IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

RUSSELL JOSEPH KINTARO
Defendant-Appellant

OPINION

Supreme Court Case No. CRA98-008
Superior Court Case No. CF0041-98

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Appeal from the Superior Court of Guam
Argued and Submitted on January 27, 1999
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice[1]; JANET HEALY WEEKS[2], and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J.:

[1] Appellant Russel Joseph Kintaro appeals his convictions for 1) Operating and being in physical control of a vehicle while under the influence of alcohol in violation of 16 GCA §18102 (a) (1994); and 2) Operating and being in physical control of a vehicle while he had 0.08% or more, by weight, of alcohol in his blood in violation of 16 GCA §18102 (b) (1994). He argues that he was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, and that there was insufficient evidence to support his convictions.

[2] For the reasons set forth below, we find that Appellant received effective assistance of counsel. We also affirm the felony conviction for operating and being in physical control of a vehicle while under the influence of alcohol, pursuant to 16 GCA §18102 (a). However, we reverse the felony conviction for operating and being in physical control of a vehicle while having 0.08% or more, by weight, of alcohol in his blood in violation of 16 GCA §18102 (b).

BACKGROUND

[3] At approximately 2:00 a.m. on January 15, 1998, Officer Jason P. Flickinger and Officer Joseph Balbas of the Guam Police Department investigated an automobile crash at the intersection of Routes 1 and 3 in Dededo. The officers determined that a vehicle had run off the roadway and

[1] The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

[2] Justice Janet Healy Weeks resigned from the court after hearing oral arguments in this matter.

struck a retaining wall approximately 100 feet off the roadway shoulder. Bystanders informed the officers that an individual wearing a polo shirt and dark colored pants "involved" with the vehicle had walked towards Johndel Supermarket.

[4] Proceeding in the direction of the supermarket, Officer Flickinger observed Appellant Russel Joseph Kintaro ("Appellant") wearing a polo-type shirt standing by the pay phones at the supermarket. Officer Flickinger asked Appellant if he was the owner of the vehicle that had struck the wall, to which Appellant responded, "yes." At this time, Officer Flickinger detected the odor of an intoxicating beverage on Appellant's breath as he spoke to him. He also noted that Appellant was "stumbling slightly and that his speech was slurred."

[5] Appellant agreed to accompany Officer Flickinger back to the scene of the accident. Once there, Appellant displayed difficulty keeping his balance. Both officers observed that his eyes were also bloodshot and watery. The officers also noticed the strong odor of alcohol emanating from the interior of the police vehicle. Officer Flickinger then asked Appellant to submit to a field sobriety test to which Appellant refused. However, when questioned about his alcohol consumption, he did admit to drinking that night. At this point, Appellant was placed under arrest and transported to the Dededo precinct.

[6] At the precinct, Appellant submitted to a breath test and answered questions concerning his alcohol consumption that evening. He indicated that he had started drinking "mostly beers" at 7:00 p.m. and stopped at about 10:00 p.m.. He claimed that he consumed four beers. Subsequently, Officer Balbas administered the Intoxilyzer test, the results of which indicated that Appellant's blood alcohol content was 0.185%, exceeding the legal limit of 0.08% by 0.105% (B.A.C.).

[7] Subsequently, on January 22, 1998, Appellant Kintaro was charged with 1) Operating and

being in physical control of a vehicle while under the influence of alcohol, in violation of 16 GCA § 18102 (a); and 2) Operating and being in physical control of a vehicle while he had 0.08% or more, by weight, of alcohol in his blood, in violation of 16 GCA § 18102 (b).

[8] At trial, Officer Flickinger testified that at the scene of the accident Appellant stated that he was driving the vehicle involved in the accident. Significantly, Appellant maintained that he was forced to drive off the road in order to avoid colliding with a vehicle that had made an unsafe lane change. Officer Flickinger also testified that Appellant was not able to provide the license plate number or a description of the vehicle nor did he appear to be concerned about the whereabouts of the vehicle that had allegedly run him off the road and caused the accident. At the conclusion of the trial, the jury returned a guilty verdict on both charges.

ANALYSIS AND APPLICATION OF LAW

[9] This court has subject matter jurisdiction based upon 7 GCA §§ 3107 and 3108 (1994). This appeal is based on four grounds. Appellant argues that 1) He was denied effective assistance of counsel; 2) There was insufficient evidence to establish that he was driving the vehicle; 3) There was insufficient evidence to convict him of driving with a blood alcohol content over 0.08%; and 4) The breath analysis device ("Intoxilyzer") used to determine his blood alcohol content was not properly calibrated.

I.

[10] We begin with Appellant's claim of ineffective assistance of counsel. Whether a defendant has received ineffective assistance of counsel is a question of law. *People v. Quintanilla*, 1998 Guam 17, ¶ 8 ; *People v. Reyes*, 1998 Guam 32, ¶ 9; *People v. Perez*, 1999 Guam 2, ¶ 33. Where this legal query turns significantly on the facts of a particular case, the issue becomes a question of fact as well. *See Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070 (1984). Appellant's claim of ineffective assistance of counsel shall be reviewed *de novo*. *Quintanilla*, at ¶ 8; *Reyes*, at ¶ 9; *Perez*, at ¶ 33.

[11] "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. To determine whether this right to counsel has been violated, we employ a two part test. *Quintanilla*, at ¶ 8. First, a convicted defendant must show that counsel's performance was deficient. *Id.* Secondly, the defendant must prove that defense counsel's deficient performance must have so prejudiced the defendant as to result in the denial of a fair trial. *Id.*

[12] Pursuant to the first prong of the test, it is the role of this court to "'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Quintanilla*, at ¶ 9, *quoting Strickland* 466 U.S. at 690, 104 S.Ct. at 2066. In turn, "'[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.'" *Id.*

[13] Attempting to identify the unreasonable acts and omissions of his counsel, Appellant argues that his trial counsel failed to make objections that would have required the prosecution to follow the corpus delicti doctrine. According to the corpus delicti doctrine, "in order to convict a defendant of a crime based upon an extra-judicial confession or statement, the defendant's statement must be corroborated by some evidence of the corpus delicti." *Government of Virgin Islands v. Harris*, 938 F.2d 401, 409 (3rd Cir. 1991). In contrast, the trustworthiness doctrine provides that "direct proof of the corpus delicti is not required; the evidence may even be collateral to the crime itself." *Id*. The two doctrines differ in that the trustworthiness doctrine emphasizes the reliability of the defendant's confession over the independent evidence of the corpus delicti. *Id.*

[14] In the instant case, Appellant, employing the corpus delicti doctrine, argues that hearsay statements and his admission were erroneously allowed into evidence despite the absence of independent proof that he was in fact driving. Taking into consideration the fact that the corpus delicti doctrine has been characterized as "fraught with opportunity with endless dispute," we explicitly decline to adopt the doctrine. *See Harris* 938 F.2d at 410, n.7. Consequently, we do not agree with Appellant's assertions of error. Instead, we adopt the trustworthiness doctrine, recognizing that it is as strict, if not stricter, than the corpus delicti doctrine in excluding confessions. *Id*. Indeed, although the two doctrines may lead to the same ultimate result in many cases, "[t]he advantage of the trustworthiness doctrine 'lies in its simplicity and its direct bearing on the reliability of the facts stated in the confession or admission.'" *Id.*

[15] In view of the undisputed facts that Appellant matched the description given to police by the bystanders and that Appellant owned the vehicle involved in the accident, we are satisfied that Appellant's admission of driving the vehicle at the time of the accident was adequately corroborated by "substantial independent evidence which would tend to establish the trustworthiness of the statement." *Harris*, 938 F.2d at 410, *quoting Opper v. United States*, 348 U.S. 84, 93, 75 S.Ct. 158, 164 (1954).

[16] In addition, the defense's theory of the case, that is, the explanation of evasive driving, logically presumes that Appellant was driving at the time of the accident.[3] The record also indicates that defense counsel conceded this fact in arguing that Appellant drove off the road in an attempt to avoid another car. The cross examination of the police officers also highlighted the reasonableness of Appellant's feathering of the brakes as well as the proposition that a person with a knee injury would not be able to physically perform the field sobriety test as well as someone without an injury. To be even relevant, this line of questioning presumes that Appellant was driving.

[17] Based on the foregoing, we are unable to say that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Quintanilla*, at ¶ 9. Furthermore, in *Quintanilla*, we held that, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* Mindful of the thorough, yet deferential nature of this review, we find that the record before us does not reveal evidence sufficient to overcome this presumption. Accordingly, we conclude that Appellant received effective assistance

[3] The record on appeal did not include the opening nor the closing statements of either party. Thus, the court may only glean the defense's trial strategy from the line of questioning set forth in the limited record.

of counsel during his trial.

II.

[18] We next address Appellant's sufficiency of the evidence claims. "The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Reyes*, 1998 Guam 32, ¶ 7. When a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this court reviews the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* "The Ninth Circuit has noted that this is a highly deferential standard." *Id.*

[19] Appellant was charged and convicted of 1) Operating and being in physical control of a vehicle while under the influence of alcohol, in violation of 16 GCA § 18102 (a); and 2) Operating and being in physical control of a vehicle while he had 0.08% or more, by weight, of alcohol in his blood in violation of 16 GCA § 18102 (b). He argues that there was insufficient evidence to support the conviction for violating 16 GCA § 18102 (a), specifically because that there was no reliable proof that he was driving. We disagree.

[20] In the previous discussion addressing the ineffective assistance of counsel claim, we found Appellant's admission that he was driving the vehicle to be admissible. We noted that the police received a description of the vehicle's operator from witnesses at the scene and that this description matched Appellant's. It was also undisputed fact that Appellant owned the vehicle involved in the accident. In addition, we also observed that the defense's theory of the case presupposed that

Appellant was driving the vehicle. Combined, these factors provided adequate indicia of trustworthiness and reliability such that the admission was deemed to be admissible. While this determination led us to conclude that Appellant received effective assistance of counsel in the previous discussion, it also serves to provide sufficient evidence of the fact that Appellant was indeed driving the vehicle at the time of the accident. Consequently, the matter as to whether or not Appellant was driving is well settled.

[21] The record further reveals that Appellant exhibited objective signs of being under the influence of alcohol. He smelled of alcohol, had difficulty maintaining his balance, and slurred his speech. His eyes were also bloodshot and watery. In view of the highly deferential standard to which we must adhere, we hold that the essential elements of the crime were proven beyond a reasonable doubt. *Reyes*, at ¶ 7. Consequently, we find there is sufficient evidence to convict on the Driving Under the Influence charge pursuant to 16 GCA §18102 (a).

III.

[22] We turn now to the conviction for violating 16 GCA §18102 (b) (as a third degree felony). Appellant once again asserts that there was insufficient evidence to convict. As in the previous analysis, we review the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Reyes*, at ¶ 7.

[23] Appellant asserts that there was no testimony regarding the meaning of the Intoxilyzer reading in this case, including what it was that the Intoxilyzer was measuring and the relationship of this measurement to blood alcohol by weight. Appellant maintains that the Intoxilyzer employed

by GPD does not measure blood alcohol content but rather breath alcohol content. Thus, there was insufficient evidence to convict because the Intoxilyzer did not technically measure Appellant's blood alcohol content, and there was nothing offered regarding the correlation between blood alcohol content and the breath alcohol that was actually measured.

[24] Although subject to varied judicial interpretation, "DUI" statutes are substantially similar relative to the elements that must be proven. *See* 1 RICHARD E. ERWIN, DEFENSE OF DRIVING DRUNK CASES, § 1.00, (3d ed. Matthew Bender & Company Inc. 1991). Generally, the offense of Driving Under the Influence consists of "the operation, control, or manipulation of a vehicle, in a place accessible to the public, while under the influence of an intoxicant (alcohol or drugs or a combination of both) **or while one's blood alcohol level is at or above a certain level** . . . ." *Id.* (emphasis added).

[25] Locally, section 18102 (b), the applicable statute, differs slightly from the general statutes in that it omits the public place prong. However, the statute conforms to the "norm" in the remaining aspects, the most notable of which is the "per se" driving offense whereby an individual is in violation merely by virtue of the amount of alcohol in his or her blood. Specifically, section 18102 (b) provides that an individual is in violation if he or she has "eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood."

[26] In their entirety, 16 GCA § 18102 (a) and (b) provide:

> Influence of Alcohol and Controlled Substances; Causing Bodily Injury to Person Other Than Driver; Alcoholic Content in Blood; Proof.
>
> (a) It is unlawful for any person, while under the influence of an alcoholic beverage or any controlled substance, or under the combined influence of an alcoholic beverage and any controlled substance, to operate or be in physical control of a motor vehicle.
>
> (b) It is unlawful for any person, while having eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood to operate or be in physical control of a motor vehicle.

16 GCA § 18102 (a) and (b) (1994).

[27] In addition, Title 16 of the Guam Code Annotated section 18101 defines the term "Driving Under the Influence" as follows:

> (a) Driving under the influence ("DUI") or while intoxicated means any person driving a vehicle under the influence of an alcoholic beverage or a controlled substance or a combination thereof, when as a result of consuming such alcoholic beverage or controlled substance or the combination thereof, his or her physical or mental abilities are impaired to such a degree that he or she no longer has the ability to drive a vehicle with the caution characteristics of a sober person of ordinary prudence, under the same or similar circumstance, and includes any person operating or in actual physical control of a motor vehicle who has **eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood.**

16 GCA § 18101 (a) (1994) (emphasis added).

[28] In the instant case, the record indicates that the trial judge explained to the jury that the legal amount of blood alcohol content ("B.A.C.") on Guam was 0.08%.[4] However, the unit of measurement relative to this amount, that is, "grams of alcohol per one hundred (100) milliliters of

[4] The trial transcript indicates that the judge stated, "The Court has already advised the Jury that one of the elements that must be proven is that the Defendant was driving above the 0.08." Transcript, vol. I, p. 79 (Trial, March 25, 1998).

blood," was not stated. The record also indicates that the prosecution attempted to present evidence that Appellant's B.A.C. was above the legally permissible amount. The prosecutor asked: "And what was the subject's blood alcohol reading?" The witness who had conducted the test responded, "[p]oint one eight five." Subsequently, the printed result indicating the Intoxilyzer reading was also admitted into evidence. Significantly, however, the question propounded by the prosecution pertaining to the blood alcohol level of the Appellant lacked the specificity necessary to elicit a response sufficient to prove the violation.

[29] Turning our analysis to the adequacy of the foundation in this case, in *People v. Sandbergen*, 1985 WL 56575 (D. Guam App. Div. July 24, 1985), a Superior Court DUI conviction was reversed because the trial court erroneously admitted the results of the Alcohol Level Evaluation Road Tester (ALERT). This ruling was based upon the appellate division's finding that the ALERT results were admitted without foundation. In *Sandbergen*, the court found that the breath test was administered by a police officer who conducted the test and checked the device in accordance with instructions he had been given. However, this officer could neither explain: 1) How the device actually worked; 2) How the test results are converted to a blood alcohol concentration figure; nor, 3) How the device is calibrated to ensure accuracy of the results. Significantly, no other witnesses were called to supply this information. *Sandbergen*, 1985 WL 56575 at *1.

[30] Consequently, the court held that the results of the breath test were inadmissible due to lack of a proper foundation. *Id.* In doing so, the court emphasized the necessity of valid evidence specifically offered to prove the degree of intoxication of the person who has breathed into the measuring device. *Id.* The court also noted that:

> [t]he device, apparently, makes some kind of an analysis of the breath, but how and

> what kind we are not told. There may be some correlation between the analysis of the breath and the alcohol level of the blood, but again, we have no evidence of whether or why this is so. It is not enough to prove that the test was administered according to instructions, if there is no proof that the results are valid when that is done.

Id.

[31] We find the absence of two out of the three *Sandbergen* factors to be determinative in this matter. The instant case lacks: 1) Evidence explaining how the breath test results are converted into a percentage of blood alcohol concentration; and 2) An explanation as to how the device works. The absence of both factors was significant in the view of the *Sandbergen* court. In addition, although the record indicates how the Intoxilyzer is, or at least should be, calibrated, and that the calibration of the Intoxilyzer used in this case conformed to factory specifications, we note that the calibration of the Intoxilyzer did not conform with GPD policy. Indeed, despite viewing the evidence in a light favorable to the People, their failure to provide an adequate foundation as to the Intoxilyzer results is glaringly apparent.

[32] In summation, in order to prove that section 18102 (b) was violated, the evidence specifically pertaining to the results of the Intoxilyzer must strictly conform to the statutory measurement. Specifically, the People must prove that the defendant "while having eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood, based upon grams of alcohol per one hundred (100) milliliters of blood" was operating or in physical control of a motor vehicle. The proper foundation for the crime of Driving Under the Influence in violation of Section 18102 (b) must also include: 1) Evidence explaining how the breath test results are converted into a percentage of blood alcohol concentration; 2) An explanation as to how the device works; and 3) How the device is calibrated to ensure accuracy of the results.

[33] Based on the foregoing, we hold that insufficient evidence existed to justify the conviction for violating 16 GCA §18102 (b) (as a third degree felony).[5]

IV. CONCLUSION

[34] Based on the foregoing, we find that Appellant received effective assistance of counsel in conformance with the Sixth Amendment to the United States Constitution. In addition, we **AFFIRM** the felony conviction for operating and being in physical control of a vehicle while under the influence of alcohol in violation of 16 GCA §18102 (a). Finally, we **REVERSE** the felony conviction for operating and being in physical control of a vehicle while having 0.08% or more, by weight, of alcohol in the blood in violation of 16 GCA §18102 (b).

BENJAMIN J.F. CRUZ
Associate Justice

JANET HEALY WEEKS
Associate Justice

PETER C. SIGUENZA
Chief Justice

[5] Because we reverse the 16 GCA §18102 (b) conviction, we need not address the calibration of the Intoxilyzer used in this case.