

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the result reached by the majority, but write separately to explain my analysis.

I.

In order to lay an adequate foundation for the admission of evidence derived from a scientific measuring device, the Hawai'i Supreme Court has held that 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 speed detection device (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 or was in proper working order (the "proper functioning prong"); and (2) the operator was qualified by training and experience to operate the device (the "qualified operator prong"). 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 Eid, the supreme court did not make the laying of an adequate foundation on the qualified operator prong depend on a showing by the prosecution that the officer's training satisfied requirements imposed by the manufacturer. Indeed, the court held that a sufficient foundation had been laid on this prong even though no manufacturer for the speed check device, and thus no manufacturer's training requirements, had been identified. Eid, 126 Hawai'i at 444-45, 272 P.3d at 1211-12; State v. Amiral, 132 Hawai'i 170, 180-81, 319 P.3d 1178, 1188-89 (2014) (Recktenwald, C.J., concurring). The court in Eid concluded that the persons operating the speed check device "were qualified by experience to operate the device." Eid, 126 Hawai'i at 444, 272 P.3d at 1211.

However, in State v. Assaye, 121 Hawai'i 204, 216 P.3d 1227 (2009), and State v. Gonzalez, 128 Hawai'i 314, 288 P.3d 788 (2012), the court focused on training indicated by the

manufacturer with respect to laying a foundation for the qualified operator prong. In Gonzalez, the court stated:

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." Assaye, 121 Hawai'i at 215, 216 P.3d at 1238. 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.

II.

The focus on training indicated by the manufacturer in Assaye and Gonzalez is premised on the assumption that the manufacturer has in fact established specific training requirements for operating a laser gun. But what happens if that assumption is incorrect and the manufacturer has not established specific training requirements?

In this appeal, the State of Hawai'i (State) represents that the manufacturer of the laser gun used in this case has not set forth specific training requirements for the operation of the laser gun. If this representation is true, then the State could not lay an adequate foundation that is conditioned on a showing that the manufacturer's specific training requirements have been satisfied. In my view, it simply cannot be that the absence of specific manufacturer's training requirements renders it impossible for the State to lay a sufficient foundation with respect to the qualified operator prong for a laser gun. See Eid, 126 Hawai'i at 444-45, 272 P.3d at 1211-12.

In light of Eid, "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." State v. Amiral, No. CAAP-11-0000374, 2013 WL 1829591, at \*3 (Hawai'i App. Apr. 30, 2013) (SDO) (Nakamura, C.J., dissenting); see Eid, 126 Hawai'i at 445, 272 P.3d at 1212. Instead, compliance with the manufacturer's training requirements would be one way, but not the only way, of

showing that "the operator was qualified by training and experience to operate the [device]." Tailo, 70 Haw. at 582, 779 P.2d at 13; Eid, 126 Hawai'i at 443-44, 272 P.3d at 1210-11.

The ultimate purpose served by laying a foundation for the admission of evidence derived from a scientific measuring device is to provide a basis for believing that the measurement produced is reliable -- that the measurement produced can be relied upon as a substantive fact. Eid, 126 Hawai'i at 441, 272 P.3d at 1208; Wallace, 80 Hawai'i at 407, 910 P.2d at 720. The qualified operator prong serves to provide assurance of the reliability of the measurement by requiring a showing that the operator was competent to operate the device. In my view, given the function served by the qualified operator prong, the means of establishing this prong should not be restricted to compliance with manufacturer's training requirements. Regardless of whether the manufacturer has set forth specific training requirements, a showing that would demonstrate that an officer is competent to operate the laser gun should be sufficient. For example, a showing that the officer has demonstrated proficiency in operating the laser gun or has undergone training reasonably designed to ensure competency in operating the laser gun should be valid methods of establishing a sufficient foundation.

There is a tension between the focus in Assaye and Gonzalez on manufacturer's training requirements and the broader "qualified by training and experience" standard set forth in Tailo and Eid. Given this tension, I believe it would be helpful for the supreme court to clarify that an adequate foundation for the qualified operator prong can be established by any means that would serve to show that "the operator was qualified by training and experience to operate the [device]." Tailo, 70 Haw. at 582, 779 P.2d at 13; Eid, 126 Hawai'i at 443-44, 272 P.3d at 1210-11. As stated, in my view, given the function served by the qualified operator prong, the means for laying an adequate foundation should not be restricted to compliance with manufacturer's training requirements.

III.

As the State concedes, in this case, even if compliance with manufacturer's training requirements were not required, it failed to lay a sufficient foundation on the qualified operator prong under the "qualified by training and experience" standard set forth in Tailo and Eid. Accordingly, I concur in the majority's conclusion that the laser gun reading was improperly admitted. I also agree with the majority that without the laser gun reading, there was insufficient evidence to support Ramos's conviction.

The State acknowledges, and I agree, that a decision on the State's request to take judicial notice of the laser gun manual would not affect the outcome of this appeal. Therefore, in my view, we need not decide the State's request for judicial notice.

  
Chief Judge