NO. 25921

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROBERT C. PYLE, JR., Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD TRAFFIC NO. 002501869)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant Robert C. Pyle, Jr. ("Robert") appeals from the judgment of the District Court of the First Circuit ("district court") filed on October 20, 2003, the Honorable Judge Michael Marr presiding. At trial, Robert was found guilty of operating a vehicle under the influence of an intoxicant ("OVUII") in violation of Hawai'i Revised Statutes ("HRS") § 291E-61(a)(1) (Supp. 2002).[1]

On appeal, Robert asserts that the district court erred by: (1) allowing the witness-officers of the Honolulu Police Department ("HPD") to testify as to "clues," "results," and "failure" of Robert's field sobriety test ("FST"); (2) allowing HPD Officer Brandon Yamamoto to testify as to the contents of the

[1] HRS § 291E-61(a)(1) (Supp. 2002), the version in effect at the time of Robert's arrest, reads:

> (a) 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:
>
> (1) 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.

National Highway Transportation Safety Administration ("NHTSA") manual in the absence of having the manual itself admitted into evidence or made available to the defense, thereby violating the best evidence rule, Hawai'i Rules of Evidence (HRE) Rule 1002 (1993);[2] (3) improperly taking judicial notice that red, glassy and watery eyes are indicia of intoxication; and (4) finding sufficient admissible evidence to convict Robert of OVUII.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, and addressing Robert's best evidence rule and judicial notice arguments first, we hold as follows:

(1) The district court did not violate the best evidence rule, because the prosecution expressly stated in response to defense objection that it was not offering to prove the contents of the NHTSA manual. Indeed, the district court expressly gave its rationale for overruling the defense objection, stating that ". . . . these are all . . . . foundational questions as to why the officer obviously -- [was led] to believe defendant was intoxicated." (Emphases added.)

Thus, the court made clear that it was only allowing the testimony as to the NHTSA manual for foundational purposes, and not to prove its contents. Cf. State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999) ("this was a bench trial, and it is well established that a judge is presumed not to be influenced by incompetent evidence[]" (citation omitted)

[2] HRE Rule 1002 provides in pertinent part: "[t]o prove the content of a writing . . . . the original writing . . . . is required . . . ."

(internal quotation marks omitted)).

(2) The district court did not err in taking judicial notice of "glassy, red, watery eyes" as indicia of intoxication. While we have not expressly judicially noticed "glassy, red, watery eyes" as indicia of intoxication, this court and the Intermediate Court of Appeals have frequently found an association between this physical symptom and intoxication. See e.g., State v. Dow, 96 Hawai'i 320, 325-26, 30 P.3d 926, 931-32 (2001) (holding that lay testimony as to defendant's "bloodshot eyes and an attendant odor of alcohol" could be use to "corroborate a factual inference" that defendant's blood alcohol content level was 0.19, rather than .0019); Vliet, 91 Hawai'i at 293, 983 P.2d at 194 (finding that police officer's testimony that defendant had "red and glassy" eyes and an odor of alcohol on his breath, inter alia, constituted sufficient evidence for a reasonable fact-finder to conclude that defendant was DUI); State v. Nishi, 9 Haw. App. 516, 524, 852 P.2d 476, 481 (1993) (impliedly recognizing defendant's "red glassy bloodshot" eyes as substantial evidence to sustain his DUI conviction); State v. Mitchell, 94 Hawai'i 388, 399, 15 P.3d 314, 325 (App. 2000) ("[t]he testimonies of the police officers painted a classic portrait of intoxication. Mitchell's breath was redolent of alcohol. His speech was slurred. His eyes were red, bloodshot and watery. . . ." (emphasis added)); and State v. Ferrer, 95 Hawai'i 409, 431, 23 P.3d 744, 766 (App. 2001) (deferring to district court's finding that defendant's red eyes and odor of alcohol on his breath, inter alia, constituted probable cause to arrest him for DUI).

Moreover, as in the afore-cited cases, evidence of Robert's "glassy, red, watery eyes" was not viewed in isolation; in the instant case, both police officers at the accident scene who observed Robert also noted his slurred speech, to which no defense objection was made, and the "strong" odor of alcohol on his breath. We also note that the district court carefully considered the "totality of circumstances" in making its ruling. Thus, we are unconvinced that the district court exceeded the bounds of reason in taking judicial notice of "glassy, red, watery eyes" as indicia of intoxication.

(3) Assuming arguendo that the district court erred in admitting all testimony specifically relating to Robert's FST, following sedulous review of the record, such errors were harmless in light of the overwhelming and compelling evidence tending to show beyond a reasonable doubt that Robert was under the influence of alcohol in an amount sufficient to impair his ability to guard against casualty; thus, there is no reasonable possibility that the FST-related evidence contributed to Robert's conviction. See State v. Toyomura, 80 Hawai'i 8, 27, 904 P.2d 893, 912 (1996); State v. Kaiama, 81 Hawai'i 15, 22-23, 911 P.2d 735, 742-43 (1996); HRS § 291E-61(a)(1). Of particular note is the district court's express ruling that all of the FST subtests (the horizontal gaze nystagmus test, the "walk and turn" test, and the "one leg stand" test) were considered only "minor factors" in its "totality of circumstances" analysis.

(4) Finally, in light of our holding that overwhelming and compelling evidence exists on the record such that any error committed by the district court in accepting and considering

incompetent evidence is rendered harmless, a fortiori, we hold that there is more than substantial evidence to uphold Robert's OVUII conviction. See State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996). As such, Robert's OVUII conviction is affirmed.

Therefore,

IT IS HEREBY ORDERED that Robert's OVUII conviction is affirmed.

DATED: Honolulu, Hawai'i, September 29, 2006.

On the briefs:

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defendant-appellant

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