SCWC-19-0000874

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I,

Respondent/Plaintiff-Appellee,

vs.

SHANA N. KAWAKAMI,

Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000874; 1DTA-16-00540)

DISSENT TO ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI
(By: Wilson, J.)

I respectfully disagree with the majority's rejection of the certiorari application from the Intermediate Court of Appeals' ("ICA") June 3, 2020 summary disposition order affirming Shana N. Kawakami's conviction for operating a vehicle under the influence of an intoxicant ("OVUII").

During Kawakami's bench trial for OVUII, the arresting police officer--the sole testifying witness in this case--testified on cross-examination that while he recalled a portion

of Kawakami's performance on the standard field sobriety test ("SFST"), the "majority" of his SFST testimony relied on the police report he filed in 2016 after the incident and reviewed prior to testifying. Approximately thirty-five minutes later, the defense stated during its closing argument that the District Court of the First Circuit, Honolulu Division ("district court") should not consider the officer's SFST testimony because it was not from his "personal memory."[1] After making findings of fact wholly consistent with the officer's testimony--including findings pertaining to Kawakami's performance on the SFST--the district court convicted Kawakami of OVUII. On appeal, Kawakami argued that the district court erroneously relied on the officer's SFST testimony because it was not based on his "present recollection." The ICA, however, found that Kawakami had "failed to object to or move to strike the challenged testimony" pursuant to Hawai‘i Rules of Evidence ("HRE") Rule 103(a)(1) (1992),[2] and thus, "no error may be predicated on its

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[1] Defense counsel stated, in relevant part:

> But then again, Your Honor, the officer doesn't remember -- doesn't have a personal memory of this. He just has the personal memory of the heel-to-toe, nothing else from the [SFST] that he testified. So I don't believe the Court can take that into consideration, that it's not based on the officer's testimony, personal -- personal memory.

[2] HRE Rule 103(a)(1) states that "[e]rror may not be predicated upon [such] a ruling . . . unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]"

admission[,]" meaning that Kawakami was precluded from challenging the district court's admission of the SFST testimony on appeal.

I dissent to clarify that the district court had discretion to consider Kawakami's objection to the officer's SFST testimony. The record indicates that the district court did, in fact, (1) construe Kawakami's statement during closing argument as an objection and (2) exercise discretion in overruling the objection: the district court expressly found that the officer "had enough recollection[,]" and that it "did not find or hear any testimony to give the [district court] reason to question the officer's memory, whether it was refreshed after reading his report or specifically remembered on his own." The district court also emphasized that it would make appropriate findings if it "had heard anything to give [it] pause or reason to -- question the officer's memory [or] to question whether he was actually testifying from his memory at the time of the incident[.]" I would grant certiorari in this case to clarify that the district court had discretion to consider Kawakami's objection, which was made less than an hour after the close of evidence during closing argument in a bench trial. To rule otherwise is to needlessly limit and encroach upon the trial court's power to exercise discretion in determining the admissibility and weight of evidence. See

Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992) (quoting Nani Koolau Co. v. K & M Construction, Inc., 5 Haw. App. 137, 140, 681 P.2d 580, 584 (App. 1984)). So ruling also undermines the trial court's "inherent powers" to "control the litigation process" in order to prevent unfairness and to protect the defendant's fundamental right to a fair trial. Richardson v. Sport Shinko (Waikiki Corp., 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994), superseded on other grounds by rule as stated in DL v. CL, 146 Hawai'i 415, 463 P.3d 1072 (2020) (noting that "courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them[,]" including the power to "create a remedy for a wrong even in the absence of specific statutory remedies" and "to prevent unfair results").

For the foregoing reasons, I respectfully dissent from the majority's denial of the application for writ of certiorari.

DATED: Honolulu, Hawai'i, August 18, 2021.

/s/ Michael D. Wilson