

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent.

The Hawai'i Supreme Court has held that in order to lay an adequate foundation for the admission of evidence derived from a scientific measuring device, there must be a showing that the measurement produced can be relied upon as a substantive fact. State v. Eid, 126 Hawai'i 430, 441, 272 P.3d 1197, 1208 (2012); State v. Wallace, 80 Hawai'i 382, 407, 910 P.2d 695, 720 (1996). For measuring devices based on accepted scientific principles, such as a laser gun, a sufficient foundation can be laid by a showing that (1) the device was tested in accordance with accepted procedures to determine that it was functioning properly; and (2) the operator was qualified by training and experience to operate the device. Eid, 126 Hawai'i at 443-44, 272 P.3d at 1210-11; State v. Tailo, 70 Haw. 580, 582, 779 P.2d 11, 13 (1989). In other words, to lay an adequate foundation that the laser gun reading in this case was sufficiently reliable to warrant admission, the prosecution was required to show that (1) the laser gun was in proper working order (the proper functioning prong); and (2) the officer who used the laser gun was qualified to operate it (qualified operator prong). Eid, 126 Hawai'i at 443-44, 272 P.3d at 1210-11.

In State v. Gonzalez, 128 Hawai'i 314, 288 P.3d 788 (2012), the Hawai'i Supreme Court discussed the qualified operator prong as follows:

To lay a sound foundation for the introduction of a reading from a laser gun, Assaye requires the prosecution to demonstrate that "the nature and extent of an officer's training in the operation of the laser gun meets the requirements indicated by the manufacturer." [State v. Assaye, 121 Hawai'i [204,] 215, 216 P.3d [1227,] 1238 [(2009)]. Logically, to meet this burden the prosecution must establish both (1) the requirements indicated by the manufacturer, and (2) the training actually received by the operator of the laser gun.

Gonzalez, 128 Hawai'i at 327, 288 P.3d at 801.

It is not clear to me that the manufacturer of the laser gun used in this case actually has any specific training

requirements for the operation of the laser gun. Thus, literal compliance with the requirements set forth in Gonzalez and Assaye may not be possible.<sup>1</sup> However, I do not read Gonzalez and Assaye as holding that proof of compliance with the manufacturer's training requirements, which may not exist, is the only way to satisfy the qualified operator prong. See Eid, 126 Hawai'i at 445, 272 P.3d at 1212 (concluding that a sufficient foundation was laid for the introduction of the results of "speed checks" obtained through the use of a device designed to verify the accuracy of a car's speedometer despite the absence of a manufacturer for the entire speed check device).

The essence of the qualified operator prong is proof that the officer is competent to operate the laser gun. It would appear that there is more than one way to establish the officer's competency. For example, in my view, even in the absence of specific manufacturer's training requirements, evidence that the officer was tested and demonstrated the ability to operate the laser gun to obtain accurate results for vehicles traveling at fixed or known speeds would satisfy the qualified operator prong. I also believe that evidence that the operating manual for the laser gun contains specific instructions on how to operate the laser gun and the officer has demonstrated competence in following these instructions would be sufficient.

In this case, the prosecution failed to distinguish between the proper functioning prong and the qualified operator prong in attempting to lay a foundation for the laser gun reading. The prosecution satisfied the proper functioning prong by presenting evidence that before using the laser gun, Officer Ondayog successfully completed the four tests set forth in the laser gun's operating manual for determining whether the laser

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<sup>1</sup> In both Gonzalez and Assaye, the supreme court appears to assume that the manufacturer requires a certain type of training for the operation of the laser gun, but does not refer to evidence demonstrating that any specific manufacturer's training requirements exist.

gun was in good working order. However, the prosecution did not satisfy the qualified operator prong.

With respect to the qualified operator prong, the prosecution only presented Officer Ondayog's conclusory assertion that he was trained to operate the laser gun according to the manufacturer's recommended procedure. However, where (as in this case) an adequate objection based on lack of foundation is raised, Gonzalez appears to require more than this type of bare-boned, conclusory assertion. Instead, to overcome such an objection, Gonzalez appears to require the introduction of more specific evidence from which the conclusion that the officer was qualified to operate the laser gun could be drawn. For example, evidence regarding the requirements for properly operating the laser gun and the officer's competency in meeting these requirements. The prosecution failed to adduce this type of evidence.

In light of Gonzalez, I believe that the prosecution failed to satisfy the qualified operator prong and therefore failed to lay an adequate foundation for the introduction of the laser gun reading. Without evidence of the laser gun reading, there was insufficient evidence to prove that Defendant-Appellant John N. Amiral committed the traffic infraction of exceeding the speed limit. Accordingly, I would reverse the Judgment of the District Court.