NO. 25480

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

VAGAN LEE BRYANT, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(TRAFFIC HPD NO. 002268576)

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

Defendant-Appellant Vagan Lee Bryant ("Bryant") appeals from the judgment and sentence of the District Court of the First Circuit[1] ("district court") entered on October 15, 2002. At trial, Bryant was found guilty of (1) operating a vehicle while under the influence of an intoxicant ("OVUII") in violation of HRS § 291E-61 (Supp. 2001) (effective January 1, 2002),[2] and (2) disregarding a red traffic control signal in violation of HRS § 291C-32(a)(3)(A) (1993).[3]

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[1] The Honorable George Y. Kimura presided.

[2] HRS § 291E-61 (Supp. 2001), the version in effect at the time of Bryant's arrest, provided in pertinent part:

> (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 . . . .

[3] HRS § 291C-32(a)(3)(A) provides in pertinent part:

> Vehicular traffic facing a steady red signal alone shall stop at a clearly marked stop line, but if none, before entering the

On appeal, Bryant essentially contends: (1) the district court committed reversible error in accepting incompetent evidence of the horizontal gaze nystagmus ("HGN") subtest of the field sobriety test ("FST") given by police (in this case, HPD Officer Daniel Jacso) to check for DUI violations, where (a) Bryant had taken muscle relaxant medication on the day of his traffic stop such that the HGN test's reliability was questionable, and (b) in any event, the HGN test was improperly administered; (2) the failure of Officer Jacso to ascertain that Bryant's medication would not affect his performance on the other two subtests of the FST (the "walk-and-turn" and "one-leg stand" tests) "diminished" their reliability; (3) no "wealth of overwhelming and compelling evidence" exists to support Bryant's conviction for DUI such that any error in improperly admitting evidence of the HGN subtest must be deemed harmless notwithstanding the error; and (4) no substantial evidence exists to support Bryant's conviction for DUI.

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 as follows:

(1) Addressing Bryant's Points of Error Numbers 1, 3 and 4 together:

(a) First, as to Point of Error #1, the prosecution made clear at trial that Jacso's HGN testimony was not being used as substantive evidence of Bryant's

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crosswalk on the near side of the intersection or, if none, then before entering the intersection and shall remain standing until an indication to proceed is shown[.]

intoxication, but only to establish probable cause. Inasmuch as Bryant does not raise lack of probable cause as an issue on appeal, this point of error is arguably moot. In any event, Bryant's arguments as to HGN are unavailing because "this was a bench trial, and it is well established that a judge is presumed not to be influenced by incompetent evidence." State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999) (emphasis added) (citation omitted) (internal quotation marks omitted). "This means that when evidence is admissible for a limited purpose, we presume that the judge only considered the evidence for the permissible purpose." State v. Lioen, 106 Hawai'i 123, 133, 102 P.3d 367, 377 (App. 2004) (citations omitted).

Bryant can only point to two ambiguous statements from the district court's ruling ("[t]here's the field sobriety test" and ". . . . from the performance on the field sobriety test, his exiting the vehicle, and the light, I find the Government has proved each and every element of the crime for which the defendant has been charged beyond a reasonable doubt[]") in support of his bald assertion that ". . . . the trial judge found the HGN and FST results critical in finding Bryant guilty of DUI."[4] Admittedly, the district court does not expressly exclude the HGN subtest from "field sobriety test." However, the mere presence of

[4] The record reflects that the trial court carefully considered the evidence in its ruling, as it discussed the elements of the DUI offense, Bryant's consumption of alcohol, the relative credibility of the witnesses, Bryant's physical state after exiting vehicle, "and the light" (presumably intended to mean "and the like"), in addition to the FST.

an ambiguity cannot, by definition, affirmatively rebut the presumption that the district court properly limited consideration of the HGN subtest to probable cause and not substantive purposes. See Vliet and Lioen, supra. As such, Bryant's first argument must fail.

(b) Second, as to Point of Error #3, assuming arguendo that (1) the district court accepted Jacso's HGN testimony as substantive evidence, in contravention of the prosecution's representation that such testimony was only to be used for probable cause purposes, and (2) that the testimony was incompetent evidence, the inquiry does not end there.

As this court noted in State v. Kaiama, 81 Hawai'i 15, 22-23, 911 P.2d 735, 742-43 (1996):

> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

(Emphasis added.) (Citation omitted.) "Where there is a wealth of overwhelming and compelling evidence tending to show the defendant guilty beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless." State v. Toyomura, 80 Hawai'i 8, 27, 904 P.2d 893, 912 (1996).

Following sedulous review of the record, we discern ample overwhelming and compelling evidence, independent of Jacso's HGN testimony, tending to show that Bryant was guilty of operating his vehicle "while under the

influence of alcohol in an amount sufficient to impair the person's normal mental facilities or ability to care for the person and guard against casualty." See Toyomura, 80 Hawai'i at 27, 904 P.2d at 912 (citation omitted), and HRS § 291E-61(a)(1) (Supp. 2001). Accordingly, we hold that there is no reasonable possibility that Jacso's HGN testimony could have contributed to his DUI conviction.

(c) Third, as to Point of Error #4, in light of our holding that overwhelming and compelling evidence exists on the record such that any error committed by the district court in accepting and considering incompetent evidence is rendered harmless, a fortiori, we hold that there was substantial evidence to uphold Bryant's OVUII conviction. See State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996). As such, Bryant's OVUII conviction is affirmed.

(2) As to Bryant's remaining contention, Point of Error #2, we observe that Bryant has raised it for the first time on appeal. In State v. Naeole, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980), this court stated that

> [i]t is the general rule that evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute ground for reversal. It is equally established that an issue raised for the first time on appeal will not be considered by the reviewing court. Only where the ends of justice require it, and fundamental rights would otherwise be denied, will there be a departure from these principles.

(Emphases added.) The record reflects that Bryant had ample opportunity to object to Jacso's testimony as to the "walk-and-turn" and "one-leg stand" subtests which also comprise the FST. His failure to do so below precludes him from asserting error for

the first time on appeal. See Naeole. Consequently, we disregard Bryant's remaining point of error.

(3) Because Bryant raises no discernible argument as to his HRS § 291C-32(a)(3)(A) (1993) (disregarding a red traffic control signal) conviction, it is affirmed.

Therefore,

IT IS HEREBY ORDERED that the judgment and sentence of the district court is affirmed.

DATED: Honolulu, Hawai'i, August 25, 2006.

On the briefs:

George A. Burke, deputy
public defender,
for Defendant-Appellant
Vagan Lee Bryant

James M. Anderson,
deputy prosecuting attorney,
for Plaintiff-Appellee
State of Hawai'i