

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28472

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
EDWARD D. FLEMING, Defendant-AppellantNORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
WAILUKU DIVISION
(CASE NO. 2DTA-07-00030)SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Edward D. Fleming (Fleming) appeals from the Judgment filed on March 14, 2007 in the District Court of the Second Circuit, Wailuku Division (district court).¹ After a bench trial, Fleming was convicted of one count of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a) (Supp. 2006).²

¹ The Honorable Douglas H. Ige presided.

² HRS §291E-61(a) provides:

§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:

- (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;
- (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
- (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or

(continued...)

On appeal, Fleming contends the district court

(1) erred by misstating and/or misinterpreting the law with regard to proper chain of custody for evidentiary blood samples;

(2) abused its discretion when it admitted into evidence the results of a blood sample taken from Fleming that lacked a proper chain of custody; and

(3) lacked sufficient evidence to convict Fleming.

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 Fleming's points of error as follows:

(1) The district court did not abuse its discretion (or commit plain error) by admitting blood evidence over Fleming's chain-of-custody objection. "[O]n appeal, unless the decision to admit evidence over a chain-of-custody objection constitutes a clear abuse of discretion, it will not be overturned." State v. Nakamura, 65 Haw. 74, 81, 648 P.2d 183, 188 (1982) (internal quotation marks, citation, and parentheses in original omitted). "An accounting of hand-to-hand custody of the evidence between the time it is obtained and the time admitted to trial is not required in establishing chain of custody." State v. DeSilva, 64 Haw. 40, 41, 636 P.2d 728, 730 (1981). This court has instructed that in chain-of-custody objection cases:

Chain of custody is sufficiently established where it is reasonably certain that no tampering took place, with any doubt going to the weight of the evidence. *And despite the mere possibility that others may have had access to the*

²(...continued)

(4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

exhibits, there exists a reasonable certainty that no tampering took place.

State v. Mitchell, 88 Hawai'i 216, 229, 965 P.2d 149, 162 (App. 1998) (ellipsis omitted; emphasis in original) (quoting DeSilva, 64 Haw. at 41, 636 P.2d at 730).

The State of Hawai'i (State) established that the evidence seals on the blood vials had not been tampered with, the vials had not been damaged, and the vials were as originally labeled by the person who drew the blood. Two lapses in the record of the chain of custody, pointed out by Fleming, do not diminish the reasonable certainty shown by the State that the evidence was not tampered with. The absence of a chain-of-custody record covering transportation of the evidence from the locked evidence refrigerator at the Wailuku Police Station to the locked refrigerator at the Maui Memorial Medical Center (MMMC) and the shipment via airline of the evidence from MMMC to the Oahu testing lab does not raise a reasonable question of evidence tampering.

(2) The district court did not abuse its discretion in admitting the blood sample results into evidence. To constitute an abuse of discretion, it must appear that the trial court "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000).

No evidence was presented that the blood evidence had suffered any degradation caused by its handling. The State established that there was a reasonable certainty that the blood sample had not been tampered with, and the district court ruled that any doubt based on the chain of custody would go to the weight of the evidence. Mitchell, 88 Hawai'i at 228-29, 965 P.2d

at 161-62. The district court correctly applied the law to the facts of this case.

(3) The district court had sufficient evidence to convict Fleming. The State based its OVUII charge on two standards of under the influence of an intoxicant: first, on the arresting officer's observation of Fleming at the time of arrest and while performing the field sobriety test administered by the officer, HRS § 291E-61(a)(1); and second, on the blood alcohol level of Fleming's blood sample, HRS § 291E-61(a)(4).

The arresting officer testified that he observed Fleming driving unsafely on the morning of November 16, 2007 and that Fleming was unable to successfully complete a standard field sobriety test. The officer also testified that Fleming had an inability to focus, red and watery eyes, slurred and mumbled speech, odor of liquor on his breath, and unsteadiness on his feet. The arresting officer was trained and experienced in DUI detection and enforcement. The officer's testimony provided compelling evidence that Fleming was "under the influence of an intoxicant . . . in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty." HRS § 291E-61(a)(1).

Blood evidence was properly admitted, and there was no challenge to the accuracy of its testing. The test results showed that Fleming had a blood alcohol level in excess of the legal limit -- his blood tested at .124 grams of alcohol per 100 milliliters of blood. Consequently, there was sufficient evidence to convict Fleming of OVUII based on a blood alcohol level in excess of ".08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood." HRS § 291E-61(a)(4).

Therefore,

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The Judgment filed on March 14, 2007 in the District Court of the Second Circuit, Wailuku Division, is affirmed.

DATED: Honolulu, Hawai'i, May 28, 2008.

On the briefs:

David A. Sereno
for Defendant-Appellant.

Renee Ishikawa Delizo,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge