NO. 26250

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DAVID C. SODERLUND, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD Traffic No(s): 003091984)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Nakamura, JJ.)

David C. Soderlund (Soderlund) appeals the December 2, 2003 judgment[1] of the district court of the first circuit[2] that convicted him of operating a vehicle under the influence of an intoxicant (DUI); namely, alcohol.[3] We affirm.

I. Background.

At Soderlund's bench trial, Scott Alan Juntikka (Juntikka) testified that on March 8, 2003, he was driving

[1] David C. Soderlund's November 26, 2003 notice of appeal states that he is appealing "from the judgment to be filed in this case whenever it is filed and which is not attached hereto pursuant to Rule 3(c)(2) of the Hawaii Rules of Appellate Procedure because of [sic] the clerk of the district court refuses to provide me with a copy." See Hawaiʻi Rules of Appellate Procedure Rule 4(b)(4) (2004) ("A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be deemed to have been filed on the date such judgment or order is entered.").

[2] The Honorable James H. Dannenberg presided.

[3] Hawaii Revised Statutes § 291E-61(a)(1) (Supp. 2004) provides, "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: 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[.]" (Enumeration omitted; format modified.)

Kailua-bound on the Pali Highway -- after the tunnels where it is a two-lane highway in each direction -- when he saw a lone car in front of him traveling very slowly. The car was "swerving across lanes and within lanes" when it veered over from the right lane across the left lane and sideswiped the center divider. Despite the collision, the car kept going on down the highway. Soderlund was the driver of the car.

Juntikka followed, but hung back for safety. He also activated his hazard lights in order to warn any cars that might approach from behind. Juntikka called 911 and related what he had just seen. He then started flashing his headlights in an effort to get Soderlund to stop. Finally, after continuing on down the road a ways, Soderlund pulled over and stopped. Juntikka followed suit. Juntikka noticed that Soderlund's left front tire was flat and that his left front fender was damaged. When Soderlund got out of his car, evincing some difficulty, he told Juntikka, "Yes. My tire just went flat." According to Juntikka, Soderlund seemed, "Little bit tired, disconnected, not aware of what was going on a little bit. Kind of . . . . kind of surprised." It appeared to Juntikka that Soderlund was unaware that he had just had an accident. As Juntikka was preparing to help Soderlund change the flat tire, Juntikka heard Soderlund's car still running. Juntikka reached into the car, turned off the ignition and kept the keys, which he later turned over to the police.

Honolulu Police Department officer Jose Villanueva (Officer Villanueva) testified that he and his field training officer were dispatched to the scene. They were waved down by Juntikka, who told them what had happened. Officer Villanueva saw Soderlund trying to change his tire. He noticed that Soderlund "was staggering a little bit. He had red, watery, glassy eyes and a strong smell of alcohol was present." With Soderlund's consent, Officer Villanueva conducted a battery of field sobriety tests (FSTs).

For the statement of his single point of error on appeal, Soderlund cites the following excerpt from the direct examination of Officer Villanueva, regarding the administration of the FSTs:

> Q Okay. And so let's go into the FSTs. Are you trained and certified to administer the FSTs?
>
> A Yes, sir.
>
> Q And where were you trained and certified?
>
> A At the Honolulu Police Department Training Academy.
>
> Q And when was this?
>
> A In December of this year, this last year.
>
> Q Okay. And who taught you to administer and evaluate the FSTs?
>
> A Sergeant Nishibun.
>
> Q Okay. And in your -- based on your knowledge, was Sergeant Nishibun a certified instructor?
>
> A Yes.
>
> Q And was Sergeant Nishibun certified by the National Highway [Traffic] Safety --
>
> [DEFENSE COUNSEL]: Objection, Your Honor. There's no foundation. I don't know how he even knows that. And I do happen

to know personally National Highway [Traffic] Safety Administration [NHTSA] doesn't certify anybody.

[DEPUTY PROSECUTING ATTORNEY (DPA)]: Your Honor, if he knows.

THE COURT: Well, they don't have to be; but since it's a foundational question to begin with, you don't need a foundation.

[DEFENSE COUNSEL]: Well, he (inaudible) --

THE COURT: (Inaudible) don't apply, but is this going to be an issue here?

[DPA]: I don't believe so.

[DEFENSE COUNSEL]: Well, it's going to be an issue. The prosecutor has to ask if these people are NHTSA certified. One, NHTSA doesn't certify; two, I don't think he would know one way or another. It's up to the sergeant to testify to that.

THE COURT: Well, I hope not; but let's -- I mean, is it an important issue here?

[DEFENSE COUNSEL]: Well, I object to him testifying to something he has no personal knowledge about.

THE COURT: Do you know if Sergeant Nishibun is certified?

A I'm not, I'm not exactly sure, sir.

THE COURT: I'm not aware of any requirement that he needs to be certified.

[DPA]: I understand, Your Honor. That's why I was asking if he knew or not. Thank you.

Q So, Officer Villanueva, how many hours of field sobriety test training did you receive?

A Twenty-four hours.

Q Okay. And did this training include both classroom and practical training?

A Yes, sir.

Q And are you familiar with the National Highway Traffic Safety Administration, otherwise known as NHTSA?

A Yes, sir.

Q And as part of your training, did you receive a NHTSA manual?

[DEFENSE COUNSEL]: Objection, Your Honor. Best evidence rule. If they want to talk about a NHTSA manual, let them produce it.

THE COURT: Overruled. Foundation is evidence (indiscernible). The Rules of Evidence do not apply in the laying of foundation.

[DEFENSE COUNSEL]: Well, that's true.

THE COURT: They've got to prove it.

[DEFENSE COUNSEL]: Well, if they're --

THE COURT: (Indiscernible).

[DEFENSE COUNSEL]: The next question he's about to ask is, is concerning the contents of the manual. And that is governed by the best evidence rule.

THE COURT: Don't agree. It's still foundation. Hearsay can come in (indiscernible) as long as I deem it reliable. Okay. Next question.

[DPA]: Well, I'll repeat the question. I believe he answered it. I believe that appears in his report.

Q All right. As part of your training, did you receive a NHTSA manual?

A No.

Q No, you did not. What kind of written material did you have?

A Hand outs.

Q Hand outs. And do these hand outs set forth standards for the administration, evaluation and --

[DEFENSE COUNSEL]: Objection. I object to him leading the witness now.

THE COURT: He can still lead on, on --

[DEFENSE COUNSEL]: Well, I mean, he's testifying now, not the officer.

THE COURT: At some level, that's true; but otherwise, you missed your afternoon appointment so (indiscernible).

Q BY [DPA]: Officer Villanueva, the hand outs that you received at your, at your training, do they set forth standards to administer and evaluate the FSTs?

A Yes.

Q And what three tests are covered under the NHTSA manual -- well, not the NHTSA, but the hand outs that you received during your training?

A The Horizontal Gaze Nystagmus [HGN], the walk-and-turn [WAT] and the one-leg stand [OLS].

Q And did these hand outs –- did the hand outs provide precise procedures by which a police officer is to administer and evaluate these FSTs?

A Yes, sir.

Q And can you please briefly describe your training.

A Sure. First we're taught to ask questions to the person who we give the Field Sobriety Test to. Ask them if they're under the care of a doctor, taking any medication, (indiscernible) wearing any glass eye or contact lens (indiscernible) and to observe the condition of the person who (indiscernible) FST.

Q And why do you ask these questions?

A Just to determine to see if they (indiscernible) as far as to be able to perform the Field Sobriety Test.

Q Thank you. And was this training mandatory –- was all FST training mandatory and given to all HPD officers?

A Yes, sir.

Q And was this training given as -– during the entire time in class you received the training together?

A Yes, sir.

Q To your knowledge, was this training part of HPD's official protocol?

A Yes, sir.

Q When you learn how to administer and evaluate the FSTs, were you required to pass any examinations?

A Yes, sir.

Q And can you please describe the examination for the Court.

THE COURT: I'm gonna ask you to pass on that. I don't think we have to do that.

[DPA]: Thank you, Your Honor.

THE COURT: He's got his badge so he passed.

Q So based on your training after you asked these preliminary questions that you previously testified to, what were you trained to do next?

A After we (indiscernible) the Horizontal Gaze Nystagmus.

Q And can you please explain what is each –- what is Horizontal Gaze Nystagmus?

THE COURT: I know. You don't have to ask him that. The

only question is, are the results admissible. [Defense counsel], do you have an argument about that now? Maybe you could –- I don't know what the result is obviously, but is this an issue here?

[DEFENSE COUNSEL]: Well, yes, there are several issues. One, first of all, I don't think there's an adequate foundation been layed [sic] here for the admissibility of any test. We have, we have no idea what standards he was taught. So I think that's a problem.

Two, under United States vs. Horn, I think Your Honor is familiar with this federal DUI case in the District of Maryland, 2002, which is in 185 Federal Supplement 2nd.[4]

THE COURT: Actually I'm not, but –-

[DEFENSE COUNSEL]: Oh, well, perhaps I can help Your Honor. A U.S. District Court Judge in a federal DUI case decided to do a survey around the country on Field Sobriety Tests. And in fact, he put in an appendix collecting all the cases around the country on it. And he concluded, particularly in viewing the studies, first he felt that the so-called validation studies that the National Highway Traffic Safety Administration did and then he worked with some subsequent studies [sic]. It's a very lengthy opinion I have here, if Your Honor would like to look at it.

And he concluded that neither testimony about proves or conclusions about pass or fail are admissible because there isn't sufficient scientific validity. But what the officer may testify to is what he saw with his own eyes how the person performed on the test.

I submit that in looking at the case, and it's essentially a treatise on the Field Sobriety Test, that this view makes eminent good sense because there are questions about how the test is performed and there's a large objective element. I think Your Honor is aware in April, I went off to Las Vegas and became qualified to administer the test myself.

I would encourage the Court, maybe on a recess, to look at the Horn opinion. I don't think –- I might add it cites to reports from Ito[5] and Ferrar [sic].[6] So the U.S. District Judge really did his homework on his test.

THE COURT: This is two very flawed cases.

[DEFENSE COUNSEL]: Well, I would submit that there certainly is no foundation to admit any evidence of the test, other than what the officer saw.

THE COURT: Let me answer that briefly. It may save time by

---

[4] U.S. v. Horn, 185 F.Supp.2d 530 (D. Md. 2002).

[5] State v. Ito, 90 Hawai‘i 225, 978 P.2d 191 (App. 1999).

[6] State v. Ferrer, 95 Hawai‘i 409, 23 P.3d 744 (App. 2001).

doing this. I, I have always ruled that I do not view the testimony regarding Field Sobriety Test as testimony regarding performance on a test. It's only a (indiscernible) to which I can watch the defendant the same way the officer did. (Indiscernible) doesn't count, though it's always there.

In fact, I generally allow it because usually it can only help the defendant if the officer can say that he passed. I'll give the defendant the benefit of that.

But in the end, other than the HGN, which might have a separate argument to be made about it, I agree. I think the only relevant testimony is about what the officer saw, but as I recall the case on the HGN hinted, hinted (indiscernible) conflicting conclusions.

On the one hand, supposedly the State is supposed to establish the foundation to the extent that the HGN is given pursuant to NHTSA standards, something that is probably impossible to do in the real world without calling the presiding officer in NHTSA in to testify.

But that aside, I've always held that nystagmus is nystagmus is nystagmus. I think you could observe nystagmus through binoculars 200 yards away. You can see these involuntary jerking of the eyeball. It doesn't matter where onset begins or what the angle of maximum deviation is. It's only the presence of nystagmus which I may take judicial notice of in the context of nystagmus being correlated with central nervous system impairment.

I think that's what the ICA actually said I could do. The only question is they said I can only do that if this foundation is layed [sic] that the officer administering the test did it pursuant to NHTSA standard. There's a certain absurdity in that because the nystagmus exists just, it exists. It doesn''t matter if you do it with your elbow or your pen or you do it –- observe it from 200 yards away.

[DEFENSE COUNSEL]: Well, it does matter if the nystagmus test is given properly because I don't know if Your Honor is familiar with Schultz v. State, 664 Atlantic 2nd 60, that's a Maryland Intermediate Appellate Court opinion[7] which discusses nystagmus at length; and at page 77 in that opinion, the Court lists 38 other possible causes for the nystagmus.

THE COURT: I agree. All I'm saying is, it's correlated. It's not –- it doesn't prove causation. It just –- it may be that the absence of nystagmus would be very strong evidence that alcohol was not available or not, not here; but the presence of nystagmus, while it doesn't show the defendant was impaired by alcohol, it does show that the central nervous system was impaired –-

[DEFENSE COUNSEL]: No, no.

THE COURT: –- in some way.

---

[7] Schultz v. State, 664 A.2d 60 (Md. Ct. Spec. App. 1995).

[DEFENSE COUNSEL]: No, no. That's not necessarily true. It would be caused by patterns unrelated to the central nervous system. So Schultz is --

THE COURT: Well, the ICA said I could take judicial notice of that. In fact that's what the Oregon Supreme Court said.

[DEFENSE COUNSEL]: That it's possible.

THE COURT: No, no. That it's -- that I can take judicial notice that there is central nervous system impairment.

[DEFENSE COUNSEL]: Well just, just look at, for example, on causes --

THE COURT: No, I agree there are plenty of other causes, but alcohol is one of the causes.

[DEFENSE COUNSEL]: Well, sun stroke can cause nystagmus.

THE COURT: Well (indiscernible) for the sake of context, I'm getting a little off (indiscernible). Let's say the officer sees the defendant fall down.

[DEFENSE COUNSEL]: Yes, that's certainly admissible.

THE COURT: Right. Falling down is highly correlated with alcohol. It's also highly (indiscernible) with sun stroke as well.

[DEFENSE COUNSEL]: No, the point I was making is that nystagmus is not necessarily associated with central nervous system function.

THE COURT: That I disagree with. It is.

[DEFENSE COUNSEL]: Well, the literature says otherwise.

THE COURT: No, the ICA says it is. The Oregon Supreme Court said it was, but we're getting way --

[DEFENSE COUNSEL]: But if Your Honor --

THE COURT: -- (indiscernible). We're getting way ahead of ourselves.

[DEFENSE COUNSEL]: If Your Honor would look at it yourself, you could -- or I could send you a copy, but this is the only copy I have with me.

THE COURT: I don't really have time right now. What's the (indiscernible) here? We can waste an hour talking about foundations for the Field Sobriety Test. I'll tell you and I'll state it for the record that, even though I understand your correlations that NHTSA says can be made, you know, dropping the foot at count 22 could be correlated with a particular blood-alcohol content, I do not view the test that way.

I look at it strictly from the point of view of a lay

person, strictly from the point of view of what the officer actually observed and his conclusions about what he observed I don't consider relevant to my decision. I will take the facts. I'll add them up, but maybe we can shorten some of the arguments about the FST if I make that statement for the record. Can we get to the test and see what he observed and then argue about what, what they mean?

[DEFENSE COUNSEL]: I have no problem with that.

THE COURT: Obviously, the officer is trained to make every other (indiscernible) to HPD.

[DEFENSE COUNSEL]: But I don't think the, the foundation has been layed for the HGN. I think he can testify on the other two tests.

THE COURT: Let me ask you, actually do we need the HGN in this case?

[DPA]: Probably not, but it might help. I'm never sure about how much I need and how much I don't need, Your Honor, in all honesty.

THE COURT: All right. Well, I'll tell you what. You were trained in the HGN like everyone else at the academy, Officer?

A Yes, sir.

THE COURT: I'll, I'll note [defense counsel's] objection. I'll, I'll make a finding at the moment that this had been admitted in every other case that we've got. I'll let him testify as to what the results were and then I'll let [defense counsel] argue at some later point whether I should consider it; and I'll tell you whether I'll consider it for factoring in for further argument.

[DEFENSE COUNSEL]: Continuing objection, Your Honor.

THE COURT: Understood. Okay. Let's go to what the officer actually saw that day and that'll be quicker.

Q BY [DPA]: Officer Villanueva, I guess we'll get to the date that you –- of March 8, 2003, when you got the defendant at this time. When you –-after you asked the defendant to –- if he wanted to take the Field Sobriety Test and he agreed to, did you go over any preliminary questions with him?

[DEFENSE COUNSEL]: That's been asked and answered.

THE COURT: Next question, "What were the questions you asked him?"

Q BY [DPA]: Okay. What was his response to the preliminary questions that you previously testified to?

A He said he wasn't under the care of a doctor, he wasn't a diabetic. He didn't have any physical defects, (indiscernible) he didn't have a glass eye. He wasn't under the care of a dentist.

That’s pretty much what I asked him. He wasn’t wearing contacts.

Q Okay. And so you proceeded to perform the HGN test on him?

A Yes, sir.

Q Before you –- can you tell us the three parts of the HGN test that you, that you did.

A Yes, sir. It’s lack of smooth pursuit, the onset of nystagmus and maximum deviation (indiscernible) at 45 degrees.

Q Before you did the three parts of the HGN test, do you perform any other test?

A Yes, sir.

Q What test do you perform?

A It’s a vertical gaze nystagmus.

Q And, and how did you perform the vertical gaze nystagmus.

A Well, the vertical gaze nystagmus, I held a stimulus about 12 to 15 inches away from the defendant’s nose, slightly above eye level. And I pretty much (indiscernible) to go straight up to see the nystagmus in his eyes and I did it twice (indiscernible).

Q What exactly is nystagmus?

A Nystagmus is --

[DEFENSE COUNSEL]: Excuse me, Your Honor, did he say he observed nystagmus? I move to strike. It’s not relevant to any issue in this case. Vertical nystagmus has nothing to do with alcohol.

THE COURT: Is that what you said or did you –-

A Yes, sir.

THE COURT: You saw vertical nystagmus?

A Yes, sir.

]DPA]: Your Honor, I could also ask, there is problem as to what is vertical –- where is he trained.

[DEFENSE COUNSE]: Well, I’ll withdraw my objection. Let him testify to it.

THE COURT: Yeah, I agree that this doesn’t hurt you.

[DEFENSE COUNSEL]: Yes, I agree.

THE COURT: Okay. Go ahead.

[DPA]: And so what (indiscernible).

THE COURT: (Indiscernible) Go right to what he saw.

Q According –- based on your training when you say "nystagmus" or when you say vertical gaze nystagmus --

THE COURT: (Indiscernible) That's not gonna help you no matter what he says. So let's to the other one.

[DPA]: Okay. Thank you, Your Honor. I guess we'll go straight to the three parts that you conducted for the Horizontal Gaze Nystagmus for the defendant. Did you perform the, the three parts –- you performed the three parts on the defendant. Can you please tell the Court how you, how you performed the three parts.

A Okay. Well before that, I had a lack of smooth pursuit. I held a stimulus at about 12 to 15 inches away from the (indiscernible) slightly above eye level. He started from the (indiscernible). About two seconds, I held the stimulus and moved it to his left and then continued again back to the center and did it again twice on each eye and I observed nystagmus. He failed to have lack of smooth pursuit.

And then from there, I went to the maximum deviation, did the same thing, held the stimulus the same distance 15 inches away from his nose slightly above eye level and I moved the stimulus to (indiscernible) his eyes and I observed nystagmus on both sides as well and then (indiscernible). I moved the stimulus (indiscernible) and about 45 degrees and then I started to check nystagmus (indiscernible) and I observed nystagmus (indiscernible).

Q So about three-fourth's you observed nystagmus in both eyes?

A Yes, sir.

[DPA]: Your Honor, would you like me to go into foundation for the walk-and-turn?

THE COURT: I don't think you need it. I'm not looking at it as a test.

[DPA]: I understand, Your Honor.

THE COURT: I'm looking at just observations.

Q So what did you do before you finished, performed the HGN on the defendant?

A Okay. Once I did the HGN, (indiscernible), I informed the sergeant that I was gonna conduct the walk-and-turn. I instructed him to (indiscernible) walk-and-turn in which I was in myself so in the position myself. And as I explained the walk-and-turn to him and as I explained the walk-and-turn, I was demonstrating the walk-and-turn to Mr. Soderlund.

Q Okay. And what position do you have the defendant or did

you have the defendant in while you were explaining the instructions?

A Okay. He moved slightly both hands to the side of his body, your right foot in front of your left foot, heel-to-toe and that's the starting position.

Q Okay. And as you –- and you instructed the defendant as to how to perform the walk-and-turn, did you also demonstrate it?

A Yes, as I was explaining, I was demonstrating.

Q Can you please tell the Court what you told the defendant to do in how to perform the walk-and-turn.

A Okay. Before I asked him to begin, I asked him to (indiscernible), until I instructed him to begin. And then I went into explaining the walk-and-turn to him and demonstrated as well.

Q Can you please tell the Court exactly what the instructions are.

A Okay. Once I instructed him to get into the starting position, I instructed him to keep his hands to his side and the first thing is to take nine steps forward and when (indiscernible) he is to turn to his left and come back and take nine steps (indiscernible).

Q In what manner are the nine steps taken?

A Heel-to-toe.

Q Are –- when you say heel-to-toe, does that mean that the heel-to-toe have to be touching?

A Have to be touching, yes.

Q And while you are doing the instructions, what are you looking for on the defendant?

A Well, I'm looking for if, if –- during the instruction phase if he starts to sway (indiscernible) and I'm checking to see if his (indiscernible) and his arms move and he sways and if he steps off line and how many steps he actually takes. And then I ask him (indiscernible) --

[DEFENSE COUNSEL]: Your Honor, I believe he's testifying about clues and I object to this and move to strike.

THE COURT: It's not objectionable; but you don't have to ask him what he's looking for. I don't care. I wanna know what he saw.

[DPA]: I understand, Your Honor.

THE COURT: I've seen, you know, I've heard 20,000 of these so --

Q BY [DPA]: Okay. Officer Villanueva, while you were

giving the instructions and demonstrating the walk-and-turn to the defendant, what did you notice about his condition?

A Okay. Well, first of all, he started too soon. I had to instruct him to stop and go back to the starting position. He was swaying. Once he started, he didn't touch heel-to-toe on any of the steps. He took too many steps. He actually took ten steps which means he would be turning the wrong way. When he was coming back, the still didn't have heel-to-toe and that's pretty much of it.

Q And as he was –- and about how far apart were his heel-to-toe when you mentioned he missed heel-to-toe?

A A few inches.

Q And before you had him start, did you make sure that he understood your instructions?

A Yes, sir.

Q When you demonstrated the walk-and-turn to the defendant, did you go through the entire nine steps to and the entire nine steps back?

A Yes, sir.

Q Did you have any problems doing the test yourself?

A No, sir.

Q And what is the next step, next thing that you did after you've completed the walk-and-turn?

A After the walk-and-turn is completed, then I instruct, I instructed him that I was gonna give him the one-leg stand next. And once I instructed him, I told him to watch what I was doing and I told him basically the instructions for the one-leg stand, which is to hold each foot (indiscernible) he desired, six inches, approximately six inches off the ground, keep his hands to his side and he's supposed to do –- I instructed him to count to 30 and in the thousands, so one one-thousand, two one-thousand, three one-thousand and four. I told him to stop once he got to 30.

Q And when you were –- did you also demonstrate this test for him?

A Yes, sir.

Q So you instructed how –- you instructed the defendant how high you wanted him to go at this point?

A Yes, sir.

Q And what did you –- and the defendant indicated he understood the instruction, is that right?

A Yes, sir.

> Q And did he end up performing this test?
>
> A Yes, sir.
>
> Q And what did you observe (indiscernible)?
>
> A Well he swayed, put his foot down several times and that's when (indiscernible).
>
> Q And when you say "several", about how many times?
>
> A About three times.
>
> Q And what did he do after he put his foot down three times, I mean, each time?
>
> A Well, he just (indiscernible) and continued to count.
>
> Q As you were talking to defendant, did you notice any condition about his speech pattern?
>
> THE COURT: About his what?
>
> [DPA]: Speech pattern, Your Honor.
>
> A It was slurred speech.
>
> Q Slurred speech.
>
> [DEFENSE COUNSEL]: I didn't hear that answer.
>
> A Slurred speech.
>
> Q BY [DPA]: So based on your observations and based on what you heard from Mr. Juntikka, the other civilian witness, what did you proceed to do?
>
> A I –- after the three tests was completed, I placed Mr. Soderlund under arrest.

(Footnotes supplied.)

On cross-examination, Officer Villanueva acknowledged that Soderlund was cooperative and provided the documents that Officer Villanueva requested. Officer Villanueva had no difficulty understanding Soderlund. Officer Villanueva also agreed that he did not know how hard Soderlund's car had hit the center divider, nor whether Soderlund was wearing his seat belt at the time. Officer Villanueva was not aware how "shaken up"

Soderlund was by the collision or how that might have affected his performance on the FSTs. Officer Villanueva acknowledged that the ground was wet that day and that he administered the FSTs on a slight incline, on a dirt-and-gravel surface. Officer Villanueva also admitted that he did not provide Soderlund a straight line as a guide for the walk-and-turn FST.

Soderlund did not present any witnesses in his defense, but he did have his Exhibit A, U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., Improved Sobriety Testing (1984), admitted into evidence. The district court ruled as follows:

> Thank you. Defendant will please rise. Okay. I guess I'll, I'll say if we didn't have Mr. Juntikka's testimony, this would be a more difficult case, to say the least.
>
> I'll also indicate that probably this wasn't the ideal place to perform the FST or I'll reiterate that I, I am not looking at the Field Sobriety Test as a test. It's just more testimony about what the defendant did. If someone driving by had seen the defendant, they could testify just as well (indiscernible) about it.
>
> The officer sees it as a test as he's making a decision whether to arrest the defendant and that's perfectly proper and I don't know how else you'd do it in an objective way, but in this case, no.
>
> I, I am satisfied that the evidence in total satisfies the State's burden. I am satisfied, first of all, that the defendant had alcohol in his system. The testimony about the defendant's -- the odor of alcohol on his breath is enough to establish that. It doesn't tell me how much. It doesn't tell me anything about impairment, but it tells me that there's alcohol. Other things reinforce that, but they might be due to other things other than alcohol. But the fact is, there is testimony there is an alcohol odor.
>
> I'm willing to exclude the red eyes in this case. It's usually a red herring because it doesn't matter in most cases. If you had just the evidence of red eye and no, no odor of alcohol, you wouldn't get any alcohol finding.
>
> But I think at least the folk lore [sic] is that that's certainly is associated, but whether it was or not, it was there. If it hadn't been observed, I suspect that [defense counsel] would be arguing there wasn't any evidence in the eyes. That's usually

one of the arguments (indiscernible).

The fact is, the odor of alcohol is enough to establish the presence of alcohol. I then have to determine beyond a reasonable doubt that there was enough alcohol in Mr. Soderlund's system to, basically in plain English, impaired [sic] his ability to drive safely, even substantially. I think that's a fair reading of the test.

As I look at everything I have here, I am satisfied of that. If I had only the evidence from the officer's observations of the Field Sobriety Test, I would say it's a must [sic] closer case, but I've got quite a bit more than that.

First of all, the officer said that the defendant did stagger as he got up to approach the officer; that he did start too soon on the heel-to-toe test, which tells me he's -- his ability to follow instructions is compromised. I'll, I'll say it's correlated with alcohol consumption. Maybe, as I say, the result of something else; but I, I'm not satisfied that that's the reason for it today.

He swayed on both the heel-to-toe test and the leg raise. His speech was slurred. He put his foot down three times which I will feel was because he couldn't keep his balance. But even if that to be fair, I'm satisfied the swaying is enough, when combined with the testimony of Mr. Juntikka, which shows that the defendant just clearly could not safely control his car on the road.

Now, maybe there are other explanations for that. Maybe his wheels are out of balance. Maybe he had a heart attack. Maybe gama [sic] rays were affecting him; but the fact is, I have no evidence of any of this. I have only evidence that the defendant had alcohol in a way that at least according to the way I've seen the world work the last 58 years seems to be the way alcohol works in a body.

He had bad driving. He was not driving safely. It was only at the end that he hit the wall so that hitting the wall wouldn't be the reason he was driving badly. I look at this and I just see a case, this is as typical a DUI case as I generally will see.

I don't have any doubt that the defendant had enough alcohol in his system to impair his ability to drive safely. And in the end, it did impair his driving in a way that was pretty unsafe. If I had any other explanation for it, I'd go for it, but I don't. It's not on the record.

I'm going to find that the defendant is guilty as charged. As I say, though, I'm not considering the eyes, I'm not considering the HGN. The HGN is only corroborative, but it wouldn't make any difference if the guy had closed his eyes and not taken it.

The vertical nystagmus I'll agree is curious 'cause you just never have that. And I suppose the only argument that you can make is that that's usually correlated with drugs like pakalolo; but the supreme court has told us that if you have conflicting

> evidence of drugs and alcohol, the State is only required to (indiscernible) to the point where they say it's the result of one or the other. I'm satisfied that this is consistent with alcohol impairment, that there was impairment; and I'm satisfied beyond a reasonable doubt. So that is my ruling today. Now what should I do about it?

II. Discussion.

Soderlund avers on appeal that the district court erred in allowing Officer Villanueva to testify about Soderlund's performance on the field sobriety tests, because the proper foundation had not been laid. See State v. Toyomura, 80 Hawai'i 8, 26, 904 P.2d 893, 911 (1995); State v. Ferrer, 95 Hawai'i 409, 430, 23 P.3d 744, 765 (App. 2001); State v. Mitchell, 94 Hawai'i 388, 398, 15 P.3d 314, 324 (App. 2000); State v. Ito, 90 Hawai'i 225, 244, 978 P.2d 191, 210 (App. 1999); State v. Nishi, 9 Haw. App. 516, 523, 852 P.2d 476, 480 (1993). Soderlund argues:

> While it appears that the district court was trying to walk the line between scientific test evidence and lay evidence, the record clearly shows that the district court improperly slipped across this line. With regard to the WAT and OLS, the district court failed to understand the significance of Villanueva's failure to administer the test according to NHTSA standards. Even Villanueva admitted on cross examination that from his observations, he could only say that Soderlund *might* have been under the influence. Both tests were given on a slope, on dirt containing rocks, and on ground which was wet. Further, the WAT was given on an imaginary line. It is undisputed from the evidence at trial that both tests "should be given on level ground, on a hard, dry, non-slippery surface, and under conditions in which the suspect would be in no danger should he fall" (Ex. "A" at 6 & 7). The WAT "requires a line that the suspect can see. If a natural line is not present, draw one in the dirt with a stick or on the sidewalk with chalk. Walking parallel to a curb is also adequate" (Ex. "A" at 6). The conditions under which these two tests were given in the instant case give Villanueva's observations minimal relevance. This case is a test book illustration of why compliance with NHTSA standards is mandatory.
>
> It would have been a different matter if the district court had limited Villanueva's testimony to what he had observed about Soderlund other than the FSTs, but the district court did not so

> limit the evidence it received. In effect, the district court looked at the WAT and OLS as if it were a test and drew conclusions from Soderlund's *performance* disregarding the conditions under which the tests were given. Additionally, while the district court claimed to have disregarded the HGN, the district court's erroneous statements that the existence of HGN in and of itself is evidence of a central nervous system impairment coupled with the district court's criticism of Ito and Ferrer as "very flawed' cases calls into serious question the claim that the HGN evidence was disregarded. The district court, by means of the back door and stealth, did the very thing that Ito and Ferrer have condemned. This court must not tolerate this patent evasion of the rules regarding FSTs.

Opening Brief at 19-20 (footnotes omitted; emphases in the original). Soderlund concludes that the district court's error mandates reversal or vacatur.

We disagree. Error *vel non*, nothing in the record indicates that the district court relied upon anything other than Officer Villanueva's observations of Soderlund's demeanor during the FSTs, along with the testimonies about the preceding events. The district court expressly disavowed reliance upon any testimony regarding Soderlund's FST performance or whether Soderlund "passed" or "failed" the FSTs. Hence, there is not a reasonable possibility that the error urged might have contributed to Soderlund's conviction. See Toyomura, 80 Hawai‘i at 26-27, 904 P.2d at 911-12; Mitchell, 94 Hawai‘i at 398, 15 P.3d at 324; Nishi, 9 Haw. App. at 524, 852 P.2d at 480. Cf. Ferrer, 95 Hawai‘i at 430, 23 P.3d 744, 765 (the district court erred when it expressly relied upon a police officer's opinion that the defendant "failed" the FSTs, where the police officer's opinion lacked the proper foundation for admissibility); Ito, 90 Hawai‘i at 245, 978 P.2d at 211 (the

district erred because it "based the existence of probable cause solely on the HGN test results," where the police officer's opinion lacked the proper foundation for admissibility). We presume the district court ignored any incompetent evidence, see Toyomura, 80 Hawai'i at 27, 904 P.2d at 912; Mitchell, 94 Hawai'i at 398, 15 P.3d at 324, and mere self-serving insinuations on appeal about "the back door and stealth," without real support in the record, do not rebut that presumption:

> And, as noted, the record reflects that the trial court both assured Toyomura that he was considering Officer Fujihara's testimony "only from a lay point of view" and that the trial court applied its independent assessment of the evidence in finding Toyomura guilty of DUI. We have no reason to construe the trial court's statement that "everything" that it heard about Toyomura's condition on the evening in question "told" it that Toyomura was "drunk" constituted a breach of the trial court's promise. See State v. Aplaca, 74 Haw. 54, 65-66, 837 P.2d 1298, 1304-05 (1992) (presuming that trial court applied the correct standard of proof).

Toyomura, 80 Hawai'i at 27, 904 P.2d at 912.

As for Soderlund's protestations about the conditions under which Officer Villanueva had him perform the FSTs, the weight to be assigned thereto was for the district court and the district court alone. Mitchell, 94 Hawai'i at 393, 15 P.3d at 319 ("The appellate court will neither reconcile conflicting evidence nor interfere with the decision of the trier of fact based on the witnesses' credibility or the weight of the evidence." (Citations and block quote format omitted.)).

III. Conclusion.

Accordingly, the December 2, 2003 judgment of the district court is affirmed.

DATED: Honolulu, Hawai‘i, March 10, 2005.

On the briefs:

Earle A. Partington,
for defendant-appellant.

Ryan Yeh,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge