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NO. CAAP-21-0000313

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
TREVAILL D. CHACON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NUMBER 1DTC-20-048693)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, Hiraoka and Nakasone, JJ.)

Defendant-Appellant Trevaill D. **Chacon** appeals from the "Notice of Entry of Judgment and/or Order and Plea/**Judgment**" entered by the District Court of the First Circuit, Honolulu Division, on April 8, 2021.[1] For the reasons explained below, we vacate and remand for a new trial.

On January 30, 2020, Chacon was driving a motor vehicle. Honolulu Police Department (**HPD**) Corporal Eric **Hokama** noticed Chacon's third brake light wasn't working. Corporal Hokama also saw Chacon drive over a solid white line into a bike lane. Corporal Hokama stopped Chacon and ultimately issued him a **Citation** for Operating a Vehicle After License and Privilege Have Been Suspended or Revoked for Operating a Vehicle Under the Influence of an Intoxicant (**OVLPSR-OVUII**), in violation of Hawaii

[1] The Honorable James C. McWhinnie presided.

Revised Statutes (**HRS**) § 291E-62(a). The Citation was filed on February 3, 2020, initiating the case below.

On June 26, 2020, a **Complaint** was filed in the case below charging Chacon with OVLPSR-OVUII. The Complaint was signed by a deputy prosecuting attorney (**DPA**) under penalty of perjury. Chacon pleaded not guilty.

On August 11, 2020, Chacon filed a motion in limine. He sought to preclude the State from offering into evidence his traffic abstract and an Administrative Driver's License Revocation Office (**ADLRO**) decision unless he was allowed to confront the declarants. The district court denied the motion. A bench trial followed. The district court found Chacon guilty as charged. The Judgment was entered. This appeal followed.

Chacon raises five points of error:[2] **(1)** the Complaint did not comply with HRS § 805-1; **(2)** his arraignment violated Hawaiʻi Rules of Penal Procedure (**HRPP**) Rules 5(b) and 10(a); **(3)** the district court erred by denying his motion in limine; **(4)** the ultimate Tachibana[3] colloquy was defective; and **(5)** there was insufficient evidence to support his conviction.

(1) Chacon argues that the Complaint didn't comply with HRS § 805-1 because the DPA can't be the complainant. Whether a complaint complied with an applicable statute or rule is a question of law we review de novo. State v. Mortensen-Young, 152 Hawaiʻi 385, 392, 526 P.3d 362, 369 (2023). The Complaint wasn't required to comply with HRS § 805-1 because it wasn't used to obtain a penal summons or arrest warrant. Id. at 399, 526 P.3d at 376. Chacon's argument is without merit.[4]

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[2] The first two points of error were raised in supplemental briefing pursuant to our order entered on April 12, 2022.

[3] Tachibana v. State, 79 Hawaiʻi 226, 900 P.2d 1293 (1995).

[4] In addition, the charging document in this case was the Citation, not the Complaint. OVLPSR-OVUII is a petty misdemeanor. HRS §§ 701-107(4) (2014) and 291E-62 (Supp. 2019). Corporal Hokama was authorized to issue a citation for a petty misdemeanor in lieu of arresting the suspect. HRS § 803-6(b) (2014); State v. Silva, 91 Hawaiʻi 111, 117, 979 P.2d 1137, 1143 (App. 1999). Corporal Hokama signed the Citation under penalty of perjury.
(continued...)

(2) Chacon's argument that his arraignment violated HRPP Rules 5(b) and 10(a) is premised upon the charging document being defective. The Complaint wasn't defective. Nor was the Citation. See supra note 4. Chacon's argument is without merit.

(3) Chacon argues that the district court erroneously denied his motion in limine. We review for abuse of discretion. Carvalho v. AIG Haw. Ins. Co., 150 Hawaiʻi 381, 384, 502 P.3d 482, 485 (2022).

