

NO. 23435

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
GREGORY WYHONG YEE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,  
KANEHOHE DIVISION  
(TRAFFIC NO. 98-194433)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

On April 7, 2000, Defendant-Appellant Gregory Wyhong Yee (Yee) was arraigned on one count of Driving Under the Influence of Intoxicating Liquor (DUI), in violation of Hawaii Revised Statutes (HRS) § 291-4(a)(1) (Supp. 1999).<sup>1</sup>

Following a bench trial,<sup>2</sup> the District Court of the First Circuit (district court) found Yee guilty. Since this conviction was Yee's second within a five-year period for DUI,

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<sup>1</sup> **§291-4 Driving under the influence of intoxicating liquor.**  
(a) A person commits the offense of driving under the influence of intoxicating liquor if:

- (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty[.]

<sup>2</sup>Per diem Judge W. Patrick O'Connor presided.

the district court sentenced Yee to a one-year license suspension, one hundred hours of community service, and a fourteen-hour alcohol abuse program; fined him \$500; and ordered him to pay \$107 to the Driver's Education Fund.

Yee appeals the April 7, 2000, Judgment of the district court. On appeal, Yee contends the district court erred in denying his motion for judgment of acquittal in the absence of substantial evidence that Yee was under the influence of alcohol at the time he operated his vehicle. We disagree with Yee's contention and affirm the April 7, 2000, Judgment of the district court.

#### **I. BACKGROUND**

Credible evidence at trial established that on May 23, 1998, Tony Raiola (Raiola), a twenty-year employee of GTE Hawaiian Telephone was working as a line worker, placing telephone cable and repairing facilities, cables, and poles on the road. Raiola testified that at approximately 11:00 p.m. on May 23, he responded to a trouble call in the Pounder's Beach area in Laie. Raiola traveled to Laie on Kamehameha Highway, a four-lane highway (two lanes heading in each direction). Raiola recalled that traffic conditions on Kamehameha Highway at that hour were light. Raiola was familiar with the area because he drove that route three to four times a month.

Raiola testified that in the Kaaawa Beach area, he noticed a red Dodge Colt (the Colt) about ten to fifteen feet in front of him swerve across the double solid yellow line. Raiola saw the Colt pass over the yellow line by over half of the car's length for about a second and a half before moving back. Believing that the driver of the Colt was falling asleep, Raiola remained directly behind the Colt because he was afraid of passing the Colt.

Raiola testified that between Kaaawa and the big turn at Kahana Bay/Crouching Lion, he observed the Colt swerve across the line about three times. As the Colt made the turn at Kahana Bay, Raiola saw the Colt cross completely into the on-coming traffic lane, remain there for approximately one to two seconds, and then return to his lane of travel. Raiola described that as the "wake up call" and gave the Colt some space -- about thirty to forty feet -- because he was concerned the Colt was going to hit a utility pole or encounter oncoming traffic.

Raiola testified that after the turn going up towards the bridge at Kahana Bay, the Colt swerved over the line again. Before the turn, Raiola tried to get the Colt's attention by signaling with his horn, but there was no response from the Colt.

Raiola testified that by the Kahana Bay pier, he saw the Colt go over the double solid line for three or four seconds as

the Colt rounded the turn; as the turn straightened out, the Colt went back in its lane. Between Punaluu and Hauula Elementary School, the Colt crossed over the center lane "about five more times." Near the elementary school area, the driver of the Colt pulled off to the right side of the road and stopped suddenly. Raiola stopped and yelled at the driver that the driver was going to hit a utility pole or kill someone. The driver said, "fuck off." Raiola identified Yee as the driver of the Colt.

Raiola testified that he called 911 and reported a person DUI in a red Dodge Colt. Raiola made a u-turn by the shopping center across the street and then noticed that the Colt had been reversed and parked a couple of houses back from where it had initially stopped. Raiola shouted to two kids in the garage of the house, asking where was the driver of the Colt; they replied that he was inside sleeping. Raiola then called 911 again, and within five minutes one officer was with Raiola and two were across the street. Raiola identified the car and Yee to the police.

Francisco Pizarro (Officer Pizarro) testified that as a police officer with the Honolulu Police Department (HPD) for the last ten years he has made hundreds, if not thousands, of traffic stops, and hundreds of those have led to DUI arrests. On May 24, 1998, Officer Pizarro was assigned to patrol duty in the Kahuku

area, riding with Officer Greg Young (Officer Young) (collectively "the Officers"). At approximately 12:10 a.m., the Officers received a "hazardous driver call" in response to a "vehicle being operated in a hazardous manner traveling Kahuku bound on Kamehameha Highway." The Officers were dispatched to a location in the 5400 block of Kamehameha Highway. Approximately ten minutes elapsed between the call and the Officers' arrival at the location.

Officer Pizarro testified that upon arrival, he met with Raiola who identified a red Dodge as the vehicle that was being operated in a hazardous manner traveling from Kaaawa to the present location. Honolulu Police Department dispatch had given Officer Pizarro a license plate number of the "hazardous driver" that matched that of red Dodge. Officer Pizarro then went to the residence where the Dodge was parked and spoke with a female, asking her where was the driver of the car. The female responded that the driver was sleeping inside the house. The female went inside the house, and Yee came out.

Officer Pizarro testified that when Yee came out, Yee had red, bloodshot, watery eyes and a moderate odor of alcohol on his breath. Yee told Officer Pizarro that Yee had been operating the red Dodge. Yee responded "no" to a series of questions regarding whether he was under the care of a doctor, dentist, or

optometrist; had any speech impediments or physical defects; was on any medication; wore a glass eye, contact lenses, or glasses; or was epileptic or diabetic. Yee agreed to take the field sobriety test (FST).

Officer Pizarro testified he administered the FST to Yee, specifically the horizontal gaze nystagmus (HGN) test on dry, flat ground, free from debris under lighting provided by street lamps and a police flashlight. Officer Pizarro explained to Yee the consequences of failing the tests. Officer Pizarro used the tip of his pen to determine whether Yee was able to smoothly pursue the pen with his eyes. Holding the pen approximately 8-12 inches away from Yee's face between his eye and nose level, Officer Pizarro instructed Yee to hold his head still and follow the tip of the pen with his eyes. Both of Yee's eyes moved in sync, but there was observable distinct nystagmus in both eyes. Officer Pizarro then established that Yee had distinct nystagmus at maximum deviation. The final phase of the HGN test established that Yee had distinct nystagmus in both eyes prior to the onset of 45 degrees. After observing that Yee had distinct nystagmus in all three portions of the test, Officer Pizarro opined that Yee failed the HGN portion of the test.

Officer Pizarro testified that he next administered the nine-step walk-and-turn test to Yee; Yee failed this test.

Officer Pizarro then administered the one-legged stand test, which Yee "slightly failed." All of the tests administered to Yee were given consistent with Officer Pizarro's training. After concluding that Yee was too impaired to operate a vehicle in a safe manner, Officer Pizarro arrested him for DUI.

Following the State's case, Yee moved for a judgment of acquittal, which the district court denied. Yee renewed his motion for judgment of acquittal at the close of evidence, and the motion was again denied.

The district court did not find credible Yee's testimony that his eyes were red and watery because he was an organic farmer and the fertilizer he used caused an allergic reaction. Nor did the district court find credible Yee's testimony that he did not have anything to drink that evening prior to arriving at the beach house in Hauula, but he did consume vodka upon arrival to calm himself down because he was being tailgated by a truck.

The Court stated its findings as follows:

Alright, the Court's ready to rule. And just briefly we didn't really have a stop in this case. We have the officers arriving after they've [sic] been a stop and there's no question in the Court's mind that from the testimony that the Court's heard, that there was evidence shown that the defendant was drinking and that he was border line on some of the field test and flunked some of them. I think that's pretty established. The real underlying question to resolve from the credibility of the witnesses and all of the testimony, is whether he had been drinking and whether it impaired his driving to the extent that he was incapacitated.

The testimony on the driving is overwhelming and the question then as to whether you know [it's] credible testimony or not is something that the Court has to look into carefully. The lay witness certainly didn't have any background or reason to be untruthful. Mr. Raiola really is in the capacity of almost a commercial driver. He's out there on the road to maintain his livelihood and the evidence the Court feels is convincing in this respect is the 10 miles or more of erratic driving down this long stretch from Kaaawa all the way to Hauula. And that coupled with the field sobriety test and the observations, leads the Court to conclude that the Prosecution's met its burden and that the defendant is guilty as charged. And I'm going to find that.

## II. STANDARD OF REVIEW

### **Motion for Judgment of Acquittal.**

When reviewing a . . . motion for judgment of acquittal,

we employ the same standard that a trial court applies to such a motion, namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Jhun, 83 Hawai'i 472, 481, 927 P.2d 1355, 1364 (1996) (citations and internal quotation marks omitted).

State v. Jenkins, 93 Hawai'i 87, 99, 997 P.2d 13, 25 (2000)

(quoting State v. Timoteo, 87 Hawai'i 108, 112-13, 952 P.2d 865, 869-70 (1997)).



### III. DISCUSSION

Yee contends the district court erred in denying his motion for judgment of acquittal in the absence of substantial evidence that Yee was under the influence of alcohol at the time he operated his vehicle. Specifically, Yee argues that neither of the State's witnesses was able to provide direct evidence that Yee was under the influence of alcohol at the time he was driving.

However, in deciding whether to uphold the district court's decision, we must review the evidence adduced in the district court "in the strongest light for the prosecution" when evaluating the "legal sufficiency of such evidence to support a conviction." State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." 73 Haw. at 248, 831 P.2d at 931. Furthermore, it is "for the trial judge as factfinder to assess credibility of witnesses, including defendants, and to resolve all questions of fact." Lono v. State, 63 Haw. 470, 473, 629 P.2d 630, 633 (1981).

There was substantial, credible evidence that Yee was the driver of the red Dodge Colt that was driven erratically from

Kaaawa to Hauula, failed the FSTs administered by Officer Pizarro, "slightly failed" the one-legged stand test, and presented distinct nystagmus in both eyes following the HGN tests. There was evidence that when Yee came out of the house, Yee had red, bloodshot, watery eyes and a moderate odor of alcohol on his breath.

"The trier of fact may draw all reasonable and legitimate inferences and deductions from the evidence adduced from admitted or known facts, and findings of the trial court will not be disturbed unless clearly erroneous." Id. at 473-74, 629 P.2d at 633.

To support a conviction for violating HRS § 291-4, the State was required to prove that Yee operated or assumed actual physical control of the operation of any vehicle while under the influence of intoxicating liquor. There was substantial evidence that Yee was under the influence of intoxicating liquor in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty in violation of HRS § 291-4.

We conclude there was substantial evidence on the record for the district court to find that Yee violated HRS § 291-4(a)(1).

**IV. CONCLUSION**

The district court's April 7, 2000, Judgment in this case is affirmed.

DATED: Honolulu, Hawai'i, November 16, 2001.

On the briefs:

Jon N. Ikenaga,  
Deputy Public Defender,  
for defendant-appellant.

Acting Chief Judge

Loren J. Thomas,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

Associate Judge

Associate Judge