IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

NINO ABRIGO,
Petitioner/Defendant-Appellant.

SCWC-17-0000087

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000087; CASE NO. 1DTA-16-01924)

JUNE 28, 2019

CONCURRING IN THE JUDGMENT, AND DISSENTING
OPINION BY RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

This case requires us to consider the following scenario: a police officer conducts a standardized field sobriety test (SFST) of a defendant suspected of driving under the influence of an intoxicant. The officer writes a report of the observations made of the defendant during the course of the test.

Months later, when the officer is called to testify, the officer cannot recall the details of the stop. Provided that the officer is subject to cross-examination and a proper foundation is established, should the officer be allowed to read his or her report into evidence, as past recollection recorded under Hawaiʻi Rules of Evidence (HRE) Rule 802.1(4)?

The Majority holds that use of the officer's report in that manner is absolutely precluded because HRE Rule 803(b)(8), the public records exception to hearsay, requires that result. In reaching that outcome, the Majority relies heavily on United States v. Oates, 560 F.2d 45 (2d. Cir. 1977), a federal case that analyzed the legislative history of a federal rule of evidence similar to HRE Rule 803(b)(8). The Second Circuit Court of Appeals in Oates argued persuasively that the federal rule was not intended to allow police reports to be admitted into evidence as a substitute for live testimony by the police officer who wrote the report.

However, as other courts including the Second Circuit itself have noted, Oates does not address the situation in which the officer who wrote the report testifies, and then is subsequently cross-examined. Oates therefore does not address the applicability of the past recollection recorded rule. In such a circumstance, many courts hold that testimony about the

report's content is admissible, provided that a proper foundation is established. Notably, these decisions include several state cases that consider the precise circumstances presented by the instant case: testimony by an officer based on a report about an encounter with a defendant suspected of driving while intoxicated.

The practical effects of the Majority's decision are substantial. A police officer patrolling busy streets may not be able to recall the details of a driver's SFST performance when called to testify months after a particular stop. Under the Majority's analysis, the officer will not be able to testify about the contents of their report, even if a proper foundation under HRE Rule 802.1(4) can be established and even if the officer is subject to cross-examination.

Such a result is not required by the federal or Hawaiʻi constitutions. Rather, it is a product of the Majority's interpretation of the history of a federal rule of evidence, an interpretation that many other courts have rejected. Accordingly, I respectfully dissent from the Majority's analysis, but concur in the judgment given my conclusion that the State failed to establish a proper foundation under HRE Rule 802.1(4).

I. BACKGROUND

On May 15, 2016, after allegedly observing Abrigo

commit multiple traffic violations, Honolulu Police Department Officer Aaron Ostachuk (Ostachuk) pulled Abrigo over. Suspecting that Abrigo was inebriated, Officer Ostachuk administered an SFST, and based on Abrigo's performance, arrested him for OVUII. Abrigo's bench trial began on August 1, 2016, with Officer Ostachuk's testimony spanning three days due to several continuances. According to the district court, Officer Ostachuk's August 1, 2016 testimony stemmed from Officer Ostachuk's independent recollection of events. The district court noted, however, that by December 15, 2016, Officer Ostachuk had "very limited recollection" of the events, and that by December 30, 2016, Officer Ostachuk had "almost no recollection" of the events. Indeed, Officer Ostachuk testified on December 15 and 30 that he could not recall many of the details of Abrigo's traffic violations or performance on the SFST without reviewing his police report. On appeal, the ICA held that Officer Ostachuk's testimony, which in large part had been based on his report, was admissible under HRE Rule 802.1(4), the past recollection recorded exception to hearsay.

II. DISCUSSION

A. HRE Rule 803(b)(8)'s Exclusions Should Not Bar Police and Investigative Reports From Admission Under HRE Rule 802.1(4).

The Majority contends that HRE Rule 803(b)(8), the

public records exception to hearsay, "was intended to render all police reports inadmissible against defendants in criminal cases." Majority at 27. As such, the Majority concludes that Officer Ostachuk's testimony, which was based in large part on the notations in his police report,[1] should have been excluded from evidence. In so holding, the Majority relies heavily on the Second Circuit's analysis in Oates.

In Oates, the Second Circuit considered whether a chemist's official report and worksheet, which identified an unknown substance as heroin, could be admitted as evidence against the defendant. 560 F.2d at 63. Because the chemist was unavailable to testify, the government called in another chemist, who was able to explain the practices and procedures used by Customs Service chemists in analyzing unknown substances. Id. at 64. Notably, the testifying chemist could not explain material discrepancies in the documents because she had not prepared them. Id. at 64-65.

Primarily concerned that the defendant was "being denied his Sixth Amendment right to confront his accusers," the defense argued that the report and worksheet constituted

[1] As the Majority notes, the document referred to in Officer Ostachuk's testimony is not included in the record. Majority at 7 n.6. While the State referred to the document as an "SFST form," the defense referred to it more broadly as a "report." For consistency with the Majority's opinion, I also refer to the document as a "report."

inadmissible hearsay. Id. at 64. The government, on the other hand, argued that the documents were admissible under the public records, business records, and residual exceptions to hearsay, under Federal Rules of Evidence (FRE) Rule 803(8), Rule 803(6), and Rule 803(24),[2] respectively. Id.

The Oates court first determined that the documents were inadmissible under FRE Rule 803(8) because they fell within the public record rule's exclusions for matters observed by law enforcement personnel and investigative reports. Id. at 66-68. The court examined the legislative history of the rule and its exclusions, and in doing so, concluded more broadly that the documents would be inadmissible under all of the FRE's hearsay exceptions.

In making that determination, the court highlighted the statements of two representatives, whose comments established that the impetus for the rule's exclusions was to protect "the accused's right to confront the witnesses against him." Id. The court also noted that an earlier proposal for the rule, which would have allowed for the submission of police reports into evidence in lieu of an officer's live testimony, had been rejected because of the drafters' confrontation concerns. Id.

[2] FRE Rule 803(24), which set forth the residual exception to hearsay, was recodified as FRE Rule 807 in 1997.

The court explained:

> [T]he pervasive fear of the draftsmen and of Congress that interference with an accused's right to confrontation would occur was the reason why in criminal cases evaluative reports of government agencies and law enforcement reports were expressly denied the benefit to which they might otherwise be entitled under [the public records exception]. It follows that this explanation of the reason for the special treatment of evaluative and law enforcement reports under [the public records exception] applies with equal force to the treatment of such reports under any of the other exceptions to the hearsay rule. The prosecution's utilization of any hearsay exception to achieve admission of evaluative and law enforcement reports would serve to deprive the accused of the opportunity to confront his accusers as effectively as would reliance on a "public records" exception.

Id. at 78 (emphasis added).

Put simply, the Oates court suggested that the FRE's drafters had not intended for police and investigative reports to be admitted against criminal defendants under any federal hearsay exception. Id.

This interpretation is too broad, and ignores the general principle that "hearsay evidence failing to meet the requirements of one exception may nonetheless satisfy the standards of another exception." See United States v. Davis, 181 F.3d 147, 149 (D.C. Cir. 1999); Parker v. Reda, 327 F.3d 211, 214 (2d. Cir. 2003). Many federal courts have thus rejected Oates, and hold that police and investigative reports may still be admissible as evidence under other hearsay exceptions, including the past recollection recorded hearsay exception. See, e.g., United States v. Picciandra, 788 F.2d 39, 44 (1st Cir. 1986);

United States v. Sokolow, 91 F.3d 396, 404-05 (3d Cir. 1996); United States v. Smith, 197 F.3d 225, 231 (6th Cir. 1999); United States v. King, 613 F.2d 670, 672-73 (7th Cir. 1980); United States v. Hayes, 861 F.2d 1225, 1230 (10th Cir. 1988).

In explaining the purpose of the public records exclusions, Representative David Dennis, who proposed the exclusions, stated:

> What I am saying here is that in a criminal case, . . . we should not be able to put in the police report to prove [the] case without calling the police [officer]. I think in a criminal case you ought to have to call the police [officer] on the beat and give the defendant the chance to cross examine him, rather than just reading the report into evidence. That is the purpose of this amendment.

United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979), cert. denied, 445 U.S. 943 (1980) (emphasis added) (citing 120 Cong. Rec. H 564 (Feb. 6, 1974)).

This suggests to me, and to the many other courts that have rejected Oates' holding, that while Congress "intended to bar the use of law enforcement reports as a substitute for the testimony of an officer," it did not intend to bar the use of those reports in instances where the authoring officers or investigators testify.[3] See id. (emphasis added) ("We are not

[3] Under this narrower reading of the drafters' intent, the Second Circuit's specific rulings in Oates – that the chemist's report and worksheet could not be admitted under the business records and residual exceptions to hearsay – would still apply. To hold otherwise would defeat the drafters' intent, given that those exceptions would allow the documents into evidence without requiring the chemist to testify.

persuaded . . . that the restrictions of [FRE Rule] 803(8) were intended to apply to recorded recollections of a [t]estifying law enforcement officer that would otherwise be admissible [as a past recollection recorded] under [FRE Rule] 803(5)."); George E. Dix et al., 2 McCormick on Evidence § 296 (7th ed. 2016) (explaining that with regard to FRE Rule 803(8)'s exclusions, the "essential purpose of Congress was to avoid admission of evidence not subject to cross-examination").

In Parker v. Reda, the Second Circuit itself rejected Oates' expansive interpretation of the drafters' intent. 327 F.3d at 214. There, the Second Circuit held that a police officer, who had no recollection of the incident at issue, could read his memorandum, which had documented the incident, into evidence as past recollection recorded. Id. at 214. In so holding, the court explained that "the danger of unreliability was minimized[] because the trier of fact ha[d] the opportunity to weigh credibility and to consider the circumstances [that] surround[ed] the preparation of the report." Id. at 215. Specifically, because the officer was required to testify, the defendant had the opportunity to test the officer's "capacity for observation, his general credibility, his narrative abilities, and the circumstances under which [his] memoranda were ordinarily prepared." Id.

Notably, state courts have also taken this position in cases analogous to the one at issue. In State v. Scally, 758 P.2d 365 (Or. Ct. App. 1988), for instance, the Oregon Court of Appeals held that an officer who had no recollection of his police report in a DUI case could read portions of his report into evidence, despite the report's inadmissibility as a public record. The result was the same in Arizona, and also in New Mexico. See Goy v. Jones, 72 P.3d 351, 353 (Ariz. Ct. App. 2003) ("[N]either federal nor state law mandates the exclusion of recorded-recollection testimony simply because the form of the recorded recollection is a law-enforcement report."); see also State v. Vigil, 336 P.3d 380, 388 (N.M. Ct. App. 2014), cert. granted, 337 P.3d 95 (2014) ("We hold . . . that [the public records exception to hearsay] does not bar a police officer from reading aloud at trial the recorded recollection contained in a police report provided a proper foundation is laid pursuant to [the past recollection recorded exception to hearsay].").

There are sound reasons why federal and state courts have rejected Oates, and why this court should do the same. As Mueller & Kirkpatrick explain:

> it seems unwise to conclude that no other exception [could] apply . . . to records by police and law enforcement personnel, when offered against the accused. . . . [I]mportantly, the use restrictions in [FRE Rule 803(8)'s exclusions] should not bar resort to the exception for past recorded recollection. . . . Indeed, technicians running tests are unlikely to recall critical details of any of their tests after a

> short period of time, and investigators can hardly be expected to retain serial or license numbers, makes of cars, detailed descriptions of objects at crime scenes, or precise details about physical layout. If the preparer testifies to lack of recollection on such points and the report otherwise qualifies as past recorded recollection, admitting it seems wise: The purpose of the use restrictions is satisfied in large measure because an investigator . . . submits to cross, and the report is admissible only insofar as recollection fails. Even with failed recollection, cross can test sources, expose motivational factors, and bring out weaknesses in method.

Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.51 at 919 (5th ed. 2012).

Lastly, State v. Davis, 140 Hawaiʻi 252, 400 P.3d 453 (2017), does not suggest that we should adopt Oates' expansive proposition, as the Majority contends. See Majority at 21. Rather, our holding in Davis – that two sworn statements, which were inadmissible under the public records exception to hearsay, could not be admissible through the "back door" as business records – comports with the narrower reading of the drafters' intent that I would adopt. See 140 Hawaiʻi at 265, 400 P.3d at 466; see also HRE Rule 803(b)(6). That is, had we admitted the sworn statements into evidence as business records, we would have subverted the intent of the FRE's drafters because the business records exception to hearsay, like the public records exception, would not have required the author of those sworn statements to testify. "This is simply not the case with statements admitted under [the past recollection recorded exception to hearsay]." 30B Charles Alan Wright & Arthur R. Miller, Federal Practice and

Procedure, Evidence § 6853 (2018 ed.). "Consequently, there is no reason to read [the public record rule's] limitation into [the past recollection recorded rule]." Id.

For these reasons, I respectfully disagree with the Majority's analysis, and would hold instead that if a proper foundation could be laid, HRE Rule 803(b)(8) would not disqualify the recorded recollections of a testifying police officer as evidence under HRE Rule 802.1(4).

B. Officer Ostachuk's Report Should Not Have Been Admissible Under HRE Rule 802.1(4) Because the State Did Not Establish a Sufficient Foundation.

Despite my conclusion above, I would hold that Officer Ostachuk's testimony from his police report was erroneously admitted as past recollection recorded, since the State failed to lay the required foundation. In order for a record to be admissible under HRE Rule 802.1(4), a showing is required that: (1) the witness's memory of the events detailed in the record was sufficiently impaired; (2) the witness prepared or adopted the record at or near the time of the events; and (3) at the time the witness prepared or adopted the record, it correctly reflected his or her knowledge of the events. In other words, in order to be reliable, "the statement must reflect personal knowledge of the recorded event, must have been contemporaneously made, and

must be vouched for in terms of accuracy."[4] Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 802.1-5[3], at 8-18 (2018-2019 ed.).

Here, Officer Ostachuk's testimony established that he once had knowledge of stopping Abrigo, that he could not remember what happened at the time of his testimony, and that he made his police report when the stop was fresh in his mind. Despite this, the State failed to establish that Officer Ostachuk's report was accurate. The State attempted to establish this requirement by asking: "You guys fill out clues on the SFST pretty regularly, right?" This question, even when answered in the affirmative, did not speak to the record's accuracy. See State v. Keohokapu, 127 Hawaiʻi 91, 106, 276 P.3d 660, 675 (2012) ("The witness may testify either that he remembers making an accurate recording of the event in question which he now no longer sufficiently remembers, [or] that he routinely makes accurate records of this kind[.]" (emphasis added) (citing Michael H. Graham, Federal Practice and Procedure: Evidence § 7046, at 486-91 (interim ed.

[4] The Majority contends that "Abrigo's ostensible ability to question [Officer Ostachuk's] general credibility and methodology was a hollow substitute for cross-examination on the officer's actual basis for arresting Abrigo and charging him with a crime, and the process plainly did not offer any assurances of the report's reliability." Majority at 30. Yet, it has long been recognized that the "guarantee of trustworthiness" under the past recollection recorded exception to hearsay "is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." See FRE Rule 803(5) cmt. Accordingly, as long as a proper foundation can be established, and a defendant has had the ability to challenge the bases for that foundation through cross-examination, the reliability concerns raised by the Majority will be addressed.

2006)); Parker, 327 F.3d at 213 ("[I]t is sufficient if the witness testifies that he knows that a record of this type is correct because it was his habit or practice to record such matters accurately." (emphasis added) (citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803(5)[01], at 803-181 (1996))). The State thus failed to establish the foundation required to admit Officer Ostachuk's testimony under HRE Rule 802.1(4).

III. CONCLUSION

For the foregoing reasons, I respectfully dissent from the Majority's reasoning, but concur in the judgment.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama