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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Petitioner/Plaintiff-Appellee,

vs.

HATEM A. EID, Respondent/Defendant-Appellant.

NO. SCWC-29587

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA No. 29587; HPD Traffic No. 1DTC-07-045030)

January 26, 2012

CONCURRING OPINION BY ACOBA, J.

At oral argument, in State v. Fitzwater, 122 Hawai'i 354, 227 P.3d 520 (2010), Petitioner/Plaintiff-Appellee State of Hawai'i (Petitioner) considered it "'unfortunate'" that "'there was not very detailed testimony as to what the speed check tests composed of and what the person who conducted the tests did.'" Id. at 382, 227 P.3d at 548 (Acoba, J., concurring and dissenting). According to Petitioner, there was a "'test case' [] on appeal 'before the ICA' in which 'the person who conducted the tests actually came in to trial and gave live testimony to

what he did.'" Id. The instant case is apparently the "test case" that Petitioner referred to in Fitzwater,¹ but that was not before this court at the time.

In Fitzwater, in my view, "there was an absolute failure of proof[,]" with respect to the foundational requirements for admitting the speed check cards and the police officer's testimony regarding his speedometer reading at the time he paced the defendant's vehicle. Id. at 378, 227 P.3d at 544. Consequently, there was no need for the majority to provide "guidance[,]" for admitting speed card evidence under the business record exception to the rule against hearsay, HRE Rule 803(b)(6), or to decide that such admission would not violate a defendant's right of confrontation under the United States Constitution, inasmuch as that "guidance" could not be applied to the facts in Fitzwater. See id. at 365-74, 227 P.3d at 531-40 (majority opinion). Unlike Fitzwater, this is a "case[]" that [is] premised on facts for which our ruling will have a real consequence." Id. at 382, 227 P.3d at 548 (Acoba J., concurring and dissenting).

I.

Pertinent to the issue raised by Petitioner in its application for writ of certiorari (Application), "[a] fundamental evidentiary rule is that before the result of a test

¹ The audio recording of the oral argument is available at http://www.courts.state.hi.us/courts/oral_arguments/recordings_archive.html under case number 28584 at 0:41:44 to 41:53.

made out of court may be introduced into evidence, a foundation must be laid showing that the test result can be relied on as a substantive fact.'" Id. at 379, 227 P.3d at 545 (quoting State v. Long, 98 Hawai'i 348, 354, 48 P.3d 595, 601 (2002)) (emphasis in original; brackets omitted). In light of Hawai'i Rules of Evidence (HRE) Rules 702² and 703,³ it is apparent that "'a proper foundation for the introduction of [the speed check card] would necessarily include expert testimony regarding: (1) the qualifications of the expert; (2) whether the expert employed valid techniques to obtain the test result; and (3) whether the measuring instrument is 'in proper working order.'" Id. (quoting State v. Manewa, 115 Hawai'i 343, 350, 167 P.3d 336, 343 (2007))

² HRE Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

(Emphases added.)

³ HRE Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

(Emphasis added.)

(quoting Long, 98 Hawai'i at 355, 48 P.3d at 601)) (internal quotation marks omitted).

In contrast to Fitzwater, in this case, Roy Ozaki (Roy), the owner of Roy's Automotive (Roy's), provided expert testimony regarding his "'qualifications'" to operate the dynamometer. Id. In addition, Roy testified extensively regarding how the dynamometer was used to calibrate the speedometers in the HPD vehicles, establishing that "'valid techniques [were employed] to obtain the [speed check] result[s].'" Id. Finally, a letter from the manufacturer of the master head used by Roy's to conduct the speed checks was stipulated into evidence for purposes of the hearing on the motion in limine, indicating that the master head was "found . . . to be in working condition" and "considered to be accurate." In other words, evidence was adduced before the district court of the first circuit (the court) establishing that the dynamometer used to conduct the speed checks was "'in proper working order.'" Id. (internal quotation marks omitted).

In light of the foregoing, proper foundation was laid through Roy's testimony for the admissibility of the speed check cards and testimony pertaining to the speedometer reading in this case. Accordingly, here, we have had "the benefit of a concrete controversy to validate our opinion[,]" id. at 381, 227 P.3d at 547, that was lacking in Fitzwater.

II.

The sole question raised by Petitioner in its Application is: "Whether the [Intermediate Court of Appeals (ICA)] gravely erred by concluding that there was insufficient foundation, as a matter of law, to admit the speed reading obtained from the speedometer in Officer Perez's . . . patrol car?" On appeal to the ICA, similar to Fitzwater, Respondent/Defendant-Appellant Hatem A. Eid (Respondent) raised other issues pertaining to whether the speed check evidence fell within the business record exception to the rule against hearsay, HRE Rule 803(b)(6),⁴ and whether the admission of the speed check card into evidence through the testimony of an HPD officer would violate Respondent's right of confrontation under the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution. However, Respondent neither filed an application for writ of certiorari from the judgment of the ICA nor a Response to Petitioner's Application.

⁴ HRE Rule 803(b)(6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

(Emphases added.)

Consequently, these issues raised on appeal to the ICA by Respondent are not implicated on the instant writ. Therefore, as to the sole question raised by Petitioner, a proper foundation was laid by expert testimony to support the court's admission of the speed check cards and Officer Perez's speedometer testimony into evidence. On that ground, I concur.

/s/ Simeon R. Acoba, Jr.

