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SCWC-18-0000150

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee,

vs.

RYAN M. GIUGLIANO, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000150; CASE NO. 3DTA-17-00625)

DISSENT OF McKENNA, J., IN WHICH WILSON, J., JOINS

I respectfully dissent from the rejection of the defendant's certiorari application from the Intermediate Court of Appeals' judgment on appeal, entered pursuant to its June 30, 2020 summary disposition order ("SDO").

On appeal, Giugliano contended that the district court erred by admitting the results of the Horizontal Gaze Nystagmus ("HGN") test because it lacked proper foundation and could not be used as substantive evidence of impairment. Giugliano further asserted that the error was not harmless. State v. Giugliano, CAAP-18-0000150 (App. June 30, 2020) (SDO) at 8.

In its SDO affirming Giugliano's conviction, the ICA correctly determined there was insufficient evidence to demonstrate that Officer Llanes was qualified to administer the HGN test and grade the results. Giugliano, SDO at 9. The ICA therefore correctly concluded that the district court erred by admitting the results of the HGN test. Id. Nonetheless, the ICA held the erroneous admission of the HGN test results harmless.

In his certiorari application, Giugliano challenges the ICA's holding that the admission of the HGN test results was harmless. Under the harmless error standard, "[t]he relevant question . . . is whether there is a reasonable possibility that error might have contributed to [the] conviction.'" State v. Jones, 148 Hawai'i 152, 170, 468 P.3d 166, 184 (2020) (quoting State v. Han, 130 Hawai'i 83, 93, 306 P.3d 128, 138 (2013)).

The ICA, however, held the admission of the HGN test results harmless beyond a reasonable doubt on the grounds (1) there was overwhelming evidence that Giugliano was intoxicated, and (2) there was no indication that the trial court relied on the HGN test results in reaching its conviction. Giugliano, SDO at 9; see State v. Mitchell, 94 Hawai'i 388, 400, 15 P.3d 314, 326 (App. 2000). On both points, the ICA erred.

In concluding that "there was substantial evidence for a trier of fact to conclude that Giugliano was guilty beyond a

reasonable doubt of OVUII," the ICA erroneously applied the sufficiency of evidence standard instead of the harmless error standard. Giugliano, SDO at 11 (citing State v. Matavale, 115 Hawai'i 149, 157-58, 166 P.3d 322, 330-31 (2007)).

As noted, however, in a criminal case, if there is a reasonable possibility that error contributed to a conviction, then the error cannot be said to be harmless beyond a reasonable doubt, and the judgment of conviction on which the error may have been based must be set aside. Jones, 148 Hawai'i at 165-66, 468 P.3d at 179-80 (citing State v. Cabrera, 90 Hawai'i 359, 365, 978 P.2d 797, 803 (1999)).

Thus, the existence of "other substantial evidence" supporting a conviction does not govern whether the error is harmless beyond a reasonable doubt. Jones, 148 Hawai'i at 170, 468 P.3d at 184. Rather, in applying the harmless error standard, "the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Teixeira, 147 Hawai'i 513, 537-38, 465 P.3d 960, 984-85 (2020) (citations omitted) (emphasis added). If such a reasonable possibility exists, then the error is not harmless beyond a reasonable doubt and the judgment of conviction on which it may have been based must be set aside. State v. Baker, 147 Hawai'i 413, 435, 465 P.3d 860, 882 (2020)

(citing State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999)).

In this case, there was a reasonable possibility that the erroneous admission of the HGN test results contributed to Giugliano's conviction. Jones, 148 Hawai'i at 165-66, 468 P.3d at 179-80. This is because the ICA also erred in ruling there was no indication that the trial court relied on the HGN test results in reaching its conviction. In a bench trial, "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence." 148 Hawai'i at 170, 468 P.3d at 184 (quoting State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999)). In this case, however, the district court specifically referred to Giugliano's performance on the HGN test before adjudging Giugliano guilty of OVUII. The district court also concluded the State proved its case beyond a reasonable doubt based on the "totality of the circumstances," which included the improperly admitted HGN test results testimony.

Thus, there is a reasonable possibility that the admission of the HGN test results contributed to Giugliano's conviction, and the erroneous admission of HGN evidence was not harmless beyond a reasonable doubt. Jones, 148 Hawai'i at 165-66, 468 P.3d at 179-80.

Based on the foregoing, the ICA erred in holding that the improper admission of the HGN evidence was harmless error. I would therefore accept Giugliano's application, vacate the conviction, and remand the case to the district court.

DATED: Honolulu, Hawai'i, November 20, 2020.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

