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NO. CAAP-15-0000528

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
LEE KI BOYD, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
HONOLULU DIVISION  
(CASE NO. 1DTA-15-01335)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Reifurth, JJ.)

Defendant-Appellant Lee Ki Boyd (Boyd) appeals from the Notice of Entry of Judgment and/or Order and Plea/Judgment, entered on June 23, 2015 in the District Court of the First Circuit, Honolulu Division (District Court).<sup>1</sup>

Boyd was convicted of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a)(1) and/or (a)(3) (Supp. 2015).

On appeal, Boyd contends (1) the District Court erred by failing to dismiss the complaint for failure to define the term "alcohol" in the charge, (2) HRS § 291E-1 and -61 are void for vagueness for failure to include beverages that do not meet the statutory definition of alcohol, (3) the District Court erred by denying his Motion for Judgment of Acquittal because the State failed to prove that he consumed alcohol as defined in HRS § 291E-1, (4) the District Court erred by denying his Motion to

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<sup>1</sup> The Honorable David W. Lo presided.

Suppress, (5) there was insufficient evidence to support his conviction, and (6) the District Court failed to conduct an adequate Tachibana colloquy.

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 by the parties, we resolve Boyd's points of error as follows:

(1) The District Court did not err by denying the Motion to Dismiss because the complaint was not fatally defective for failing to define the term "alcohol." State v. Tsujimura, 137 Hawai'i 117, 120-21, 366 P.3d 173, 176-77 (App. 2016); State v. Turping, 136 Hawai'i 333, 335, 361 P.3d 1236, 1238 (App. 2015), cert rejected, SCWC-13-0002957 May 20, 2015.

(2) Contrary to Boyd's argument, HRS § 291E-61 is not unconstitutionally void for vagueness because OVUII includes being under the influence of ethyl alcohol commonly found in beverages such as beer and wine, Tsujimura, 137 Hawai'i at 120-21, 366 P.3d at 176-77, and beer and wine are commonly known as alcoholic beverages. See Dictionary.com <http://www.dictionary.com/browse/beer?s=t> (beer is "an alcoholic beverage made by brewing and fermentation") and <http://www.dictionary.com/browse/wine?s=t> (wine is "the fermented juice of grapes, . . . usually having an alcoholic content of 14 percent or less") (last accessed June 2, 2016); or Oxforddictionaries.com [http://www.oxforddictionaries.com/us/definition/american\\_english/beer](http://www.oxforddictionaries.com/us/definition/american_english/beer) (beer is an "alcoholic drink made from yeast-fermented malt flavored with hops") and [http://www.oxforddictionaries.com/us/definition/american\\_english/wine](http://www.oxforddictionaries.com/us/definition/american_english/wine) (wine is "[a]n alcoholic drink made from fermented grape juice") (last accessed June 2, 2016).

(3) The District Court did not err by denying Boyd's Motion for Judgment of Acquittal. The State was not required to prove that Boyd consumed a specific type of beverage as proof of consumption of a particular beverage is not an element of HRS § 291E-61(a)(1) or (a)(3). HRS § 291E-61(a)(1) prohibits operating 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." HRS § 291E-61(a)(3) prohibits operating a vehicle "with .08 or more grams of alcohol per two hundred ten liters of breath[.]"

(4) The District Court erred by denying Boyd's motion to suppress the result of his breath alcohol test because Boyd's consent was not informed and voluntary. State v. Won, SCWC-12-0000858, 2015 WL 10384497 at \*8-11 (Haw. Nov. 25, 2015).

(5) Boyd contends there was insufficient foundation to admit Sergeant James Yee's (Sergeant Yee) testimony regarding Boyd's performance on field sobriety tests, thus, there was insufficient evidence to convict him. Sergeant Yee testified about Boyd's performance on the horizontal gaze nystagmus test, "walk-and-turn" test, and "one-leg stand" test. Sergeant Yee did not state that Boyd had failed any of the tests, rather, he stated that based on Boyd's performance on the tests, he believed Boyd was intoxicated.

In order to render a lay opinion as to whether Boyd was intoxicated, the State was required to lay sufficient foundation to establish that

(1) the horizontal gaze nystagmus, "one-leg stand," and "walk-and-turn" procedures were elements of the HPD's official FST protocol, (2) there was any authoritatively established relationship between the manner of performance of these procedures and a person's degree of intoxication, and (3) [the officer] had received any specific training in the administration of the procedures and the "grading" of their results.

State v. Toyomura, 80 Hawai'i 8, 26, 904 P.2d 893, 911 (1995) (citing State v. Nishi, 9 Haw. App. 516, 523, 852 P.2d 476, 480 (1993)).

Sergeant Yee testified that a person's physical performance on a field sobriety test is used to determine whether a person is impaired and if the person can operate a vehicle in a safe manner. Sergeant Yee stated that there are three field sobriety tests, the horizontal gaze nystagmus, "one-leg stand," and "walk-and-turn." He also stated that as part of his training he was taught to administer the field sobriety tests pursuant to the National Highway Traffic Safety Administration standards and he was qualified to conduct and evaluate the field sobriety

tests. Based upon the record, the State laid sufficient foundation for admission of Sergeant Yee's testimony regarding Boyd's performance on the field sobriety tests.

When the evidence adduced at trial court is considered in the strongest light for the prosecution, there was substantial evidence to support Boyd's conviction for OVUII. State v. Matavale, 115 Hawai'i 149, 157-58, 166 P.3d 322, 330-31 (2007). When Boyd was initially stopped, Officer Ernest Chang could smell the odor of an alcoholic beverage from Boyd, Boyd had red, glassy, and watery eyes, and during the field sobriety tests, Sergeant Yee could detect an odor of alcohol about Boyd. Sergeant Yee stated that prior to the horizontal gaze nystagmus test, Boyd was swerving side to side. Prior to administering the "walk-and-turn" test Boyd was swaying and lost his balance. During the first part of the "walk-and-turn" test, Boyd missed several heel to toe steps and his heel was one or two inches away from his toe. Boyd also raised his hands like a T figure to keep his balance as he walked on a straight line. Boyd took only eight steps instead of nine, made a turn and lost his balance, stepped back to regain his balance, missed several heel to toe steps during his nine steps back and also raised his arms. Boyd showed five out of eight clues and based on his performance it was Sergeant Yee's opinion that Boyd was impaired. During the "one-leg" stand test Boyd raised his hands to the side, was swaying to keep his balance and put his left foot down after 14 out of 30 seconds. Sergeant Yee observed three out of four things, swaying, foot down, and raised arms which indicated to him that Boyd was impaired. Based on the three tests given and his experience, Sergeant Yee opined that Boyd was intoxicated. Boyd was stopped on a public road, street, way, or highway. Boyd was initially stopped after he turned left, partially into an oncoming lane. Therefore, there was substantial evidence that Boyd operated or assumed actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair a person's normal mental faculties or ability to care for the person and guard against casualty in violation of HRS § 291E-61(a)(1).

(6) The District Court failed to conduct an adequate "ultimate colloquy" regarding Boyd's decision to waive his right to testify as required by Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995) and State v. Han, 130 Hawai'i 83, 306 P.3d 128 (2013) because it did not obtain a response from Boyd as to whether he understood his rights.

However, "to determine whether a waiver of a fundamental right was voluntarily and intelligently undertaken, this court will look to the totality of the facts and circumstances of each particular case." Id. at 89, 306 P.3d at 134 (quoting State v. Friedman, 93 Hawai'i 63, 66-67, 996 P.2d 268, 273-74 (2000) (internal quotation marks and brackets omitted)). Prior to the start of trial on May 29, 2015, Boyd was advised that he had the right to remain silent and that remaining silent would not be held against him, and that if he testified the prosecutor would be able to cross examine him, to which Boyd stated that he understood. On June 23, 2015, during the State's case-in-chief, the District Court did conduct a colloquy with Boyd as follows:

THE COURT: All right. Uh, I'm not sure if I did or not, but, Mr. Boyd, I wish to advise you that you have the right to remain silent. And if you remain silent, I will not hold that against you. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I also wish to advise you that you have the right to testify and that no one can prevent you from testifying if you so choose. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And if you do testify, the prosecutor can cross-examine you if you testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And whether or not you testify or remain silent needs to be your own decision and not your lawyer's. Do you understand that?

THE DEFENDANT: Yes, sir.

Given the totality of the circumstances, Boyd was aware of his right to testify, right not to testify, that if he testified he could be cross examined, that if did not testify it

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would not be held against him, that the decision to testify or not testify needed to be his own decision, and that he understood each of those rights prior to deciding not to testify. Thus, Boyd voluntarily and intelligently waived his right to testify. The failure to conduct an adequate Tachibana colloquy was harmless error.

Therefore,

IT IS HEREBY ORDERED that the Notice of Entry of Judgment and/or Order and Plea/Judgment, entered on June 23, 2015 in the District Court of the First Circuit, Honolulu Division is affirmed in part and vacated in part. Boyd's conviction for violating HRS § 291E-61(a) (3) is vacated, and the case is remanded to the District Court for further proceedings consistent with this Summary Disposition Order. Boyd's conviction for violating HRS § 291E-61(a) (1) is affirmed.

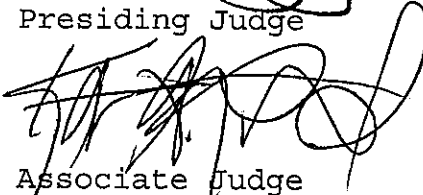
DATED: Honolulu, Hawai'i, June 15, 2016.

On the briefs:

Alen M. Kaneshiro,  
for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge