

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26853

IN THE SUPREME COURT OF THE STATE OF HAWAII

SASHA A. LEON-GUERRERO, Petitioner-Appellant,

vs.

ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF HAWAII,
Respondent-Appellee.

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(JR04-0020; ORIGINAL CASE NO. 04-01397)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Sasha A. Leon-Guerrero ("Leon-Guerrero") appeals from the September 13, 2004 judgment of the district court of the first circuit¹ affirming the August 2, 2004 administrative revocation of her driver's license by Respondent-Appellee Administrative Director of the Courts, State of Hawai'i ("the Director"), acting through a hearing officer of the Administrative Driver's License Revocation Office (ADLRO).

On appeal, Leon-Guerrero argues that: (1) the district court erred in affirming the hearing officer's decision to deny (a) the general public full and open access and (b) Leon-Guerrero her own hearing on the validity of the security procedure at the ADLRO; (2) the district court erred in ruling that Leon-Guerrero had not been denied her due process rights when the hearing officer (a) conducted the hearing in a de novo fashion and declined to follow respondents' proposed procedure in

contradiction to Hawai'i Revised Statutes ("HRS") § 291E-38(a), which provides that the revocation hearing will "review the [administration decision]," (b) did not make known a uniform common procedure in advance of the hearing, (c) admitted the entire ADLRO file and police report into evidence, and (d) disregarded the procedure set forth in HRS chapter 291E, Part III, which requires a valid chemical test result over 0.08 or a refusal to take a chemical test as a jurisdictional prerequisite for a valid administrative license hearing; (3) the district court erred in upholding the revocation even though the "Sanctions for Use of Intoxicants While Operating a Vehicle & Implied Consent for Testing HPD-396B" form ("Implied Consent Form") (a) failed to inform Leon-Guerrero that she had a right to withdraw her implied consent to a blood or breath test, (b) implied that the only issue in an administrative revocation is whether the result of her blood alcohol content ("BAC") test is 0.08 or is refused, and (c) failed to inform Leon-Guerrero that the word "vehicle" in HRS § 291E-1 (Supp. 2004) includes "vessel and moped"; (4) the district court erred in holding that the "Notice of Administrative Revocation" does not violate HRS § 291E-34(a)(2) (Supp. 2004),² inasmuch as it does not adequately

² HRS § 291E-34(a) provides:

(a) The notice of administrative revocation shall provide, at a minimum and in clear language, the following general information relating to administrative revocation:

(1) The statutory authority for administrative revocation;

(2) An explanation of the distinction between administrative revocation and a suspension or revocation imposed under section 291E-61 or 291E-61.5; and

(3) That criminal charges filed pursuant to section 291E-61
(continued...)

explain the distinction between administrative revocation and criminal suspension; (5) the district court erred in upholding the hearing officer's admission of the statement of the Intoxilyzer Supervisor because the statement does not explicitly state that the intoxilyzer was properly maintained in accordance with HRS § 291E-36a(2)(C) (Supp. 2004)³; (6) the hearing officer erred in citing to unpublished district court decisions; (7) the district court erred in affirming the hearing officer's decision to sustain the license revocation although the Intoxilyzer Supervisor, Donald W. Stafford ("Intoxilyzer Supervisor"), who was subpoenaed, failed to appear for three hearings; (8) the district court erred in upholding the revocation although her involvement in the accident affected her performance in the Standard Field Sobriety Tests ("sobriety tests").

Upon carefully reviewing the record and the briefs

²(...continued)

or 291E-61.5 may be prosecuted concurrently with the administrative action.

(Emphases added.)

³ HRS § 291E-36(a)(2)(C) states:

(a) Whenever a respondent has been arrested for a violation of section 291E-61 or 291E-61.5 and submits to a test that establishes: the respondent's alcohol concentration was .08 or more; . . . the following shall be forwarded immediately to the director:

.

the sworn statement of the person responsible for maintenance of the testing equipment, stating facts that establish that, pursuant to section 321-161 and rules adopted thereunder:

.

(C) The testing equipment used had been properly maintained and was in good working condition when the test was conducted.

submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) This court has previously addressed Leon-Guerrero's arguments (1) through (6) and found them to be without merit;⁴

(2) under the circumstances of the present matter, the hearing officer did not commit an abuse of discretion by continuing the hearing due to the Intoxilyzer Supervisor's three nonappearances, pursuant to HRS § 291E-38(k);⁵ and

⁴ As to argument No. 1a in the instant appeal: See Freitas v. Admin. Dir. of the Courts ["Freitas II"], 108 Hawai'i 31, 37-40, 116 P.3d 673, 679-682 (2005); see also Minnich v. Admin. Dir. of the Courts ["Minnich"], 109 Hawai'i 220, 227, 124 P.3d 965, 972 (2005); Dunaway v. Admin. Dir. of the Courts, 108 Hawai'i 78, 83, 117 P.3d 109, 114 (2005).

As to argument No. 1b in the instant appeal: See Minnich, 109 Hawai'i at 227, 124 P.3d at 972; Dunaway, 108 Hawai'i at 83, 117 P.3d at 114.

As to argument Nos. 2(a) and (b) in the instant appeal: See Freitas II, 108 Hawai'i at 44-45, 116 P.3d at 686-87; Minnich, 109 Hawai'i at 226, 124 P.3d at 971; Dunaway, 108 Hawai'i at 83, 117 P.3d at 114.

As to argument 2d in the instant appeal: See Freitas II, 108 Hawai'i at 45-46, 116 P.3d at 687-88; see also Minnich, 109 Hawai'i at 226, 124 P.3d at 971; Dunaway, 108 Hawai'i at 83-84, 117 P.3d at 114-15.

As to argument No. 2e in the instant appeal: See Freitas II, 108 Hawai'i at 46, 116 P.3d at 688; see also Minnich, 109 Hawai'i at 226, 124 P.3d at 971; Dunaway, 108 Hawai'i at 84, 117 P.3d at 115.

As to argument No. 3a in the instant appeal: See Dunaway, 108 Hawai'i at 84-85, 117 P.3d at 115-16; see also Minnich, 109 Hawai'i at 226, 124 P.3d at 971.

As to argument No. 3b in the instant appeal: See Dunaway, 108 Hawai'i at 85-86, 117 P.3d at 116-17; see also Minnich, 109 Hawai'i at 226, 124 P.3d at 971.

As to argument No. 3c in the instant appeal: See Dunaway, 108 Hawai'i at 86-87, 117 P.3d at 117-18.

As to argument No. 4 in the instant appeal: See id. at 87, 117 P.3d at 118.

As to argument No. 5 in the instant appeal: See Park v. Tanaka, 75 Haw. 271, 276, 859 P.2d 917, 920 (1993).

As to argument No. 6 in the instant appeal: See Freitas II, 108 Hawai'i at 46, 47, 116 P.3d at 688, 689; see also Minnich, 109 Hawai'i at 226, 124 P.3d at 971; Dunaway, 108 Hawai'i at 84, 117 P.3d at 115.

⁵ HRS § 291E-38(k) provides that "[t]he absence from the hearing of a law enforcement officer or other person [who has been properly served with a subpoena] . . . constitutes good cause for a continuance." The Director explains that under HRS § 291E-38(k), the Hearing officer did not err by
(continued...)

(3) the district court properly ruled that the administration of the sobriety tests after the accident goes to the weight of the evidence and does not bar the evidence because the officers opined that the accident affected her test performance but Leon-Guerrero did not present evidence in support of her theory that drivers who participate in sobriety tests after being involved in a major accident "will most certainly fail." Moreover, other competent evidence, including Leon-Guerrero's spontaneous utterances, red, watery, and glassy eyes, strong odor of an alcoholic beverage on her breath, and involvement in the motor vehicle accident, supports the hearing officer's preponderance finding.⁶ Therefore,

⁵(...continued)

continuing the hearing because of the non-appearance of the Intoxilyzer Supervisor.

This is further supported by the legislative history of Act 113:

the absence of police officer witnesses may be due to any number of legitimate reasons which may not be known to the ADLRO hearing officer at time of hearing. Currently, the absence of a subpoenaed and served police officer at the ADLRO hearing would cause a reversal upon judicial review, merely on the basis of the officer's unexplained non-appearance at time of hearing. There should be a means of insuring that an otherwise sustainable case is not dismissed or reversed due to the excusable non-appearance or failure of an officer to notify the office prior to hearing. Hence, the good cause for the continuance to be ordered initially by the hearing officer should be the non-appearance itself. Since the hearing officer is mandated by statute to control and conduct the hearing, the discretion to determine good cause for non-appearance upon later examination or testimony should rest in the hearing officer's hands.

Sen. Stand. Comm. Rep. No. 2274, in 2002 Senate Journal, at 1147. (Emphases added.)

⁶ See State v. Toyomura, 80 Hawai'i 8, 27, 904 P.2d 893, 912 (1995) ("Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the 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. 'Where there is a wealth of (continued...)

IT IS HEREBY ORDERED that the district court's
September 13, 2004 judgment is affirmed in all respects.

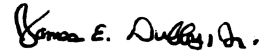
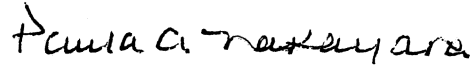
DATED: Honolulu, Hawai'i, March 27, 2008.

On the briefs:

Earle A. Partington
for Petitioner-Appellant
Sasha A. Leon-Guerrero



Girard D. Lau,
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Administrative Director
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⁶(...continued)
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.'" (Citations omitted.)).