

NO. 28584

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
ZACHARIAH IAN FITZWATER, Defendant-Appellant

2009 APR 27 AM 8:41  
Jesse K. Kuroki  
NORMA T. YATA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
'EWA DIVISION  
(HPD Traffic No. 1DTC-07-020562)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Zachariah Ian Fitzwater (Fitzwater) appeals from the Judgment filed on May 9, 2007 in the District Court of the First Circuit, 'Ewa Division (district court).<sup>1</sup>

Fitzwater was convicted of Excessive Speeding, in violation of Hawaii Revised Statutes (HRS) § 291C-105(a)(1) (2007). On appeal, Fitzwater contends that (1) the district court erred by admitting the speed check card as a business record under Hawaii Rules of Evidence (HRE) Rule 803(b)(6), (2) inadequate foundation was laid for the admission of the speed check card, (3) admission of the speed check card was a violation of his right to confrontation and (4) testimony of Officer Neal Ah Yat (Officer Ah Yat) was improperly admitted.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

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<sup>1</sup> The Honorable T. David Woo, Jr. presided.

the arguments advanced and the issues raised by the parties, we resolve Fitzwater's points of error as follows:

(1) The district court did not err by admitting the speed check card as a business record under HRE Rule 803(b)(6).<sup>2</sup> See State v. Ing, 53 Haw. 466, 497 P.2d 575 (1972); see also State v. Ofa, 9 Haw. App. 130, 136, 828 P.2d 813, 817 (1992) (calibration log for Intoxilyzer properly admitted under HRE Rule 803(b)(8)(B) as a "record of routine, nonadversarial matters made in a nonadversarial setting"). Fitzwater provides no authority to support his suggestion that Ing is no longer good law. See Commentary to HRE Rule 803(b)(6) (1993) (using Ing as an illustration of trustworthy evidence). Accord, People v. Stribel, 199 Colo. 377, 380, 609 P.2d 113, 116 (1980) ("the record-makers of speedometer calibrations have no motive to falsify the records, and the records are trustworthy").

(2) The district court did not err in overruling Fitzwater's objection to the foundation for the speed check card as a business record. See State v. Ortiz, 91 Hawai'i 181, 189-90, 981 P.2d 1127, 1135-36 (1999) (court's determination that

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<sup>2</sup> Rule 803. Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(b) Other exceptions.

. . . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

We note that Fitzwater quotes the 1985 version of this in his opening brief.

requirements of the hearsay rule exception were met is reviewed de novo). Officer Ah Yat testified that (1) his police vehicle was maintained by their vehicle maintenance section; (2) maintenance included taking the vehicle to a shop to calibrate the "actual speed of the car with the speedometer"; (3) the calibrations were done once a year and were good for a year; (4) the results of that speed calibration were recorded on a card "that is given and assigned to each vehicle"; and (5) the card reflecting the calibration for, and bearing the number of, his vehicle and covering the date of the offense was produced in court. While not the model of clarity, Officer Ah Yat's testimony showed that it was the practice of the police department to regularly have the accuracy of the speedometers in its vehicles tested, receive a card memorializing the testing of each vehicle, and maintain that card with the corresponding vehicle. This testimony was sufficient for the court to conclude the speed check card was a record of regularly conducted activity.

(3) Admission of the speed check card was not a violation of Fitzwater's right of confrontation. Crawford v. Washington, 541 U.S. 36, 56 (2004) (business records are not testimonial in nature). See also State v. Marshall, 114 Hawai'i 396, 401, 163 P.3d 199, 204 (App. 2007) (sworn statement by Intoxilyzer supervisor not testimonial, therefore not subject to Confrontation Clause).

(4) We decline to consider Fitzwater's final point as he failed to object to the testimony of Officer Ah Yat on the ground that it was improper expert testimony. State v. Vliet, 91 Hawai'i 288, 298-99, 983 P.2d 189, 199-200 (1999) (quoting Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 379 n.29, 944 P.2d

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1279, 1322 n.29 (1997) (waiver when the trial objection differs from that pressed on appeal)).

Therefore,

The Judgment filed on May 9, 2007, in the District Court of the First Circuit, 'Ewa Division, is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2009.

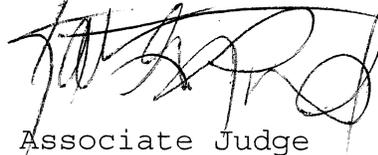
On the briefs:

Taryn R. Tomasa,  
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for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge