

CONCURRING OPINION BY ACOBA, J.

I concur with the conclusion of the majority that State v. Manewa, 115 Hawai'i 343, 167 P.3d 336 (2007), "requires [Respondent-Plaintiff-Appellee State of Hawai'i (Respondent)] to prove that the four tests conducted by [Officer Jeremy Franks (Officer Franks)] were procedures recommended by the manufacturer for the purpose of showing that the particular laser gun was in fact operating properly on September 5, 2007." Majority opinion at 16-17. However, Manewa imposes the additional requirement that Respondent show "that the [laser gun] had been properly calibrated by the manufacturer's service representatives[.]" See Manewa, 115 Hawai'i at 354, 167 P.3d at 347.

In Manewa, the defendant challenged two instruments used to obtain information about the crystalline substance at issue in that case. In regard to the instrument used to ascertain the identity of the substance, known as the "GCMS," "an expert in drug analysis and identification," id., testified that a manufacturer's representative "c[ame] in if not twice, at least once a year," "to service and calibrate" the GCMS, id. at 349, 167 P.3d at 342. Additionally, the expert testified that each morning, "a routine check" was conducted on the GCMS "to ensure that all the parameters are within the manufacturer's specifications." Id. at 354, 167 P.3d at 347. On this basis, this court held that "a proper foundation for the identity of the crystalline substances was laid." Id.

On the other hand, in regard to the instrument used to weigh the crystalline substance, known as the "balance," the expert "was not qualified as an expert in the calibration of the [] balance." Id. Although the expert testified that the balance was serviced semi-annually, "there was no evidence that [he] had personal knowledge that the balance had been correctly calibrated." Id. at 355, 167 P.3d at 348. In contrast to the evidence regarding the GCMS, there was no evidence "that there was an accepted manufacturer's established procedure for 'verifying and validating' that the balance was in proper working order[.]" Id. at 354, 167 P.3d at 347 (brackets omitted). Manewa held that no proper foundation had been laid for the balance, in part because there was no evidence "that the balance had been properly calibrated by the manufacturer's service representatives[.]" Id. Thus, Manewa requires not only that Respondent show that there is an accepted manufacturer's procedure for ensuring that the instrument is in proper working order, but also that it show that the instrument has been inspected and serviced as required by the manufacturer.

In this case, at oral argument, Respondent was asked whether the laser gun used by Officer Franks "ha[d] to be maintained and inspected periodically[.]" MP3: Oral Argument, Hawai'i Supreme Court, at 26:03 (Aug. 10, 2009).¹ Respondent

¹ This oral argument is available at http://www.courts.state.hi.us/page_server/Courts/Oral%20Arguments/ArchivePages/6E3FCA4550D3D36C11C25E500A1.html.

replied that "[i]t's not part of the record, I believe they are, once a year, and I believe there's a record log kept somewhere but I don't believe that's come out in any of these cases." Id. at 26:10.

During rebuttal, counsel for Petitioner-Defendant-Appellant Abiye Assaye (Petitioner) stated, in connection with the foregoing, that the Honolulu Police Department (HPD) maintained a record of servicing the laser guns annually, that "Officer Franks did admit that he believed or suspected that HPD kept those records although he himself did not have any of the records, he didn't maintain them personally, nor did he bring them to court for trial on that day." Id. at 37:05. As to whether the laser gun was ever serviced during the fifteen months that it was in Officer Franks's possession, Petitioner's counsel stated on rebuttal as follows:

There is evidence the gun was used when it was assigned to Officer Franks. Again in the 15 months he had the gun the gun was never sent in for any type of maintenance or servicing by Laser Technologies or any other regulatory agency. During those 15 months, Officer Franks would use the gun he said five days a week and he kept the gun in the saddle bag of his motorcycle whether he was on or off duty.

MP3: Oral Argument, at 38:25 (emphasis added).

Petitioner's counsel's rebuttal remarks are supported by the testimony Officer Franks gave at trial. Officer Franks testified, "I haven't in my one year three months, I've never turned [the laser gun] in for service." Officer Franks also stated that the tests he performed prior to his shifts were

"about it [sic] that I was instructed to do by the instructors. That's all I have to know that it's operating."

In sum, Respondent indicated that it "believed" that laser guns of the type used by Officer Franks had to be maintained and inspected periodically "once a year." However, Officer Franks testified that during the fifteen months he had had the laser gun, he had never turned it in for service. As foundation for admission of the laser gun reading, Respondent did not show that the laser gun had been inspected and serviced in the manner directed by the manufacturer.