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NO. CAAP-14-0001060

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,  
v.  
JOHN G. SCALERA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
KĀNE'OHE DIVISION  
(CASE NO. 1DTA-13-02681)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Reifurth and Ginoza, JJ.)

Defendant-Appellant John G. Scalera (Scalera) appeals from the Notice of Entry of Judgment and/or Order and Plea/Judgment, filed on July 22, 2014, in the District Court of the First Circuit, Kāne'ohe Division (District Court).<sup>1</sup>

Scalera was convicted of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a)(1) (Supp. 2013)<sup>2</sup> and Refusal to Submit to a breath, blood, or urine test, in violation of HRS

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<sup>1</sup> The Honorable Michael Marr presided.

<sup>2</sup> HRS § 291E-61 provides in pertinent part:

**§291E-61 Operating a vehicle under the influence of an intoxicant.** (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

(1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty[.]

§ 291E-68 (Supp. 2013).<sup>3</sup>

On appeal, Scalera contends: (1) the District Court erred when it did not rule upon a portion of Scalera's Motion to Suppress Evidence (Motion to Suppress) prior to trial, which claimed that evidence was obtained in violation of Scalera's rights under article I, section 7 of the Hawai'i Constitution and the Fourth and Fourteenth Amendments of the United States Constitution; and (2) the District Court erred when it denied Scalera's Motion to Suppress because it found that Scalera was not interrogated and therefore did not have a right to counsel.

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 Scalera's points of error as follows and affirm.

On July 1, 2013, Scalera was charged with OVUII and refusal to submit to a breath, blood, or urine test.

On December 13, 2013, Scalera filed a Motion to Suppress. Scalera sought to "preclud[e] from use at trial evidence obtained in violation of [Scalera's] rights under: (1) Article I, Section 7 of the Hawai'i State Constitution; (2) the Fourth and Fourteenth Amendments of the United States Constitution; and (3) Hawaii Revised Statutes ("HRS") §§ 291E-11(b), 291E-15, and 803-9."

The District Court held a hearing on Scalera's Motion to Suppress on February 11 and 25, 2014.<sup>4</sup> On direct examination, Officer Lordy Cullen (Officer Cullen) testified that Scalera was stopped on June 28, 2013, around 11:00 p.m. Officer Cullen's attention was drawn to Scalera's vehicle because it was weaving, crossing over the solid white line twice and then over a broken white line. After stopping the vehicle, Officer Cullen noticed a

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<sup>3</sup> HRS § 291E-68 provides: Except as provided in section 291E-65, refusal to submit to a breath, blood, or urine test as required by part II is a petty misdemeanor."

<sup>4</sup> The Honorable James Ashford presided over the Motion to Suppress.

strong odor of an alcoholic beverage on Scalera's breath and Scalera was red. On cross examination, Officer Cullen testified that Scalera was in the lane closest to the median when Scalera crossed over the solid white line in the median twice, and then crossed over the broken white line on the right.

Officer Michael Krekel (Officer Krekel) testified that he administered field sobriety tests to Scalera. After Scalera was arrested and transported to the Kailua Police Station, Officer Krekel read the Implied Consent form (HPD Form 396K) to Scalera. Officer Krekel also read the form that informed Scalera of potential sanctions if he refused to participate in a blood, breath, or urine test. Scalera did not take a test.

The District Court held that Scalera was not interrogated so there was no violation of HRS § 803-9 (2014), Scalera voluntarily took the field sobriety tests and was not coerced or intimidated into taking them, and Scalera understood his rights or the consequences of his decision. The District Court denied the Motion to Suppress.

After a two-day trial, Scalera was found guilty as charged.

**1. Ruling on Motion to Suppress.**

Scalera contends the District Court committed reversible error under Hawai'i Rules of Penal Procedure (HRPP) Rule 12(e)<sup>5</sup> when it failed to rule on part of his Motion to Suppress, specifically with regard to his claim that evidence was obtained in violation of his rights under article I, section 7 of the Hawai'i Constitution and the Fourth and Fourteenth Amendments

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<sup>5</sup> HRPP Rule 12(e) provides:

**(e) Ruling on motion.** A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue or until after verdict; provided that a motion to suppress made before trial shall be determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

of the United States Constitution. Scalera apparently argues that evidence related to the OVUII charge was improperly obtained as a result of an illegal traffic stop.

In his opening brief, Scalera recognizes he failed to raise this argument to the District Court. However, Scalera contends that he did not waive this argument because: (1) he specifically listed article I, section 7 and the Fourth and Fourteenth Amendments in his Motion to Suppress; (2) the main reason for Officer Cullen's testimony was to establish that the stop was lawful; and (3) there were several discrepancies in Officer Cullen's testimony. Thus, Scalera contends that the matter was properly brought to the attention of the court.

Although Scalera included article I, section 7 of the Hawai'i Constitution and the Fourth and Fourteenth Amendments of the United States Constitution in the introduction of his Motion to Suppress, Scalera did not include any supporting statements regarding a constitutional violation in the motion itself or the Memorandum in Support of Motion. In addition, during the hearings held regarding the Motion to Suppress on February 11 and 25, 2014, Scalera never referenced the above constitutional provisions or that the traffic stop was unlawful. Thus, the record does not support his claim that the District Court should have addressed whether to suppress evidence based on an unlawful traffic stop.

Therefore, the District Court did not fail to rule on part of Scalera's Motion to Suppress because Scalera's argument asserted on appeal was not properly brought before the District Court.

In the alternative, Scalera contends that, if the matter was not properly brought to the District Court's attention, the District Court's "failure to address Officer Cullen's credibility was not a harmless violation of Scalera's constitutional rights." Scalera contends that Officer Cullen's testimony contained discrepancies in how Officer Cullen described

the traffic stop. Scalera attacks testimony regarding the observation of his vehicle crossing lane markings, calling into question how many times his vehicle actually crossed over the median.

However, "an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trial judge." State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) (citation and quotation marks omitted). Scalera does not claim that there is no evidence that he crossed the solid white line at least once. See HRS § 291C-38(c)(3) (2007) ("A solid white line may be crossed only in unusual circumstances and then only with great care.") and HRS § 291C-38(c)(6) (2007) ("The crossing of a solid yellow line by vehicular traffic is prohibited except when the crossing is part of a left turn movement."). Officer Cullen testified that he observed three traffic infractions when Scalera crossed lane markings three times. Scalera claims that inconsistencies in the evidence show that Scalera only crossed lane markings twice and that the color of the lane markings were different. Yet, Scalera failed to challenge that he was observed to have committed at least one traffic infraction, and as noted above, assessing the credibility of witness testimony is the province of the trial court. After Scalera's vehicle was stopped, Officer Cullen smelled an odor of an alcoholic beverage on Scalera's breath, which provided reasonable suspicion that Scalera had committed OVUII and prompted further investigation into Scalera's faculties with the field sobriety tests.

Scalera fails to establish that his stop was unlawful. Therefore, it was not plain error for the District Court to deny Scalera's Motion to Suppress.

## **2. Right to Counsel.**

On appeal, Scalera contends the District Court erred when it denied his Motion to Suppress based on the conclusion that Scalera was not interrogated and therefore not entitled to

counsel. He also argues that his Miranda rights were violated.

In his Motion to Suppress and at the hearing on the Motion to Suppress, Scalera argued he was denied his right to counsel under HRS § 803-9. Scalera did not preserve an argument before the District Court that evidence should be suppressed because of a violation of his Miranda rights. Therefore, Scalera waived this argument on appeal. State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases.").

Scalera contends that he was denied his right to counsel under HRS § 803-9. HRS § 803-9 provides:

**§803-9 Examination after arrest; rights of arrested person.** It shall be unlawful in any case of arrest for examination:

- (1) To deny to the person so arrested the right of seeing, at reasonable intervals and for a reasonable time at the place of the person's detention, counsel or a member of the arrested person's family;
- (2) To unreasonably refuse or fail to make a reasonable effort, where the arrested person so requests and prepays the cost of the message, to send a telephone, cable, or wireless message through a police officer or another than the arrested person to the counsel or member of the arrested person's family;
- (3) To deny to counsel, (whether retained by the arrested person or a member of the arrested person's family) or to a member of the arrested person's family the right to see or otherwise communicate with the arrested person at the place of the arrested person's detention (A) at any time for a reasonable period for the first time after the arrest, and (B) thereafter at reasonable intervals and for a reasonable time;
- (4) In case the person arrested has requested that the person see an attorney or member of the person's family, to examine the person before the person has had a fair opportunity to see and consult with the attorney or member of the person's family;
- (5) To fail within forty-eight hours of the arrest of a person on suspicion of having committed a crime either to release or to charge the arrested person with a crime and take the arrested person before a qualified magistrate for examination.

In its oral ruling denying Scalera's Motion to

Suppress, the District Court stated that it

viewed the motion as at least in large part based upon Hawaii Revised Statutes 803-9 regarding defendant's right to counsel. As far as that portion of the argument goes, I do not find that this was an interrogation situation, and I do not find that there was a violation of 803-9.

This court recently cited to Deering v. Brown, 839 F.2d 539 (9th Cir. 1988) in which the Court of Appeals for the Ninth Circuit held that, where a defendant was convicted of both driving while intoxicated and refusal to take a breathalyzer test, the defendant's refusal to take a breathalyzer test was nontestimonial. State v. Won, 134 Hawai'i 59, 70-71, 332 P.3d 661, 672-73 (App. 2014) (citing Brown, 839 F.2d at 544), vacated on other grounds by State v. Won, 2015 WL 10384497, No. SCWC-12-0000858 (Nov. 25, 2015). Because the refusal to submit to testing is nontestimonial, the police inquiry into whether an OVUII suspect will submit to testing does not constitute interrogation. See Won, 134 Hawai'i at 71, 332 P.3d at 673. Therefore, the District Court did not err in determining that Scalera was not interrogated.

Further, even if there was a violation of HRS § 803-9, Scalera was not entitled to suppression of evidence in connection to his refusal to submit to testing. "'Generally, where evidence has been obtained in violation of a statute, that evidence is not inadmissible per se in a criminal proceeding unless the statutory violation has constitutional dimensions,' or the defendant can demonstrate by a preponderance of the evidence, a connection between the statutory violation and the evidence to be suppressed." Won, 134 Hawai'i at 74, 332 P.3d at 676 (brackets omitted) (citing (State v. Edwards, 96 Hawai'i 224, 237-39, 30 P.3d 238, 251-53 (2001))).

Scalera does not claim that the statutory violation has constitutional dimensions. In addition, Scalera has not demonstrated by a preponderance of the evidence that any failure to permit him to consult with counsel led to his refusal to

submit to testing. In fact, in his Opening Brief, Scalera states that he "is not appealing the lower court's denial of the motion to suppress evidence of his refusal on the grounds that he did not understand what was in the 396K or that he did not understand the consequences of his refusal."

THEREFORE,

IT IS HEREBY ORDERED that the Notice of Entry of Judgment and/or Order and Plea/Judgment, filed on July 22, 2014, in the District Court of the First Circuit, Kāne'ohe Division is affirmed.

DATED: Honolulu, Hawai'i, April 29, 2016.

On the briefs:

William H. Jameson, Jr.,  
Deputy Public Defender,  
Office of the Public Defender,  
for Defendant-Appellant.

James M. Anderson,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge