

CAAP-14-0001368

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
EVAN A.M. TABIOLO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NO. 1DTA-13-04252)

SUMMARY DISPOSITION ORDER

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

After a bench trial, the District Court of the First Circuit (District Court)¹ found Defendant-Appellant Evan A.M. Tabiolo (Tabiolo) guilty of operating a vehicle under the influence of an intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) § 291E-61(a)(1) and (b)(1) (Supp. 2013).² Tabiolo appeals from the District Court's Judgment, which was entered on November 20, 2014.

On appeal, Tabiolo contends that: (1) the District Court failed to properly advise him of his right to testify

¹The Honorable Linda K.C. Luke presided.

²Tabiolo was also charged with OVUII in violation of HRS § 291E-61(a)(3) and (b)(1) (Supp. 2013), but the District Court granted Tabiolo's motion for judgment of acquittal with respect to the (a)(3) portion of the charge.

pursuant to Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995); (2) the District Court abused its discretion in admitting the results of the horizontal gaze nystagmus (HGN) test as substantive evidence of his alcohol impairment; and (3) without the HGN evidence, there was insufficient evidence to support his conviction.

We conclude that the District Court erred in failing to properly advise Tabiolo of his rights as required by Tachibana. In particular, the District Court failed to advise Tabiolo that if he wanted to testify, no one could prevent him from doing so. See Tachibana, 79 Hawai'i at 236 n.7, 900 P.2d at 1303 n.7; State v. Han, 130 Hawai'i 83, 93 n.8, 306 P.3d 128, 138 n.8 (2013) (noting that "the court must indicate to a defendant that no one can prevent him or her from testifying" and that "'preventing' need not involve threats or force") (emphasis omitted)). Tabiolo did not testify and we cannot say that the District Court's error was harmless. See State v. Hoang, 94 Hawai'i 271, 279, 12 P.3d 371, 379 (App. 2000).

We conclude that even without the HGN evidence, there was sufficient evidence to support Tabiolo's OVUII conviction. Plaintiff-Appellee State of Hawai'i (State) presented evidence that Tabiolo illegally drove his moped on the sidewalk and ignored a stop sign; that when Tabiolo was stopped by the police, he was loud and demanding and repeatedly told the officers to "[s]lay please" when they asked him to produce his driver's license; that his eyes were red and glassy; that he had a strong odor of an alcoholic beverage emitting from his breath; that he swayed left to right and forward to backward; that on the walk-and-turn test, he repeatedly fell off balance, failed to follow directions, repeatedly missed walking heel to toe as instructed, failed to walk in a straight line, and failed to keep his arms next to his body; and that on the one-leg-stand test, he swayed, raised his arms, and prematurely put his foot down. Without considering the HGN evidence, there was substantial evidence to support Tabiolo's conviction. See State v. Tsujimura, 137

Hawai'i 117, 122-23, 366 P.3d 173, 178-79 (App. 2016) (concluding that an arresting officer may testify about his or her observations of a defendant's performance on the walk-and-turn test and the one-leg-stand test and give an opinion as to whether the defendant was intoxicated based on such observations).

Given our resolution of Tabiolo's Tachibana and insufficiency-of-evidence claims, we need not address his contention that the District Court abused its discretion in admitting the results of the HGN test as substantive evidence of his alcohol impairment.³

Based on the foregoing, we vacate the District Court's Judgment, and we remand the case for a new trial on the charge against Tabiolo for OVUII, in violation of HRS § 291E-61(a)(1) and (b)(1).

DATED: Honolulu, Hawai'i, May 27, 2016.

On the briefs:

Teri M. Wright
Deputy Public Defender
for Defendant-Appellant

Chief Judge

Donn Fudo
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee

Associate Judge

Associate Judge

³The State argues that the record reveals that the District Court did not consider the HGN test results as substantive evidence of Tabiolo's guilt.