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Intermediate Court of Appeals  
CAAP-14-0001222  
27-OCT-2017  
08:17 AM

NO. CAAP-14-0001222

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
SEAN PAUL DI AMORE, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HONOLULU DIVISION)  
(CASE NO. 1DTA-14-02868)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, and Leonard and Reifurth, JJ.)

Plaintiff-Appellee State of Hawaii (State) charged Defendant-Appellant Sean Paul Di Amore (Di Amore) with 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) (2014).<sup>1/</sup> Following a bench trial, the District Court of

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<sup>1/</sup> HRS § 291E-61(a)(1) and (a)(3) provides:

(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; [or]

. . . .

- (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

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the First Circuit (District Court)<sup>2/</sup> found Di Amore not guilty of OVUII under HRS § 291E-61(a)(1), but guilty of OVUII under HRS § 291E-61(a)(3).

I.

Di Amore appeals from the Judgment entered by the District Court on October 8, 2014. On appeal, Di Amore raises numerous points of error. We conclude that the dispositive point of error is Di Amore's contention that the District Court erred in admitting sworn statements of the Intoxilyzer supervisor, which were necessary to show that the Intoxilyzer used to determine Di Amore's breath alcohol concentration was in proper working order. Based on the Hawai'i Supreme Court's recent decision in State v. Davis, 140 Hawai'i 252, 400 P.3d 453 (2017), we conclude that the District Court erred in admitting the Intoxilyzer supervisor's sworn statements and that the State therefore failed to lay a sufficient foundation for the admission of the result of Di Amore's breath test.<sup>3/</sup> We reverse Di Amore's conviction for OVUII under HRS § 291E-61(a)(3).

II.

In Davis, as in this case, the defendant was found guilty of OVUII under HRS § 291E-61(a)(3) based on an Intoxilyzer test result that showed that the defendant's breath alcohol concentration exceeded the legal limit.<sup>4/</sup> In laying the foundation for admission of Davis's Intoxilyzer test result, the State introduced an Intoxilyzer supervisor's sworn statements verifying that on specified dates bracketing Davis's test, the Intoxilyzer was operating accurately when the supervisor

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<sup>2/</sup> The Honorable David W. Lo presided.

<sup>3/</sup> The State introduced evidence that Di Amore's breath test showed that his alcohol concentration level was .102 grams of alcohol per 210 liters of breath, which was over the legal limit.

<sup>4/</sup> Davis was initially charged with OVUII in violation of HRS § 291E-61(a)(1) and/or (a)(3), but he was only orally arraigned at the commencement of trial under HRS § 291E-61(a)(3), and he was only convicted of the HRS § 291E-61(a)(3) violation. State v. Davis, 140 Hawai'i at 253, 400 P.3d at 454; State v. Davis, No. CAAP-12-0001121, 2015 WL 4067267, at \*1 (Hawai'i App. June 30, 2015).

conducted the accuracy test. Id. at 253-54, 400 P.3d at 454-55. Other than the specified accuracy-test dates, the Intoxilyzer supervisor's sworn statements in Davis were identical to the Intoxilyzer supervisor's sworn statements in this case. In both Davis and in this case, the Intoxilyzer supervisor did not testify at trial, and the trial court admitted the Intoxilyzer supervisor's sworn statements over the defendant's hearsay objection.

In Davis, the Hawai'i Supreme Court held that the Intoxilyzer supervisor's sworn statements were inadmissible because they did not fall within the hearsay exception for public records under Hawai'i Rules of Evidence Rule 803(b)(8) (2016). Davis, 140 Hawai'i at 262-65, 400 P.3d at 463-66. The supreme court concluded that without the Intoxilyzer supervisor's sworn statements, the State failed to lay a sufficient foundation that the Intoxilyzer was in proper working order when Davis's breath test was administered, and therefore, the trial court erred in admitting the result of Davis's breath test. Id. at 265, 400 P.3d at 466. The supreme court held: "As the breath test result was wrongly admitted, the State failed to show that Davis's breath alcohol concentration was .08 or more grams of alcohol per 210 liters of breath, an essential element of the offense of OVUII under HRS § 291E-61(a)(3)." Id.

III.

Based on the supreme court's analysis in Davis, we conclude that: (1) the District Court in this case erred in admitting the Intoxilyzer supervisor's sworn statements; (2) without the Intoxilyzer supervisor's sworn statements, the State failed to lay a sufficient foundation that the Intoxilyzer was in proper working order, and therefore, the District Court erred in admitting Di Amore's breath test result; and (3) because the breath test result was wrongly admitted, the State failed to show that Di Amore's breath alcohol concentration exceeded the legal limit.

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We note that in Davis, the supreme court did not reverse Davis's conviction, but instead remanded the case for a new trial. Id. The supreme court remanded Davis's case for a new trial even though it held, by virtue of its determination on appeal that Davis's breath test result had been improperly admitted, that the State had failed to show that Davis's breath alcohol concentration exceeded the legal limit. Id. However, in State v. Wallace, 80 Hawai'i 382, 414 n.30, 910 P.2d 695, 727 n.30 (1996), the supreme court held that in determining whether Hawai'i's double jeopardy clause precludes retrial, the "sufficiency of the evidence is reviewed based only on the evidence that was properly admitted at trial." Here, based on Davis, Di Amore's breath test result was "wrongly admitted," and it is obvious that without Di Amore's breath test result, the State did not present sufficient evidence to prove that Di Amore's breath alcohol concentration exceeded the legal limit. Accordingly, we reverse Di Amore's OVUII conviction under HRS § 291E-61(a)(3).

IV.

Based on the foregoing, we reverse the District Court's Judgment.

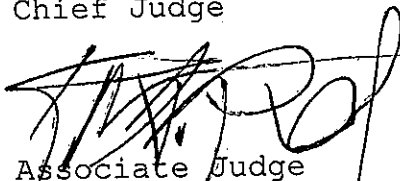
DATED: Honolulu, Hawai'i, October 27, 2017.

On the briefs:

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

  
Chief Judge

  
Associate Judge

  
Associate Judge