NO. CAAP-14-0000335

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
RITALYNN MOSS CELESTINE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
WAHIAWĀ DIVISION
(CASE NO. 1DTA-13-00956)

SUMMARY DISPOSITION ORDER
(By: Reifurth and Ginoza, JJ.;
with Nakamura, Chief Judge, dissenting separately)

Defendant-Appellant Ritalynn Moss Celestine (**Celestine**) appeals from Notices of Entry of Judgment and/or Order and Plea/Judgment filed on September 17, 2013 and December 17, 2013 in the District Court of the First Circuit, Wahiawā Division (District Court) convicting her of Operating a Vehicle Under the Influence of an Intoxicant (**OVUII**) under HRS § 291E-61(a)(1) and (a)(3).[1]

On appeal, Celestine contends that:

(1) the District Court erred in denying her Motion to Suppress her breath alcohol content test result because (a) Celestine was entitled to an attorney prior to testing under statutory and constitutional law, (b) she did not make a knowing or intelligent decision to submit to testing because the form was

[1/] The Honorable Lono J. Lee presided.

inaccurate and misleading, and (c) no warrant exception existed to justify the non-consensual testing; and

(2) the District Court violated Celestine's constitutional right to testify when it failed to properly advise her of her right to testify and ensure that her waiver was voluntary and knowing, although Celestine concedes that the District Court's pretrial advisement complied with the requirements of State v. Lewis, 94 Hawaiʻi 292, 12 P.3d 1233 (2000).

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties as well as the relevant legal authorities, we resolve Celestine's points of error as follows and affirm.

(1) Motion to suppress.

We need not resolve Celestine's point of error regarding her motion to suppress. "Subsections (a)(1) and (a)(3) can each serve as the basis for a conviction under HRS § 291E–61[,]" and where Celestine's point of error related to the motion to suppress does not affect her conviction under subsection (a)(1), her conviction under HRS § 291E–61(a)(1) will stand. State v Nesmith, 127 Hawaiʻi 48, 61, 276 P3d 617, 630 (2012); State v. Fisher, No. SCWC-12-0000684, 2016 WL 2941079 (Apr. 25, 2016) (SDO).

(2) Tachibana rights.

The District Court did not plainly err in advising Celestine of her constitutional rights related to her right to testify and ensuring that her waiver was voluntary and knowing.

Celestine concedes that the District Court's pretrial advisement complied with the requirements of State v. Lewis, 94 Hawaiʻi 292, 12 P.3d 1233 (2000). Celestine, however, contends that the District Court's Tachibana[2] colloquy "was insufficient

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[2/] In Tachibana v. State, 79 Hawaiʻi 226, 900 P.2d 1293 (1995), the supreme court stated that the trial court should advise the defendant:

> that he or she has a right to testify, that if he or she wants to testify that no one can prevent him or her from doing so, and that
>
> (continued...)

to adequately inform Celestine of all the aspects of her right to testify or not to testify." Celestine asserts that the trial court erred in not breaking down the colloquy into logical and understandable segments with a dialogue with her after each segment, as the court did in State v. Christian, 88 Hawaiʻi 407, 967 P.2d 239 (1998). She further contends the District Court failed to engage in a true colloquy which demonstrates her understanding and a knowing and voluntary waiver, similar to the failings in State v. Han, 130 Hawaiʻi 83, 306 P.3d 128 (2013).

We look to the totality of the facts and circumstances to determine whether Celestine's waiver of her right to testify was voluntarily and intelligently undertaken. See Id. at 89, 306 P.3d at 134. Here, prior to the presentation of testimony, the District Court engaged Celestine in a colloquy of the pretrial advisement consistent with Lewis[3] and State v. Monteil, 134 Hawaiʻi 361, 373, 341 P.3d 567, 579 (2014),[4] as follows.

[2/](...continued)
if he or she testifies the prosecution will be allowed to cross-examine him or her. In connection with the privilege against self-incrimination, the defendant should also be advised that he or she has a right not to testify and that if he or she does not testify then the jury can be instructed about that right.

Id. at 236 n.7, 900 P.2d at 1303 n.7 (brackets omitted) (quoting State v. Neuman, 371 S.E.2d 77, 82 (W. Va.1988)).

[3/] Lewis stated:

Therefore, we now mandate that, in trials beginning after the date of this opinion, such advice shall be imparted by the trial courts to defendants, that is, the trial courts prior to the start of trial, shall (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision.

State v Lewis, 94 Hawai'i 292, 297, 12 P.3d 1233, 1238 (2000) (emphasis added) (quotation marks, brackets, and citation omitted), holding modified by State v. Monteil, 134 Hawai'i 361, 341 P.3d 567 (2014).

[4/] The supreme court stated:

Therefore, we hold that in order to more fully protect the right not to testify under the Hawaiʻi Constitution, the trial courts when informing the defendant of the right not to testify during the pretrial advisement must also advise the defendant that the exercise of this right may not be used by the fact finder to decide the case. This requirement will be effective in trials
(continued...)

> THE COURT: Okay. Miss Celestine, to advise you of your rights at trial, at some point in time the State will rest, okay, and you'll have an opportunity to testify or remain silent. Should you choose to remain silent, the Court can infer no guilt because of your silence. Basically, you'll be invoking your Fifth Amendment right against self-incrimination. Okay, you understand?
>
> [CELESTINE]: Yes, sir.
>
> THE COURT: However, if you do wish to testify, you need to be sworn in, you're also subject to cross-examination by the State's attorney. Okay?
>
> [CELESTINE]: Okay.
>
> [THE COURT[5]]: And when the State does rest, okay, I'll remind you again, okay, I have to finish this even though we're doing this piece -- piecemeal today.
>
> All right. Any questions? Okay. Thank you.

Thus, Celestine told the District Court she understood what the court had said and did not indicate any questions at that time.

On the next trial date, after defense counsel informed the court "Miss Moss Celestine has been advised of her right to -- to testify and she would like to remain silent[,]" the following colloquy ensued between the District Court and Celestine.

> THE COURT: Okay. Just in caution, okay, I had explained to you, okay, on the 12th that you had the right to testify and the right to remain silent, okay. They call this your *Tachibana* rights. It's based on a case law that the appellate court found that the trial court needed to inform you of your rights, okay. If you chose not to testify, the Court could infer no guilt because of your silence; basically you would be invoking your Fifth Amendment right against self-incrimination. Okay. On the other hand, if you do wish to testify, you need to be sworn in, you also will be subject to cross-examination by the State's attorney.
> Okay. Your attorney just indicated to the Court that you will not be testifying. Is that correct?
>
> [CELESTINE]: Yes, sir.
>
> THE COURT: Okay. Is anybody forcing you not to testify?

[4/](...continued)
beginning after the date of this opinion. The inclusion of this information in the pretrial advisement will enhance the even balance of the trial court's statement to defendants regarding the right to testify or the right not to testify. *See Lewis*, 94 Hawai'i at 295, 12 P.3d at 1236.

Monteil, 134 Hawaiʻi at 373, 341 P.3d at 579.

[5/] It appears that the transcript is in error, where it indicates Celestine is speaking, because in context, the court would have made the statements indicated.

> [CELESTINE]: No, sir.
>
> THE COURT: Okay. It's your own decision?
>
> [CELESTINE]: Yes, sir.
>
> THE COURT: Okay, very good, why don't you have a seat. And defense rests. You're going to argue the motion to suppress first?

Citing the Tachibana colloquy provided in Christian, 88 Hawaiʻi at 414–15, 967 P.2d at 246–47, Celestine argues that the Tachibana colloquy in her case was deficient because the District Court did not provide the same type of advisement by asking after each right was addressed whether she understood that right. We disagree. Although the Hawaiʻi Supreme Court concluded in Christian that "the trial judge assiduously followed the procedures mandated in Tachibana[,]" Christian, 88 Hawaiʻi at 420, 967 P.2d at 252, and has cited the Tachibana colloquy in Christian as a model, see Han, 130 Hawaiʻi at 91 n.6, 306 P.3d at 136 n.6, the supreme court has not held that the method used to conduct the Tachibana colloquy in Christian is the only way to obtain a valid waiver. Indeed in Han, the supreme court stated that the first time the trial court should have requested a response from the defendant was after the trial court had advised the defendant that he had a right to testify, that the decision to testify was his alone, that no one could force him to testify, that he had the right to remain silent, and that if he exercised that right, the jury would be instructed not to hold that against him. Han, 130 Hawaiʻi at 90–91, 306 P.3d at 135–36. Accordingly, stopping after each right of the Tachibana advisement is addressed to determine whether the defendant understands the right is not a per se requirement for an adequate Tachibana colloquy. That said, because the method used in Christian to conduct the Tachibana colloquy has been cited favorably by the supreme court, it appears to provide a safe harbor and clear method for establishing a valid Tachibana colloquy.

Celestine relies upon Han in arguing that the Tachibana colloquy in this case was deficient. We conclude that Celestine's reliance on Han is misplaced. Unlike in this case, there was a language barrier in Han which was a "salient fact," and the trial

court in Han did not ask Han whether he understood his rights, did not obtain Han's acknowledgment that he understood his rights, and did not advise Han of all the rights required by Tachibana. See Han, 130 Hawaiʻi at 88, 90–91, 306 P.3d at 133, 135–36. Han is therefore distinguishable and does not control the decision in this case.

In this case, the District Court advised Celestine of all the rights required by Tachibana, asked Celestine whether she understood those rights, and obtained her acknowledgment that she understood her rights. There is nothing in the record to suggest that Celestine lacked an understanding of her rights. We conclude that the Tachibana colloquy in this case was adequate and that Celestine's on-the-record waiver of her right to testify was valid.

Therefore, IT IS HEREBY ORDERED THAT the Notices of Entry of Judgment and/or Order and Plea/Judgment filed on September 17, 2013 and December 17, 2013 in the District Court of the First Circuit, Wahiawā Division, are affirmed.

DATED: Honolulu, Hawaiʻi, June 29, 2016.

On the briefs:

Jessica R. Domingo,
Deputy Public Defender,
for Defendant-Appellant.

Associate Judge

James M. Anderson,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee.

Associate Judge