

NO. 28737

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

KENNETH MICHAEL WINFREY,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(HPD TRAFFIC NO. 1DTC-07-014931)

ORDER AFFIRMING JUDGMENT ON APPEAL
(By: Moon, C.J., Nakayama, and Recktenwald, JJ.;
and Duffy, J., Dissenting, with whom Acoba, J., joins)

Petitioner/defendant-appellant Kenneth Michael Winfrey filed a timely application for a writ of certiorari from the judgment of the Intermediate Court of Appeals (ICA) filed May 18, 2009, entered pursuant to the ICA's April 29, 2009 Summary Disposition Order, which affirmed the August 3, 2007 judgment of the District Court of the First Circuit (district court).¹ This court accepted certiorari on September 16, 2009, and subsequently held oral argument on November 5, 2009.

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, and also having

¹ The Honorable Lenore K.J.H. Lee presided.

heard and carefully considered the parties' respective arguments at oral argument, we conclude that Winfrey did not preserve his objections to the testimony concerning the speed check, and that those objections were therefore waived.

We further conclude that the admission of that testimony did not constitute plain error. The decision to notice plain error is discretionary and must be "exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Fields, 115 Hawai'i 503, 529, 168 P.3d 955, 981 (2007) (citation omitted); State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988) (noting that the decision whether to notice plain error "must turn on the facts of the particular case to correct errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings") (citation and internal quotation marks omitted).

This court has previously declined to notice plain error when a defendant fails to preserve his or her objection to inadmissible evidence. In State v. Wallace, 80 Hawai'i 382, 409-10, 910 P.2d 695, 722-23 (1996), the defendant argued that the State failed to establish a sufficient foundation to admit a police officer's testimony about the gross weight of cocaine seized from the defendant's car because the State did not

establish that the scale used to measure the cocaine was accurate. We held that the foundational objection was waived, because although the defendant had objected to the testimony at trial, he did so on the basis of relevancy, not on the basis that the prosecution failed to establish the accuracy of the scale. *Id.* at 410, 910 P.2d at 723. This court did not find plain error in these circumstances. *Id.* (citing State v. Naeole, 62 Haw. 563, 570-71, 617 P.2d 820, 826 (1980)).

Moreover, Winfrey cannot overcome the effect of his waiver by suggesting that the testimony was insufficient to support a conviction because foundation was lacking. To the contrary, this court stated in Wallace that "[t]he rule is well settled that evidence even though incompetent, if admitted without objection or motion to strike, is to be given the same probative force as that to which it would be entitled if it were competent." 80 Hawai'i at 410, 910 P.2d at 723 (quoting 2 Wharton's Criminal Evidence § 265 n.3 (14th ed. 1986) (internal quotation marks omitted)). Accordingly, we observed 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 grounds for reversal." *Id.* (citing Naeole, 62 Haw. at 570-71, 617 P.2d at 826); State v. Samuel, 74 Haw. 141, 147, 838 P.2d 1374, 1378 (1992)); see *People v. Rigsby*, 890 N.E.2d 1146, 1148-51 (Ill. App. Ct. 2008) (defendant was

convicted of driving under the influence of alcohol and argued that a police officer's testimony about defendant's breath test was inadmissible because the accuracy of the machine used to conduct the test had not been properly established; the court held that any error in the admission of the breath test results was not plain error since "foundational issues go to the admissibility of the evidence, not the sufficiency of the evidence") (citation omitted).

Accordingly,

IT IS HEREBY ORDERED that the ICA's May 18, 2009 judgment on appeal is affirmed.

DATED: Honolulu, Hawai'i, December 22, 2009.

Brian Vincent
(Deputy Prosecuting Attorney)
for Respondent/Plaintiff-
Appellee

James S. Tabe
(Deputy Public Defender)
for Petitioner/Defendant-
Appellant