

NO. 30167

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
BENJAMIN WALKER, II, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NO. 1DTC-08-074544)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Reifurth, JJ.)

Defendant-Appellant Benjamin Walker, II (Walker) appeals from the Notice of Entry of Judgment and/or Order and Plea/Judgment, entered on October 7, 2009 in the District Court of the First Circuit, Honolulu Division (District Court).¹ Walker was convicted of Excessive Speeding, in violation of Hawaii Revised Statutes (HRS) § 291C-105(a)(1) and/or (a)(2) (2007).

On appeal, Walker contends that (1) the District Court erred by denying his motion in limine because the State failed to adduce the requisite foundation for admissibility of the speed check card, as required by *State v. Fitzwater*, 122 Hawai'i 354, 227 P.3d 520 (2010), (2) admission of the speed check card into evidence violated his right to confrontation, and (3) there was insufficient evidence to convict him of Excessive Speeding.

The State admits that there was insufficient foundation to admit the speed check card into evidence under *Fitzwater*, and,

¹ The Honorable Leslie A. Hayashi presided.

therefore, insufficient evidence to convict Walker of Excessive Speeding without the speedometer reading. The State argues, however, that the case should be remanded to the District Court for entry of a judgment against Walker for violating HRS § 291C-102(a)(1), a non-criminal traffic violation of speeding. The State points to Officer Grems's testimony that "I observed a set of headlights approaching from the rear at a high rate of speed and the vehicle passed me and I accelerated and began pacing[,]" and "I accelerated to match that vehicle's speed[,]" as evidence to support a finding that Walker was speeding.

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, we resolve Walker's points of error as follows:

The State failed to establish how and when the speed check was performed, including whether it was performed in the manner specified by the manufacturer of the equipment used to perform the check, and the identity and qualifications of the person performing the check. *Fitzwater*, 122 Hawai'i at 376-77, 227 P.3d at 542-43. Therefore, there was insufficient foundation to admit the speed check card into evidence. Without admission of the speed check card into evidence, there was insufficient evidence to convict Walker of Excessive Speeding. As a result, we need not address Walker's other point of error.

There was also insufficient evidence to find that Walker was speeding. Unlike *Fitzwater*, Walker did not admit to driving at any speed because he did not testify. Officer Grems's testimony that he observed Walker's vehicle coming up from the rear at a high rate of speed, pass him by, and that he had to accelerate to match Walker's speed is not sufficient evidence to conclude that Walker was driving at any specific speed. Therefore, there was insufficient evidence to find that Walker was speeding.

Therefore,

IT IS HEREBY ORDERED THAT the Notice of Entry of Judgment and/or Order and Plea/Judgment entered on October 7, 2009, in the District Court of the First Circuit, Honolulu Division, is reversed.

DATED: Honolulu, Hawai'i, October 28, 2010.

On the briefs:

Taryn R. Tomasa,
Deputy Public Defender,
for Defendant-Appellant.

Presiding Judge

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge