NO. 25867

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JERRICO LINDSEY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NOS. TR51-55; CT7:4/30/03)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Foley, and Nakamura, JJ.)

Defendant-Appellant Jerrico Lindsey (Lindsey) appeals from the five Judgments filed on November 20, 2003, in the District Court of the Second Circuit (district court).[1] After a bench trial, the district court found Lindsey guilty of the following criminal offenses: 1) operating a vehicle under the influence of an intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61 (Supp. 2001) (Count 1/Case No. TR51); 2) promoting a detrimental drug in the third degree, in violation of HRS § 712-1249(1) (1993) (Count 4/Case No. CT7); and 3) possessing an intoxicating liquor while operating a motor vehicle, in violation of HRS § 291-3.1 (Supp. 2006) (Count 5/Case No. TR55). The district court also found Lindsey "guilty" of the following traffic infractions: 1) failure to drive on the right side of the roadway, in violation of HRS § 291C-41 (1993) (Count 2/Case No. TR52), and 2) disregarding longitudinal traffic lane

[1] The Honorable Douglas H. Ige presided.

markings, in violation of HRS § 291C-38 (1993 & Supp. 2002) (Count 3/Case No. TR53). The district court imposed concurrent terms of imprisonment of two days with respect to Count 1/Case No. TR51, Count 4/Case No. CT7, and Count 5/Case No. TR55, ordered Lindsay to attend 72 hours of Narcotics Anonymous/Alcoholic Anonymous meetings, and required Lindsey to pay restitution and various fines, fees, and assessments.

On appeal Lindsey argues that: 1) the district court erred in denying his motion to suppress the marijuana recovered during the warrantless search of his shorts pocket after his arrest; 2) the district court erred in admitting evidence of Lindsey's performance on the horizontal gaze nystagmus (HGN) test and in considering such evidence in determining whether Lindsey was guilty of the OVUII charge; and 3) there was insufficient evidence to support Lindsey's conviction for possessing an intoxicating liquor while operating a motor vehicle.

Because Lindsey does not challenge the district court's determinations that he violated HRS § 291C-41 by failing to drive on the right side of the roadway (Count 2/Case No. TR52) and that he violated HRS § 291C-38 by disregarding longitudinal traffic lane markings (Count 3/Case No. TR53), we affirm those determinations without further discussion. However, because the district court erroneously found Lindsey "guilty" of these offenses, which are civil traffic infractions rather than crimes, we vacate the Judgments entered with respect to Count 2/Case No. TR52 and Count 3/Case No. TR53 and remand to the district court

for entry of replacement judgments in favor of the State of Hawai'i (the State) that comply with the applicable statutes regarding traffic infractions. See State v. Ribbel, 111 Hawai'i 426, 428, 142 P.3d 290, 292 (2006).

For the reasons set forth below, we reverse Lindsey's conviction for promoting a detrimental drug in the third degree and affirm Lindsey's convictions for OVUII and possessing an intoxicating liquor while operating a motor vehicle. After a careful review of the record and the briefs submitted by the parties, we resolve Lindsey's arguments as follows:

I.

We conclude that the district court erred in failing to suppress the marijuana seized by Officer Ruel Dalere (Officer Dalere) from Lindsey's shorts pocket. Officer Dalere testified that he recovered the marijuana from Lindsey's shorts pocket pursuant to a pat-down search for weapons after Lindsey's arrest. Officer Dalere was entitled to conduct a pat-down search for weapons incident to his arrest of Lindsey. State v. Enos, 68 Haw. 509, 511, 720 P.2d 1012, 1014 (1986); State v. Reed, 70 Haw. 107, 114-15, 762 P.2d 803, 807-08 (1988). A pat-down search for weapons, however, did not authorize Officer Dalere to remove the marijuana from Lindsey's pocket unless Officer Dalere had reason to believe that what he felt could be used as a weapon. See Enos, 68 Haw. at 510-11, 720 P.2d at 1013-14. The State offered no evidence that Officer Dalere removed the marijuana from Lindsey's pocket because Officer Dalere suspected it could be

used as a weapon. We hold that the seizure of the marijuana from Lindsey's shorts pocket violated Article I, Section 7 of the Hawai'i Constitution. See Id.

We reject the State's contention that the marijuana would inevitably have been discovered pursuant to an inventory search and thus the inevitable discovery exception to the exclusionary rule applies. To satisfy this exception, the State must present clear and convincing evidence that the unlawfully obtained evidence would inevitably have been discovered by lawful means. State v. Lopez, 78 Hawai'i 433, 451, 896 P.2d 889, 907 (1995). It is certainly possible that the State could have satisfied the inevitable discovery exception if it had presented evidence that the marijuana in Lindsey's pocket would have been discovered pursuant to an inventory search. The State, however, presented no evidence that Lindsey was or would have been subjected to an inventory search. Thus, there is no basis in the record for this court to apply the inevitable discovery exception.

Without the marijuana, there was insufficient evidence to support Lindsey's conviction for promoting a detrimental drug in the third degree. Accordingly, we reverse that conviction.

II.

