

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29017

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ROXANNE J.Y. LEE, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
WAHIAWA DIVISION
(HPD TRAFFIC NO. 1DTC-07-022536)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Roxanne J.Y. Lee (Lee) appeals from the January 15, 2008 judgment of conviction for one count of exceeding the speed limit by thirty miles in violation of Hawaii Revised Statutes (HRS) § 291C-105(a)(1) (2007) entered by the District Court of the First Circuit (district court).¹ The only issue raised on appeal is whether the district court abused its discretion in denying in part Lee's motion to compel discovery.

On September 25, 2007, Lee was orally charged with one count of exceeding the speed limit by thirty miles in violation of HRS § 291C-105(a)(1). The district court entered a plea of not guilty on behalf of Lee.

On December 7, 2007, Lee filed a motion to compel discovery (Discovery Motion). The Discovery Motion sought the following items:

- (a) [Honolulu Police Department (HPD)] departmental policies and procedures for conducting speeding citations;
- (b) The HPD manual for speeding citations;
- (c) The operation manual for the specific laser gun used in the case;
- (d) Any documentation related to the following:
 - i. The manufacturers [sic] operation and maintenance manuals for the specific laser gun used in the case,

¹ The Honorable James H. Dannenberg presided.

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- ii. The brand and model of the gun,
- iii. The age of the gun, including the manufacture date and the date of acquisition by the police,
- iv. When the gun was purchased and first put into use by HPD,
- v. Any and all warranty documents, including but not limited to, documents referencing the period of warranty on the gun,
- vi. Where the gun is stored,
- vii. How and by whom the gun is maintained,
- viii. When the gun was last tested and calibrated[,]
- ix. All certification documents[,]
- x. All police maintenance, servicing, repair and calibration records for any laser device [sic] used in the instant case,
- xi. Laser readings,
- xii. Laser unit test results for the officer(s) in the instant case,
- xiii. The laser gun training and qualification test results for the officer(s) in the instant case,
- xiv. The firearm qualification test results for the officer using the laser for the one year prior and the one year after the date of Defendant's citation/arrest[,]
- xv. The fixed distance used to calibrate the subject laser unit and location where the calibration took place,
- xvi. The delta distance used to calibrate the subject laser unit and location where the calibration took place[,]
- xvii. Any calibration reading,
- xviii. Manufacturer's service representative's maintenance, service and calibration records for the laser gun in question,
- xix. The laser gun manufacturer's established procedures for verifying and validating that the instrument was in proper working order,
- xx. Written verification that said manufacturer's established procedures were followed,
- xxi. Written verification that the laser gun was in proper working order at the time the laser gun was used[,]
- xxii. Records of regular maintenance, servicing, upkeep, repair, modification and/or calibration of the laser gun performed by the manufacturer (or the manufacturer's duly trained and licensed Representative), a year before and a year after the dates of any alleged offense(s), as well as official maintenance, repair, modification, servicing, and/or calibration manuals for the device in question prepared by and/or relied upon by the manufacturer (or the manufacturer's duly trained and licensed representative[]).

At the hearing on the Discovery Motion, Lee acknowledged receipt of the distance and location information relating to calibration of the laser gun (Items xv and xvi). During argument on the Discovery Motion, counsel for Lee referenced the LTI 2020 laser gun. The district court granted the motion to compel discovery

for "the delta distance and location," the items that were allowed in State v. Lo, 116 Hawai'i 23, 27, 169 P.3d 975, 979 (2007).

The trial commenced shortly after the decision on the Discovery Motion. At trial, the parties stipulated to the following testimony of HPD Officer James Gombio (Officer Gombio):

On August 26, 2007, at around 12:30 a.m., Officer Gombio was on duty on Farrington Highway equipped with the LTI 2020 laser gun. Officer Gombio was certified to use the LTI 2020 laser gun and was trained to use it at the Honolulu Police Academy. Based on his training and certification, Officer Gombio tested the LTI 2020 laser gun, using the four tests he learned to use at his training to determine if the LTI 2020 was functioning properly. The four tests were the self-test, the display test, the delta distance test, and the scope alignment test. The LTI 2020 was working properly. Officer Gombio retested the scope alignment after each citation he issued.

At around 12:30 a.m., Lee drove by Officer Gombio's location. The reading on the laser gun was seventy-three miles per hour. The speed limit in the area was thirty-five miles per hour. There were two official City and County of Honolulu speed limit signs that Lee would have had to pass.

Based upon Officer Gombio's knowledge and training, the LTI 2020 was working properly on that day.

Lee testified in her own defense and maintained that while she was in a hurry that night, her speedometer showed she was driving approximately sixty, not seventy-three, miles per hour.

The district court found Lee guilty as charged. Lee filed a notice of appeal from the judgment on February 12, 2008.

A ruling limiting discovery is reviewed for an abuse of discretion. State v. Peseti, 101 Hawai'i 172, 178, 65 P.3d 119, 125 (2003); see also Hawai'i Rules of Penal Procedure (HRPP) Rule 16(d).

It appears that the Discovery Motion sought five types of documents and information that were denied: (1) documents related to the operation and maintenance of the laser gun and the training and certification of the officer in the use of the laser gun (Operation, Maintenance and Training Documents);² (2) documents related to the policies and procedures of the HPD regarding speeding citations (Speeding Documents);³ (3) documents related to the date of acquisition and the age of the laser gun (Equipment Age Documents);⁴ (4) written verifications that manufacturer's procedures were followed and that the laser gun was in proper working order (Written Verifications);⁵ and "[t]he brand and model of the gun"; the "[l]aser readings"; and "[a]ny calibration reading."⁶

The district court did not abuse its discretion in denying the Discovery Motion with respect to the Operation, Maintenance, and Training Documents. In State v. Ames, 71 Haw. 304, 313-14, 788 P.2d 1281, 1286-87 (1990), the Hawai'i Supreme Court held that the trial court exceeded its authority by ordering the State to disclose manufacturer's manuals, instructions, specifications pertaining to the components, precision limits, operation, calibration, and maintenance of the Intoxilyzer, and information pertaining to the qualification, training and certification of the operator. The Operation, Maintenance, and Training Documents requested by Lee are similar in nature to the manuals, documents pertaining to maintenance, and the documents pertaining to the qualification and training of the Intoxilyzer operator in Ames and therefore are not subject to discovery in a non-felony case.

² Identified in the Discovery Motion as items (c), i, v, vi, vii, viii, ix, x, xii, xiii, xiv, xviii, xix, and xxii.

³ Identified in the Discovery Motion as items (a) and (b).

⁴ Identified in the Discovery Motion as items iii and iv.

⁵ Identified in the Discovery Motion as items xx and xxi.

⁶ Identified in the Discovery Motion as items ii, xi, and xvii.

Lee makes no argument justifying discovery of the Speeding Documents on appeal and it is not apparent how the Speeding Documents are material to Lee's case. See HRPP Rule 16(d). In the absence of any argument, the alleged error in denying Lee's request for the Speeding Documents is deemed waived. Hawai'i Rules of Appellate Procedure Rule 28(b)(7).

The Equipment Age Documents do not appear to be material to Lee's defense. In order for a conviction to be based upon the results of a laser gun, the State is required to prove "that the operator tested the device in accordance with accepted procedures to determine that the unit was functioning properly and that the operator was qualified by training and experience to operate the unit." State v. Stoa, 112 Hawai'i 260, 268, 145 P.3d 803, 811 (App. 2006) (quoting State v. Tailo, 70 Haw. 580, 582, 779 P.2d 11, 13 (1989)). If the laser gun is functioning properly on the date of the alleged offense, the age and date of purchase of the laser gun do not appear to be material to the defense. See HRPP Rule 16(d). It was therefore not an abuse of discretion for the district court to deny the request for the Equipment Age Documents.

It was not an abuse of discretion for the district court to deny discovery of the Written Verification Documents. Lee does not explain how "[w]ritten verification that said manufacturer's established procedures were followed" and "[w]ritten verification that the laser gun was in proper working order at the time the laser gun was used" "tends to negate the guilt of the defendant." HRPP Rule 16(b)(1)(vii). Therefore, both exceed the scope of discovery that the district court could allow pursuant to HRPP Rule 16(d). See also Ames, 71 Haw. at 313, 788 P.2d at 1286 ("discovery in a misdemeanor case that exceeds the limits of discovery established by HRPP Rule 16 for felony cases cannot be justified under the rule").

On the other hand, the remaining requests for (1) "[t]he brand and model of the gun" and (2) the "[l]aser readings," and "[a]ny calibration reading" to the extent they are

readings taken in preparation for or during the firing of the laser gun at Lee's vehicle on the night in question meet the criteria of materiality and reasonableness set forth in HRPP Rule 16(d). The brand and model of the laser gun meet the requirement of materiality as defined in Lo, 116 Hawai'i at 26-27, 169 P.3d at 978-79. The request is also reasonable to the extent that the request is for information in the possession and control of the HPD and its disclosure is not burdensome.

In the present case, the brand and model of the laser gun appear to have been known by defense counsel who referred to a specific brand and model of laser gun in argument on the Discovery Motion and which matched the brand and model referred to in the stipulated testimony of Officer Gombio. Therefore, it appears from the record that information of the brand and model of the laser gun were provided to Lee prior to trial.

In Ames, the Hawai'i Supreme Court held that the Intoxilyzer results and the calibration results for the Intoxilyzer may be discoverable in misdemeanor cases under HRPP Rule 16(d). Ames, 71 Haw. at 311 & n.9, 788 P.2d at 1285 & n.9. The laser gun calibration and the result of the firing of the laser gun at Lee's vehicle are similar to the results of the Intoxilyzer test and the calibration of the Intoxilyzer as was allowed in Ames and therefore should also be discoverable here.

However, the result of the laser firing at Lee's vehicle -- seventy-three miles per hour -- was also made known to Lee before the trial and thus it was unnecessary for the district court to order that "laser reading" be produced to the defense. Finally, as to the discovery of "any calibration reading," it is unclear on this record that such information, since it was

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displayed by the laser gun at the time the device was calibrated, was preserved after the calibration reading was displayed.

Therefore,

IT IS HEREBY ORDERED that this case is remanded to the District Court of the First Circuit to determine (1) whether the calibration reading taken in preparation for the firing of the LTI 2020 in the instant has been preserved and (2) whether that information would have tended to show that the LTI 2020 was not operating properly when the reading of the speed of Lee's vehicle was taken. In the event the district court answers both inquiries in the affirmative, the judgment in the instant case shall be set aside and Lee will be entitled to a new trial. If either inquiry is answered in the negative the judgment is affirmed.

DATED: Honolulu, Hawai'i, March 13, 2009.

On the briefs:

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


Presiding Judge

Delanie D. Prescott-Tate,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge