

NO. 28443

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MICHAEL FERRY, Defendant-Appellant

EMERSON
CLERK APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
KONA DIVISION
(CITATION NO. 3DTC-06-035723)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Michael Ferry (Ferry) appeals from the Notice of Entry of Judgment and/or Order filed on November 28, 2006 in the District Court of the Third Circuit, Kona Division (district court).^{1/} The district court convicted Ferry of Inattention to Driving, in violation of Hawaii Revised Statutes (HRS) § 291-12 (2007 Repl.).^{2/} The district court sentenced Ferry to pay a \$100 fine and various fees.

On appeal, Ferry argues that the district court abused its discretion by not granting his December 7, 2006 "Motion for New Trial or to Reconsider Judgment" (Motion for New Trial) because

(1) the district court erroneously applied a civil standard of negligence to Ferry's allegedly criminal conduct;

^{1/} The Honorable Joseph P. Florendo presided.

^{2/} HRS § 291-12 (2007 Repl.) provides:

§291-12 Inattention to driving. Whoever operates any vehicle without due care or in a manner as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than \$500 or imprisoned not more than thirty days, or both.

(2) the district court apparently failed to analyze whether Ferry was negligent regarding the existence of attendant circumstances specified in HRS § 291-12 during the incident and the results of his conduct during the incident;

(3) an oral finding the district court gave at trial was clearly erroneous;

(4) in ruling on Ferry's oral motion for judgment of acquittal, the district court apparently relied upon the mischaracterization by the State of Hawai'i (State) of the evidence;

(5) the district court apparently relied on impermissible inferences the State made in its closing argument and at the hearing on Ferry's Motion for New Trial; and

(6) there was insufficient evidence that Ferry committed the offense of Inattention to Driving.

Ferry contends the district court also abused its discretion by refusing to reopen the case to consider additional evidence.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Ferry's points of error as follows:

(1) There was sufficient evidence that Ferry committed the offense of Inattention to Driving. See HRS § 291-12; State v. Momoki, 98 Hawai'i 188, 195, 46 P.3d 1, 8 (App. 2002); State v. Mitchell, 94 Hawai'i 388, 402, 15 P.3d 314, 328 (App. 2000); State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982); State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996); Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001).

(2) Ferry has failed to show that the district court applied the wrong standard of negligence or did not consider the existence of attendant circumstances. The district court cited the correct definition of negligent state of mind. HRS § 702-206(4) (1993). There is nothing in the record to indicate that "the court did not consider all relevant factors mentioned in" HRS § 702-206. Au-Hoy v. Au-Hoy, 60 Haw. 354, 358, 590 P.2d 80, 83 (1979). Furthermore, the district court cited this court's decision in Mitchell.

(3) The district court's oral Finding of Fact that Ferry "speculate[d] that his foot hit the gas pedal after hitting the brake and that's what caused his vehicle to move forward" was clearly erroneous. Regardless, the district court's error was harmless because whether Ferry's foot hit the gas or slipped off the brake, causing the truck to move forward from the point of impact with the telephone pole, was immaterial. The court's error did not affect Ferry's substantial rights.

(4) The State did not mischaracterize the evidence and, thus, commit prosecutorial misconduct during Ferry's oral motion for judgment of acquittal.

(5) The State did not make impermissible inferences and, thus, commit prosecutorial misconduct during its closing argument or at the hearing on Ferry's Motion for New Trial. See State v. Carvalho, 106 Hawai'i 13, 18, 100 P.3d 607, 612 (App. 2004).

(6) The district court did not abuse its discretion by failing to reopen the case to consider additional evidence. Ferry could have presented evidence at trial regarding the integrity of the telephone pole and the least amount of force required to topple it. At the hearing on the Motion for New Trial, Ferry argued that he did not know at the time of trial that such evidence would have been available to him. However, in

the context of the hearing as a whole, we fail to see how Ferry could not have known, after reasonable investigation, that such information was available.

Therefore,

IT IS HEREBY ORDERED that the Notice of Entry of Judgment and/or Order, filed on November 28, 2006, in the District Court of the Third Circuit, Kona Division, is affirmed.

DATED: Honolulu, Hawai'i, March 14, 2008.

On the briefs:

Frank L. Miller
for Defendant-Appellant.

Frederick D. Giannini,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge