

*** NOT FOR PUBLICATION ***

NO. 24682

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

BRANDON J. SILVA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CASE NOS. TD 16P & 17P OF 10-22-01)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Brandon J. Silva (Silva) appeals from the October 22, 2001 judgment of the district court of the first circuit, the Honorable Christopher P. McKenzie presiding, convicting him of and sentencing him for: (1) driving under the influence of intoxicating liquor ("DUI") in violation of Hawai'i Revised Statutes (HRS) § 291-4(a)(1) (Supp. 2000);¹ and (2) disregarding a red light, in violation of HRS § 291C-32 (1993) (Count II).

On appeal, Silva contends that the district court erred

¹ HRS § 291-4(a)(1) provided in relevant part:

(a) A person commits the offense of driving under the influence of intoxicating liquor if:

(1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty[.]

The offense of operating a vehicle under the influence of an intoxicant was recodified as HRS § 291E-61, effective January 1, 2002, and amended in respects not pertinent to the present matter. See 2000 Haw. Sess. L. Act 189, §§ 23 and 30 at 425-26, 432; 2001 Haw. Sess. L. Act 157, § 25 at 397-98.

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in: (1) permitting the arresting officer to testify as to the results of the field sobriety test (FST), in particular the horizontal gaze nystagmus ("HGN") test, because there was an inadequate evidentiary foundation for such testimony; (2) in permitting the arresting officer to testify that according to the National Highway Traffic Safety Administration ("NHTSA"), there is a 77% chance that an individual who displays four or more possible indicia of intoxication defined by the NHTSA ("clues") on an HGN test has a blood alcohol content ("BAC") equal to or greater than .10; (3) in permitting the arresting officer to testify that the manual used in his FST training had the words "National Highway Traffic Safety Administration" on the cover, because the best evidence, i.e. the manual itself, was not put into evidence; and (4) in imposing a ninety-day driver's license suspension, even though the defendant's driver's license had already been administratively revoked for a year in an revocation proceeding arising out of the arrest in the instant case.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the trial court's admission of the officer's testimony with respect to the results of the HGN test was not an abuse of discretion; (2) the trial court did not abuse its discretion in allowing the officer to testify about the accuracy of the HGN portion of the FST; and (3) the trial court did not abuse its discretion in overruling Silva's objection to Officer Maeshiro's testimony. With respect to the court's imposition of a license

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suspension concurrent with the administrative revocation of the license, we hold that it was error in light of the clear language of HRS § 291-4. Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed, except for that portion of the sentence imposing a license suspension, which is vacated.

DATED: Honolulu, Hawai'i, February 23, 2006.

On the briefs:

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for the defendant-appellant
Brandon J. Silva

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