendant-Appellant

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2007 MAR 20 PM 12:37

FILED

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
(CASE NO. 00536388M)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Emily Louise Booth (Booth) appeals from the District Court's¹ January 25, 2006 Judgment.

During the evening of April 20, 2005, a police officer observed Booth operating a motor vehicle and violating Hawaii Revised Statutes (HRS) § 291C-41 (1993)² and HRS § 291C-38 (1993).³ The police officer testified that although he had some

¹ Judge Douglas H. Ige presided.

² § 291C-41 Drive on right side of roadway; exceptions. (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
(3) Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
(4) Upon a roadway designated and signposted one-way traffic.

³ § 291C-38 Longitudinal traffic lane markings. (a) Traffic lane markings shall be yellow, white or red in color. Black may be used in combination with these colors where the pavement itself does not provide sufficient contrast.
(b) Lane markings shall conform to the following concepts:
(1) White lines indicate the separation of lanes of traffic flowing in the same direction.
(2) Yellow lines indicate the separation of lanes of traffic flowing in opposing directions or the left boundary of a traffic lane at a particularly hazardous location.
(3) Red markings
(4) Broken lines
(5) Solid lines are restrictive in character.

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training on the subject, he was not a certified drug recognition expert. The officer had Booth perform some field sobriety tests but he did not do all of the twelve steps that he had been taught in his drug recognition expert training. After the tests, the officer decided that Booth had been operating the vehicle under the influence of cannabis and arrested her. Thereafter, Booth submitted to a urine test.

A Complaint filed on June 7, 2005 charged Booth with violating HRS §§ 291E-61 (2006)⁴, 291C-38, and 291C-41.

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- (6) A wider line
 - (7) Double lines
 - (8) Markings which require visible emphasis at night shall be reflectorized.
 - (c) Longitudinal traffic lane markings shall have the following applications:
 - (1) A broken white line
 - (2) A broken yellow line
 - (3) A solid white line is used to indicate the edge of the traffic lane where travel in the same direction is permitted on both sides of the line but where movement from lane to lane is considered to be hazardous. A solid white line may be crossed only in unusual circumstances and then only with great care. A double width solid white line
 - (4) A solid white line is also used to indicate the right edge of the pavement.
 - (5) A double solid white line
 - (6) A solid yellow line is used to indicate the left edge of a traffic lane where overtaking and passing on the left is prohibited. The crossing of a solid yellow line by vehicular traffic is prohibited except when the crossing is part of a left turn movement.
 - (7) A solid yellow line is also used to indicate the left edge of each roadway of a divided street or highway.
 - (8) A double solid yellow line
 - (9) A double line consisting of a broken yellow line and a solid yellow line
 - (10) A double broken yellow line
 - (11) A dotted line
 - (12) A solid white line when supplemented by official signs or pavement markings, is used to indicate the separation of bicycle lanes from lanes of vehicular traffic flowing in the same direction. Except as allowed under section 291C-123, vehicles other than bicycles shall be prohibited from operating in a bicycle lane.

⁴ § 291E-61 Operating a vehicle under the influence of an intoxicant. (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:

- (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;

(b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without possibility of probation or suspension of sentence:

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Roxanne Ota, a medical technologist, testified that she twice applied an "enzyme amino acid" test to determine the drug content of Booth's urine specimen and both times obtained a "presumptive positive" result. Cynthia Morrison, a licensed toxicologist, testified that her test result indicated that Booth's urine specimen was positive for "THC".

Dr. Clifford Wong has a Ph.D. in biochemistry. His field of specialty is "forensic toxicology." He is the toxicology lab director and certifying scientist for Clinical Laboratories of Hawaii. During his testimony, he explained the term "THC" as follows:

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- (1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):
 - (A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court;
 - (B) Ninety-day prompt suspension of license and privilege to operate a vehicle during the suspension period, or the court may impose, in lieu of the ninety-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a vehicle and, for the remainder of the ninety-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in substance abuse treatment programs;
 - (C) Any one or more of the following:
 - (i) Seventy-two hours of community service work;
 - (ii) Not less than forty-eight hours and not more than five days of imprisonment; or
 - (iii) A fine of not less than \$150 but not more than \$1,000; and
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund;

(d) Whenever a court sentences a person pursuant to subsection (b), it also shall require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment shall be borne by the offender.

(f) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood or urine tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test.

A We found that the metabolite for marijuana was present in the urine at a quantity greater than 457 nanograms per milliliter. When I state that the linearity range is exceeded, that means the concentration was higher than our normal calibration range. So it's -- at that point we just estimate it's greater than that.

Q [by Deputy Prosecuting Attorney (DPA)] Okay. And you said -- is it THC carboxylic acid, that the form name for the --

A Yeah. For the metabolite. It's called 11-nor-Delta-9, tetrahydrocannabinol 9, carboxylic acid is the form --

Q That's a really technical name?

A Carboxy THC is what we abbreviate.

. . . .

A To indicate that's the metabolite of the marijuana.

Q Okay. So that would be like cannabis or marijuana?

A Yes. Uh-huh.

Dr. Wong further testified in part:

Q [by DPA] Okay. Have you ever been qualified to testify as a forensic toxicologist?

A Yes. Many times.

Q And how many times have you testified as an expert?

A I go to court an average about twice a week. So it adds up to quite a bit over the --

Q So you have been doing it since what year?

A At least 100 times a year, I guess, for -- since 1998.

Dr. Wong also testified regarding the results of the urine test, the effects of marijuana on humans, and the following:

Q [by DPA] Based on the observations wrote [sic] down by the officer in this case, did you form an opinion as to whether [Booth] had been under intoxication of marijuana?

A Yes. Based on -- the information that I have learned from all the seminars and classes that I have taken on this subject, it would clearly indicate marijuana intoxication.

The Court was not asked to and did not qualify Dr. Wong as an expert. On the other hand, the defense did not object to Dr. Wong's opinion testimony.

The Court decided that the State had satisfied its burden of proof and ordered Booth to:

complete the 14-hour substance abuse rehabilitation program. . . . obtain a substance abuse evaluation and complete any treatment as recommended. Your license was previously administratively revoked, so I won't take any further action on your license. I will impose a fine of \$200 plus \$107 driver education fee, \$30 criminal injuries fee and \$25 neuro trauma fee, and order that you do 72 hours of community service. That's on the OUI charge.

On the other two D crim matters, judgment will be entered in favor of the State for \$50 each and \$7 driver education fee.

The opening brief states the sole point of this appeal:

In this case, the State failed to establish that Wong was an expert in the effects of cannabis intoxication on driving patterns; that Wong's testimony was based upon a sound factual foundation and that his opinion was the product of an explicable and reliable system of analysis. State v. Montalbo, 73 Haw. 130, 828 P.2d 1274 (1992). Due to the lack of the requisite foundation, the court's reliance on Wong's testimony as proving that Ms. Booth was under the influence of an intoxicant and that she was impaired was misplaced. Accordingly, there was no substantial evidence that Ms. Booth was under the influence of cannabis and that her driving was impaired as a result and her conviction must be reversed.

The following is a relevant precedent:

"Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion." State v. Fukusaku, 85 Hawai'i 462, 472, 946 P.2d 32, 42 (1997) (quoting State v. Maeleqa, 80 Hawai'i 172, 180, 907 P.2d 758, 766 (1995)) (internal quotation marks omitted); see also State v. Torres, 60 Haw. 271, 277, 589 P.2d 83, 87 (1978); State v. Smith, 59 Haw. 565, 569, 583 P.2d 347, 350 (1978), overruled on other grounds by State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993). Generally, the trial court abuses its discretion when it "clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (quoting State v. Ganai, 81 Hawai'i 358, 373, 917 P.2d 370, 385 (1996) (citation omitted)).

State v. Pauline, 100 Hawai'i 356, 364-65, 60 P.3d 306, 314-15

(2002).

Rule 702, Hawaii Rules of Evidence, Chapter 626, HRS

(1993) states:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

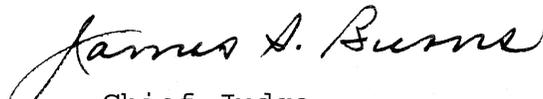
In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs, and duly considering and applying the law relevant to the issues raised and arguments presented, we affirm the District Court's January 25, 2006 Judgment.

DATED: Honolulu, Hawai'i, March 20, 2007.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

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


Chief Judge


Associate Judge


Associate Judge