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Supreme Court
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOHN N. AMIRAL, Petitioner/Defendant-Appellant.

SCWC-11-0000374

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000374; CASE NO. 1DTI-10-123021)

FEBRUARY 13, 2014

CONCURRING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J. JOINS

I concur in the majority opinion, but write separately to address an additional issue that may arise on remand or in future cases. In discussing the foundation that must be established with regard to "what type of training is recommended by the manufacturer," majority opinion at 21 (quoting State v. Gonzales, 128 Hawai'i 314, 327, 288 P.3d 788, 801 (2012)), the opinion identifies several matters that were not addressed by the police officer's testimony. These include "evidence to

demonstrate that an officer learning to perform the four tests . . . satisfies the manufacturer's training requirements," and "evidence that the training course itself was approved by the manufacturer or was consistent with the manufacturer's requirements." Majority opinion at 23-24.

That discussion is premised on the assumption that such requirements do in fact exist. To the extent the manufacturer has established requirements with regard to those matters, those requirements should be put into evidence by the State and considered by the court in determining whether a sufficient foundation has been established. See, e.g., State v. Assaye, 121 Hawai'i 204, 215, 216 P.3d 1227, 1238 (2009) (the State must prove "whether the nature and extent of an officer's training in the operation of a laser gun meets the requirements indicated by the manufacturer").

However, in the absence of such requirements, the State can attempt to establish the necessary foundation through other means. The ultimate question is whether "the operator was qualified by training and experience to operate the unit." Id. at 214, 216 P.3d at 1237 (emphasis omitted) (quoting State v. Tailo, 70 Haw. 580, 582, 779 P.2d 11, 13 (1989)).

For example, in State v. Eid, 126 Hawai'i 430, 272 P.3d 1197 (2012), this court considered whether the State had established a sufficient foundation to admit the results of

testing performed on a police car to confirm the accuracy of its speedometer. Those tests had been performed by two licensed automotive mechanics using a device called a speedometer dynamometer, which consisted of two rollers, a cable and a device called a master head. Id. at 434, 272 P.3d at 1201. The vehicle being tested would be placed on the dynamometer so that the rollers would turn when the engine was started, which would cause the cable to rotate, which in turn would cause a speed reading to be generated by the master head. Id.

Although the identity of the manufacturer of the master head was known, the mechanics were not aware of who had manufactured the other components that comprised the device, which they had purchased from another mechanic. Id. at 435 n.10, 272 P.3d at 1202 n.10. In short, the record did not even establish the identity of the manufacturer, let alone any requirements with regard to the training of potential operators. Id. at 445, 272 P.3d at 1212. Nevertheless, this court held that a proper foundation had been established:

[T]he State established that the persons conducting the speed check were qualified by experience to operate the device. The State established at the pretrial hearing that only Roy and Duane, experienced auto mechanics, performed speed checks on HPD vehicles in 2007. The district court qualified Roy as an automotive vehicle expert and a motor vehicle mechanic dealer expert and qualified Duane as an expert in the fields of automotive mechanics and repair and automotive technology. Although Roy did not receive specific training on how to use the speedometer dynamometer, Roy testified that "for a mechanic, it's pretty straightforward." Notably, Eid's expert witness, Ho, similarly testified that he was not aware of any certification, school, or formal training for

operating or using a speedometer dynamometer. Rather, Ho testified that a person would gain knowledge about a speedometer dynamometer by using it and through experience.

By showing that the speedometer dynamometer was in proper working order and used by qualified mechanics in conducting the speed checks, the State provided adequate assurances that the results of the speed checks were reliable. . . .

. . . . While the manufacturer of the rollers and cable was not established, the absence of that information was not material, since their operation was straightforward and within the expertise of Roy and Duane as licensed mechanics.

Id. at 444-45, 272 P.3d at 1211-12 (citations, footnotes, brackets, and internal quotation marks omitted).

Thus, in the absence of manufacturer's recommendations as to training, the State can utilize other means to establish that the operator had the necessary training and expertise. The record in Eid revealed that the dynamometer was a simple device that was well within the understanding of an experienced mechanic, and thus a sufficient foundation was established. In the instant case, although the officer testified that he had been trained to test the device according to the instructions in the operating manual, the nature of the tests and the officer's ability to perform them competently were not sufficiently established by his testimony. For example, the officer described a "delta distance velocity test or the calibration test," which involved pointing the laser at two concrete pillars located 155 feet and 130 feet from the officer. His explanation of the significance of the test during his direct examination was as follows:

- Q. What are you testing for in this test?
- A. To verify the accuracy of the instrument, the calibration.
- Q: Can you - well, sir, if the laser were to fail that test, how would you know?
- Q: It would not - you need to - distance times the speed should be - my laser should display 50 which will get you 50.
- Q: Do you know - well, so if the laser wasn't working properly, what would it display?
- A: We are not sure, within plus or minus 1. Say, for example, it's at 47 feet - 155 subtract the 130 comes out to 25. We times it by 2 because distance is times by - the distance times by speed. So it should come up to 50. But if it comes out to like 46, 47, then the calibration of the instrument- the verification of the calibration of the test is not accurate.

While it is not necessary for the officer to explain the internal circuitry of the device, the officer's competency to operate the device may be corroborated if he or she can explain the tests that are being performed in a way that allows the court to understand those tests and thereby assess the training necessary to perform them. The record here was not sufficient to permit such an assessment, and the officer's conclusory statements about his training were not sufficient to establish the necessary foundation.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