Chacon's motion in limine sought to preclude the State from offering into evidence his traffic **Abstract** and the Notice of Administrative Review Decision (**ADLRO Decision**) that revoked his driver's license from January 19, 2020, to January 18, 2023, unless he was allowed to confront the declarants. Thus, the motion raised the applicability of the confrontation clause set forth in the sixth amendment to the United States Constitution and article I, section 14 of the Hawaiʻi Constitution.

The district court did not abuse its discretion by denying the motion. State v. Philling, No. CAAP-18-0000653, 2019 WL 6790773, at *5 (Haw. App. Dec. 12, 2019) (SDO) (holding that defendant's right of confrontation was not implicated by admission of certified copy of ADLRO decision offered to show outcome of prior ADLRO proceeding); State v. Kaaikala, No. CAAP-18-0000931, 2021 WL 2416739, at *3-4 (Haw. App. June 14, 2021), as corrected, (July 29, 2021) (SDO) (holding that traffic abstract was cumulative of ADLRO notice of revocation, and that ADLRO notice was not testimonial and was admissible under Hawaii Rules of Evidence Rule 803(b)(8) public records hearsay exception); State v. Ho, No. CAAP-20-0000059, 2022 WL 1684279, at *4 (Haw. App. May 26, 2022) (SDO) (holding that admission of ADLRO notice of revocation did not violate defendant's confrontation clause rights).

[4](...continued)
The Citation included a summons stating the date, time, and location for Chacon's court appearance. HRS § 805-1 does not apply to the Citation, which complied with HRS § 803-6 and HRPP Rules 5(b)(1) and 7(a).

The district court also denied the motion in limine because it was filed more than 21 days after his arraignment. See HRPP Rule 12(c). The district court did not abuse its discretion by denying Chacon's motion on that basis.[5]

(4) Chacon's argument that the district court's ultimate Tachibana colloquy was defective has merit. We review the sufficiency of a Tachibana colloquy de novo under the right/wrong standard, see State v. Celestine, 142 Hawaiʻi 165, 169, 415 P.3d 907, 911 (2018), looking at the totality of the facts and circumstances of the case, id. at 171, 415 P.3d at 913.

A defendant in a criminal case has fundamental rights to testify in their own defense, or to not testify. State v. Torres, 144 Hawaiʻi 282, 292, 439 P.3d 234, 244 (2019). The trial court is required to advise a defendant, before the start of trial, of both the right to testify and the right to not testify. Id. at 293, 439 P.3d at 245. The pretrial advisory must also inform the defendant that exercise of the right to not testify may not be used by the fact finder to decide the case. State v. Monteil, 134 Hawaiʻi 361, 373, 341 P.3d 567, 579 (2014). Chacon does not challenge the district court's pretrial advisory.

Trial courts are also required to engage the defendant in a true colloquy — "a verbal exchange between the judge and the defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights" to testify and to not testify. Celestine, 142 Hawaiʻi at 170, 415 P.3d at 912 (cleaned up) (emphasis omitted). This is referred to as the "ultimate" colloquy. If a defendant chooses to *not* testify, the trial court is required to engage in an on-

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[5] The supreme court has held:

> The denial of a motion in limine, in itself, is not reversible error. The harm, if any, occurs when the evidence is improperly admitted at trial. Thus, even if the trial court abused its discretion in denying a party's motion, the real test is not in the disposition of the motion but the admission of evidence at trial.

Carvalho, 150 Hawaiʻi at 384, 502 P.3d at 485 (citation omitted).

the-record colloquy, before the defense rests, to ensure that the waiver of the right *to* testify is knowing, intelligent, and voluntary. See Tachibana v. State, 79 Hawaiʻi 226, 236, 900 P.2d 1293, 1303 (1995). As part of this inquiry, "the trial court should elicit responses as to whether the defendant intends to not testify, whether anyone is forcing the defendant not to testify, and whether the decision to not testify is the defendant's." State v. Martin, 146 Hawaiʻi 365, 378-79, 463 P.3d 1022, 1035-36 (2020), as corrected, (Apr. 23, 2020) (citation omitted). Similarly, if a defendant chooses *to* testify, the trial court is required to engage in an on-the-record colloquy, before the defendant testifies, to ensure that the waiver of the right to *not* testify is knowing, intelligent, and voluntary. Torres, 144 Hawaiʻi at 294-95, 439 P.3d at 246-47.

In this case, Chacon did not testify, and thus waived his right *to* testify. Accordingly, we review the adequacy of the district court's ultimate Tachibana colloquy concerning the right to testify. See State v. Adcock, 148 Hawaiʻi 308, 316, 473 P.3d 769, 777 (App. 2020) (noting that "when the deficiency in a Tachibana colloquy is not related to the right waived, the error appears harmless").

> When a defendant in a criminal case indicates an intention not to testify, the trial court must advise the defendant of the right to testify and must obtain an on-the-record waiver of the right. . . . This advisement should consist of informing the defendant (1) that they have a right to testify, (2) that if they want to testify, no one can prevent them from doing so, and (3) that if they testify, the prosecution will be allowed to cross-examine them.

Martin, 146 Hawaiʻi at 378, 463 P.3d at 1035 (cleaned up).

The transcript of proceedings shows that the district court recited a litany of rights, and the court didn't ask Chacon if he understood any of his rights. State v. Pomroy, 132 Hawaiʻi 85, 93-94, 319 P.3d 1093, 1101-02 (2014). The transcript of proceedings also confirms that the district court failed to elicit a response from Chacon on "whether anyone is forcing [him] not to testify[.]" State v. Chong Hung Han, 130 Hawaiʻi 83, 90-

91, 306 P.3d 128, 135-36 (2013). Thus, the district court erred, and the record in this case does not demonstrate a knowing, intelligent, and voluntary waiver of the right *to* testify.

"When the violation of a constitutional right has been established, 'the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt.'" Torres, 144 Hawaiʻi at 290-91, 439 P.3d at 242-43 (quoting Tachibana, 79 Hawaiʻi at 240, 900 P.2d at 1307). "Under the harmless beyond a reasonable doubt standard, this court must determine 'whether there is a reasonable possibility that error might have contributed to [the] conviction.'" Id. at 291, 439 P.3d at 243 (citation omitted). "If such reasonable possibility exists, then 'the judgment of conviction on which it may have been based must be set aside.'" Id. (citation omitted). "When the error was harmless, '[a] crucial if not determinative consideration . . . is the strength of the prosecution's case on the defendant's guilt.'" Id. (citation omitted).

Here, the State doesn't argue that the faulty ultimate Tachibana/Torres colloquy was harmless beyond a reasonable doubt. The record doesn't establish what Chacon would have said if he had exercised his right to testify. On this record, we cannot conclude that the district court's error was harmless beyond a reasonable doubt. The conviction must be vacated.

(5) Chacon also challenges the sufficiency of the evidence to support his conviction. Because we are vacating Chacon's conviction based upon the insufficient Tachibana/Torres colloquy, we must examine the sufficiency of evidence before determining whether to remand for a new trial or for entry of a judgment of acquittal. See State v. Davis, 133 Hawaiʻi 102, 114, 324 P.3d 912, 924 (2014) (noting that supreme court "has consistently examined the sufficiency of the evidence before determining whether to remand for a new trial based on trial error or whether to enter a judgment of acquittal.") (citations omitted).

During trial the district court admitted, over Chacon's objection, a certified copy of Chacon's Abstract and a certified copy of the ADLRO Decision that revoked Chacon's driver's license from January 19, 2020, to January 18, 2023. As discussed above, the Abstract and the ADLRO Decision were admissible. They, along with the testimony of Corporal Hokama and HPD Officer Franchot Termeteet, constituted sufficient evidence to support Chacon's conviction for OVLPSR-OVUII.

For these reasons, the "Notice of Entry of Judgment and/or Order and Plea/Judgment" entered by the district court on April 8, 2021, is vacated, and this case is remanded for a new trial.

DATED: Honolulu, Hawaiʻi, August 31, 2023.

On the briefs:

Alen M. Kaneshiro,
for Defendant-Appellant.

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

/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Karen T. Nakasone
Associate Judge