We need not decide Lindsey's claim that the district court erred in admitting the HGN test results and in considering the results as substantive evidence supporting the OVUII charge because we conclude that any error was harmless beyond a

reasonable doubt. See State v. Holbron, 80 Hawai'i 27, 32 n.12, 904 P.2d 912, 917 n.12 (1995). Even without the HGN test results, there was overwhelming evidence that Lindsey has been operating his vehicle under the influence of an intoxicant, in violation of HRS § 291E-61. This included evidence that Officer Dalere observed Lindsey's vehicle drifting beyond both the double center line and the line marking the right shoulder and then weaving for several minutes; Lindsey did not respond when Officer Dalere activated his blue strobe light; Lindsey's eyes were red, watery, glassy, and bloodshot; Lindsey had the odor of liquor on his breath and admitted that he had a Heineken beer earlier that evening; four open Heineken beer bottles, cold to the touch, were found in Lindsey's vehicle; Lindsey's speech was slurred, and he swayed from side to side and had difficulty standing when he exited his vehicle; Lindsey was unable to satisfactorily perform the one-leg stand test; a sample of Lindsey's urine was analyzed by a clinical laboratory and found to contain levels of the primary metabolites for cocaine and cannabinoids that significantly exceeded the laboratory's detection cutoff. We conclude that there is no reasonable possibility that any error by the district court in admitting the HGN test results and considering the results as substantive evidence might have contributed to Lindsey's OVUII conviction. See State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999).

III.

Lindsey argues that there was insufficient evidence to convict him of possessing intoxicating liquor while operating a motor vehicle, in violation HRS § 291-3.1, because the State failed to present substantial evidence that the liquid in the open Heineken bottles found in Lindsey's vehicle was beer. We disagree. We also reject Lindsey's claim that, in addition to proving the liquid was beer, the State was required to prove that the liquid contained one-half of one per cent or more of alcohol by volume.

HRS § 291-3.1(b) provides:

> (b) No person shall possess, while operating a motor vehicle or moped upon any public street, road, or highway, any bottle, can, or other receptacle containing any intoxicating liquor which has been opened, or a seal broken, or the contents of which have been partially removed.

HRS § 291-1 (1993 & Supp. 2006) defines the term "intoxicating liquor" as used in HRS § 291-3.1(b) to mean the same as the term is defined in HRS § 281-1 (1993 & Supp. 2006). HRS § 281-1, in turn, provides:

> "Liquor" or "intoxicating liquor" includes alcohol, brandy, whiskey, rum, gin, okolehao, sake, beer, ale, porter, and wine; and also includes, in addition to the foregoing, any spirituous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, in whatever form and of whatever constituency and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use or may be used or readily converted for use for beverage purposes.

(Emphasis added.)

Under the plain language of the HRS § 281-1, the requirement of "one-half of one per cent or more of alcohol by volume" does not apply to "beer" or the other specifically

identified alcoholic beverages, but only to the generically described "spirituous, vinous, malt or fermented liquor, liquids, and compounds." Accordingly, to satisfy the statutory definition of "intoxicating liquor," the State was only required to prove that the liquid found in the open Heineken bottles in Lindsey's car was beer. The State was not required to prove that the alcohol content of the liquid was one-half of one per cent or more by volume. Thus, Lindsey's claim that the evidence was insufficient because the State failed to introduce a chemical analysis of the liquid found in the Heineken bottles to prove its alcohol content is without merit. See People v. Angell, 540 N.E.2d 1106, 1109 (Ill. App. Ct. 1989) (holding that a chemical analysis is not required to prove that the liquid in beer cans was an alcoholic liquor).

Officer Nicholas Krau (Officer Krau) testified that he recovered a six pack of "Heineken beer" bottles, which were still cold, from Lindsey's vehicle. Four of the bottles were open. Two of the open bottles were partially filled with a liquid and the other two were empty. Officer Krau testified that he was familiar with the smell of beer and that the liquid in the bottles smelled like beer. Lindsey did not object to any of this testimony. The State also introduced evidence that Lindsey had the odor of liquor on his breath and that he admitted to drinking a Heineken beer earlier that evening. We conclude that the State presented sufficient evidence to prove that the liquid in the open Heineken bottles was beer and to establish that Lindsey was

guilty of violating HRS § 291-3.1. See State v. Ildefonso, 72 Haw. 573, 576-77, 827 P.2d 648, 651 (1992).

IV.

We affirm the two November 20, 2003, Judgments entered by the district court with respect to the convictions and sentences for operating a vehicle under the influence of an intoxicant (Count 1/Case No. TR51) and for possessing an intoxicating liquor while operating a motor vehicle (Count 5/Case No. TR55). We affirm the district court's determinations that Lindsey violated HRS § 291C-41 by failing to drive on the right side of the roadway (Count 2/Case No. TR52) and that he violated HRS § 291C-38 by disregarding longitudinal traffic lane markings (Count 3/Case No. TR53), but we vacate the two November 30, 2003, Judgments entered with respect to those traffic infractions and remand for entry of replacement judgments in favor of the State that comply with the applicable statutes regarding traffic infractions. We reverse the November 20, 2003, Judgment entered with respect to Lindsey's conviction and sentence for promoting a detrimental drug in the third degree (Count 4/Case No. CT7).

DATED: Honolulu, Hawai'i, January 30, 2007.

On the briefs:

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County of Maui
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James A. Burns
Chief Judge

Daniel R. Foley
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Craig H. Nakamura
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