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NO. CAAP-14-0001101

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
BRANDIE M. ICHIKI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
KĀNE'OHE DIVISION  
(CASE NO. 1DTA-14-00008)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Brandie M. Ichiki (Ichiki) appeals from the August 14, 2014 Judgment entered by the District Court of the First Circuit, Kāne'ohe Division (District Court).<sup>1</sup>

Ichiki 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. 2015).

On appeal, Ichiki contends that (1) the District Court erred by denying her motion to dismiss because the complaint was fatally defective for failing to define the term "alcohol," (2) HRS § 291E-61 is unconstitutionally vague because it did not give Ichiki fair notice that she could be convicted for driving under the influence of beer, (3) there was insufficient evidence to convict her where the evidence showed that her physical and mental condition were caused by an accident immediately preceding her encounter with the police, and (4) the Deputy Prosecutor committed three instances of prosecutorial misconduct that were not harmless beyond a reasonable doubt.

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<sup>1</sup> The Honorable Philip M. Doi presided.

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 Ichiki's points of error as follows:

(1) The District Court did not err by denying the Motion to Dismiss because the complaint was not fatally defective for failing to define the term "alcohol." State v. Turping, 136 Hawai'i 333, 338-39, 361 P.3d 1236, 1241-42 (2015), cert. rejected, SCWC-13-0002957 May 20, 2015.

(2) Ichiki failed to assert her argument before the District Court that HRS § 291E-61 was unconstitutionally vague because it did not give her fair notice that she could be convicted for driving under the influence of beer. Therefore, the point of error is waived. Hawai'i Rules of Appellate Procedure Rule 28(b)(4), Kernan v. Tanaka, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993).

(3) There was substantial evidence to support Ichiki's conviction for OVUII. Ichiki admitted that she drank a sixteen ounce glass of beer. Both Sergeant Roland Takesato (Sergeant Takesato) and Officer Martin Min (Officer Min) smelled a strong odor of an alcoholic beverage on Ichiki's breath. Sergeant Takesato also observed that Ichiki's eyes were red and glassy and her speech was a little slurred. Sergeant Takesato had observed Ichiki noticeably accelerating and slowing down, straddling two lanes of traffic, and weaving for about three-quarters of a mile. After she was stopped, Ichiki told Officer Min that she wanted to drive home. However, Ichiki also claimed that she was looking for a safe place to stop after her vehicle was damaged although Sergeant Takesato testified she passed at least two spots where she could have safely pulled over. Sergeant Takesato observed that the front driver's side of Ichiki's vehicle was damaged and the driver's window was shattered. When Ichiki exited her vehicle from the passenger side, Sergeant Takesato observed that she was unsteady and used the vehicle to regain her balance.

Officer Min conducted the field sobriety tests. Based on his observation of Ichiki's performance on the HGN test, walk

and turn test, and one-legged stand field sobriety tests, Officer Min believed Ichiki showed signs of impairment due to alcohol. The District Court credited the testimony of Sergeant Takesato and Officer Min. The District Court did not credit Ichiki's testimony that her performance on the field sobriety tests were affected by her being involved in an accident caused by another vehicle. "It is well-settled that 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 trier of fact." State v. Mattiello, 90 Hawai'i 255, 259, 978 P.2d 693, 697 (1999) (citation, brackets, and internal quotation marks omitted).

Contrary to Ichiki's argument on appeal, the State was not required to prove that Ichiki was under the influence of a distilled product. As stated in HRS § 291E-1 (2007), the definition of alcohol "includes ethyl alcohol, lower aliphatic alcohol, and phenol as well as synthetic ethyl alcohol, but not denatured or other alcohol that is considered not potable under the customs laws of the United States." One beer contains approximately 0.54 fluid ounces of ethyl alcohol. State v. Vliet, 95 Hawai'i 94, 113 n.39, 19 P.3d 42, 61 n.39 (2001).

(4) Ichiki claims the Deputy Prosecutor committed three instances of prosecutorial misconduct that were not harmless beyond a reasonable doubt. First, Ichiki claims the Deputy Prosecutor misrepresented the evidence by stating that Ichiki had a couple of drinks instead of one beer. The Deputy Prosecutor admitted that he misspoke after the District Court corrected his statement and struck the comment from the record. Therefore the misstatement by the Deputy Prosecutor was harmless beyond doubt. State v. Mainaupo, 117 Hawai'i 235, 247-48, 178 P.3d 1, 13-14 (2008).

Ichiki's second claim involved the Deputy Prosecutor asking Ichiki during cross-examination if two friends allegedly with her prior to her arrest that night were present at the trial. Ichiki claims that the Deputy Prosecutor attempted to shift the burden of proof to her by requiring her to call witnesses to substantiate her testimony. Assuming the Deputy

Prosecutor committed prosecutorial misconduct, it was also harmless beyond a reasonable doubt. Id. "In a bench trial, we presume that the judge was not influenced by incompetent evidence." State v. Lioen, 106 Hawai'i 123, 133, 102 P.2d 367, 377 (App. 2004) (citing State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980)). Given that the District Court sustained Ichiki's objection to the Deputy Prosecutor's questioning, it appears the District Court did not consider whether other witnesses were available to testify on behalf of Ichiki.

We also reject Ichiki's third claim based on the Deputy Prosecutor asking Ichiki whether she also told Officer Min about being involved in a collision. Such questioning under the circumstances of this case did not improperly comment on her right to remain silent. The thrust of Ichiki's testimony on direct examination was that her involvement in a collision with another vehicle weighed heavily on her mind, that she rushed through the field sobriety tests because she was still terrified because of the incident, and the incident affected her performance. Ichiki testified that she told Sergeant Takesato that she had been involved in a collision with another vehicle. However, Ichiki's counsel objected to the Deputy Prosecutor's question if Ichiki also told Officer Min about being involved in a collision with another vehicle on the ground that it improperly commented on Ichiki's right to remain silent and the District Court sustained the objection. We conclude, however, the question was not improper and therefore was not misconduct. While there is no doubt that "the accused has a constitutional right to remain silent, and the exercise of this privilege may not be used against him," State v. Alo, 57 Haw. 418, 424, 558 P.2d 1012, 1016 (1976), the prosecution on cross-examination may determine whether and exactly to whom a defendant supposedly gave an exculpatory explanation. Id. at 423, 558 P.2d at 1015. Ichiki had already testified on direct examination that she told Sergeant Takesato that she had been involved in a collision. Thus, under the circumstances of this case, the prosecution could have legitimately inquired whether Ichiki had told her exculpatory explanation to Officer Min, who conducted the field

sobriety tests. Thus, the questioning by the Deputy Prosecutor was not objectively calculated to penalize Ichiki for her silence. Id. at 424, 558 P.2d at 1016.

Therefore,

IT IS HEREBY ORDERED that the Notice of Entry of Judgment and/or Order and Plea/Judgment, entered on August 14, 2014 in the District Court of the First Circuit, Kāne'ohe Division is affirmed.

DATED: Honolulu, Hawai'i, June 6, 2016.


On the briefs:

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for Defendant-Appellant.

Sonja P. McCullen,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge