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SCWC-14-0000517

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,  
Respondent/Plaintiff-Appellee,

vs.

MICHAEL L. ARKIN,  
Petitioner/Defendant-Appellant.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-14-0000517; 3DTC-13-02654)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner Michael L. Arkin (Arkin) was convicted following a bench trial of Operating a Vehicle Under the Influence of an Intoxicant (OVUII) in which the results of a field sobriety test known as the horizontal gaze nystagmus (HGN) test were admitted into evidence.<sup>1</sup> Respondent State of Hawai'i (State), through the Office of the Prosecuting Attorney for the County of Hawai'i, confessed as error before the Intermediate

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<sup>1</sup> The Honorable Andrew P. Wilson presided.

Court of Appeals (ICA) that insufficient foundation was laid for its admission. The confession of error also conceded that, absent the HGN test results, insufficient evidence supported Arkin's conviction.

The State of Hawai'i, through Deputy Prosecuting Attorney Jason R. Kwiat, hereby concedes that the State did not lay sufficient foundation for the admission of the horizontal gaze nystagmus test as required by State v. Ito, 90 Hawai'i 225, 978 P.2d 191 (App. 1999). Coupled with the trial court's finding that the State did not lay sufficient foundation for the admission of the breath alcohol concentration test results, the State concedes that there is insufficient evidence to sustain Defendant-Appellant Michael L. Arkin's conviction under Haw. Rev. Stat. § 291E-61(a)(1).

Before accepting a confession of error a court must ascertain that the confession of error is supported by the record, well founded in the law, properly preserved, and prejudicial. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000). And, "great weight" must be given by the court to the prosecutor's confession of error.

But [the public prosecutor's] confession [of error], though entitled to great weight, is not binding upon the appellate court, nor may a conviction be reversed on the strength of his [or her] official action alone. Before a conviction is reversed on confessed error, the public interest requires and it is incumbent upon the appellate court to ascertain first that the confession of error is supported by the record and well-founded in law and to determine that such error is properly preserved and prejudicial.

Territory v. Kogami, 37 Haw. 174, 175 (Haw. Terr. 1945)

(emphasis added).

Arkin contends that the decision of the ICA failed to apply the proper standard to determine whether the State's

confession of error should be accepted. The ICA rejected the confession of error based solely on its erroneous conclusion that the failure of Arkin's trial counsel to object to the admission of the results of the HGN test automatically disqualified it from appellate consideration as plain error.<sup>2</sup> See Hawai'i Rules of Evidence Rule 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). Nonetheless, in light of the evidentiary record in this case, the admission of the HGN evidence did not rise to plain error. Thus, we concur with the ICA's affirmance of the judgment but on different grounds. We find the other issues raised by Arkin to be without merit. Accordingly, the ICA's May 15, 2017 Judgment on Appeal is affirmed.

DATED: Honolulu, Hawai'i, April 8, 2019.

John M. Tonaki,	/s/ Mark E. Recktenwald
Phyllis J. Hironaka,	
Reiko A. Bryant	/s/ Paula A. Nakayama
for Petitioner	
	/s/ Sabrina S. McKenna
Mitchell D. Roth,	
David Blancett-Maddock	/s/ Richard W. Pollack
for Respondent.	
	/s/ Michael D. Wilson



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<sup>2</sup> The ICA's summary disposition order can be found in full at State v. Arkin, No. CAAP-14-0000517 (App. March 21, 2017 as amended May 15, 2017) (SDO).