

NO. 29111

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
DIANE JOAN LIVESEY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
WAHIAWĀ DIVISION
(HPD Traffic No. 1DTC-07-044125)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Diane Joan Livesey (Livesey) appeals the Judgment entered on March 18, 2008 in the District Court of the First Circuit, Wahiawā Division (district court).¹

Livesey was convicted of Excessive Speeding, in violation of Hawaii Revised Statutes § 291C-105(a)(1) (2007).

On appeal, Livsey contends (1) the impossibility of reconstructing an unrecorded portion of testimony from Officer Kenneth Roberts's (Officer Roberts) cross-examination substantially prejudices her right to appeal, (2) the district court abused its discretion by denying her motion to compel discovery, (3) the State failed to prove that the laser gun used by Officer Roberts had been tested according to the manufacturer's accepted procedures, and (4) the State failed to adduce evidence that Officer Roberts was qualified by training and experience to operate the laser gun.

The State contends that testimony of Officer Roberts on direct examination was sufficient to convict Livesey and that Livesey cannot demonstrate any prejudice with respect to missing portions of the transcript.

¹ Per diem District Court Judge Clyde E. Sumida presided.

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, we resolve Livesey's points of error as follows:

In this case, the record is sufficient to review Livesey's point of error that the State failed to adduce sufficient evidence that the laser gun was tested according to the manufacturer's recommended procedures in order to establish sufficient foundation for the laser gun reading.

Officer Roberts did not testify that the laser gun was tested in accordance with the manufacturer's specifications. Therefore, the State failed to adduce sufficient evidence regarding the accuracy of the laser gun and it should not have been admitted into evidence. State v. Assaye, 121 Hawai'i 204, 209-14, 216 P.3d 1227, 1232-38 (2009). Without evidence regarding the accuracy of the laser gun used, there is insufficient evidence to convict Livesey of Excessive Speeding. We need not address Livesey's other points of error.

Therefore,

IT IS HEREBY ORDERED THAT the Judgment entered on March 18, 2008 in the District Court of the First Circuit, Wahiawā Division, is reversed.

DATED: Honolulu, Hawai'i, November 23, 2009.

On the briefs:

Phyllis J. Hironaka,
Deputy Public Defender,
for Defendant-Appellant.

Presiding Judge

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge