DISSENTING OPINION BY RAMIL, J.,
WITH WHOM NAKAYAMA, J., JOINS

I respectfully dissent. First, I would hold that the circuit court was correct in determining that the search of the toolshed was "independent and distinct" from the prior illegal search of the Poaipuni home.[1] Second, I would also hold that Poaipuni's custodial statement was knowingly, voluntarily, and intelligently made pursuant to his Miranda rights.

A.

The exclusionary rule provides that "'[a] subsequent search even under warrant based upon the evidence obtained in the former tainted search is also tainted.'" State v. Brighter, 63 Haw. 95, 100, 621 P.2d 374, 379 (1980) (quoting State v. Boynton, 58 Haw. 530, 535, 574 P.2d 1330, 1334 (1978)). However, "the exclusionary rule does not preclude the use of evidence derived from knowledge of incriminating facts 'gained from an independent source.'" Id. (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). "It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put

---

[1] The circuit court concluded in relevant part that:

> 4. Derivative evidence will not be excluded under the fruit of the poisonous tree doctrine if the government learned of the evidence from an independent source, distinct from the illegal source. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Mr. Poaipuni Sr.'s voluntary consent for the search of his toolshed was independent and distinct from the search warrant executed on his residence.

him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully." Sutton v. United States, 267 F.2d 271, 271-72 (4th Cir. 1959). Accordingly,

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (citation omitted).[2] As an initial matter, a review of the caselaw reveals that this court has never held that an illegal search renders, per se, a subsequent consent invalid.

In Wong Sun, the United States Supreme Court considered a factual scenario somewhat analogous to the present case. In that case, two defendants were tried together. Narcotics seized from a third party were held inadmissible against one defendant because they were the product of statements made by him at the

---

[2] The majority applies the "but for" analysis rejected by Wong Sun. See Majority at 3 ("We hold that the firearms and Poiaipuni's statement constituted 'fruit of the poisonous tree,' because, but for the exploitation by the police of a prior illegality . . . [the evidence would not have come to light]."). First, the majority ignores the clear reasoning in Wong Sun that "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun, 371 U.S. at 487-88. Furthermore, when the majority does frame the question, it does so by stating: "the ultimate question that the fruit of the poisonous tree doctrine poses is as follows: Disregarding the prior illegality, would the police nevertheless have discovered the evidence?" Majority at 12. The majority has correctly posed the inevitable discovery exception question. However, there is more than one exception to the exclusionary rule, and the case before us does not raise the question of inevitable discovery, but of independent source. The second error in the majority's "but for" analysis is that the majority wrongfully assumes that there was an "exploitation by the police of a prior illegality." See discussion infra.

time of a warrantless and illegal arrest. The Court stated, "We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against [him]." Id. at 488. Nonetheless, the same narcotics were found to be admissible against a codefendant. The Court stated,

> Our holding, supra, that this ounce of heroin was inadmissible against [the first defendant] does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to [the first defendant] was required solely by their tainted relationship to information unlawfully obtained from [the first defendant], and not by any official impropriety connected with their surrender by [a third party]."[3]

Id. at 491-92.

In the present case, Poaipuni stands in the same position as Wong Sun.[4] The guns were uncovered during a search

---

[3] The events began when narcotics agents arrested Hom Way, and found heroin in his possession. Wong Sun, 371 U.S. at 473. Hom Way, who had not before been an informant, stated that he had bought an ounce of heroin the night before from "Blackie Toy," proprietor of a laundry on Leavenworth Street. Id. The agents went to a laundry on Leavenworth Street, operated by James Wah Toy. Id. at 473-74. After arresting Toy, one of the agents said to him, "[Hom Way] says he got narcotics from you." Id. at 474. Toy responded, "No, I haven't been selling any narcotics at all. However, I do know somebody who has." Id. Toy identified the person as "Johnny," and supplied a description of Johnny's house. Id. The agents located the house, and found Johnny Yee. Id. at 474-75. After a discussion with the agents, Yee surrendered almost an ounce of heroin. Id. Yee later stated that the heroin had been brought to him by Toy and "Sea Dog." Id. When Toy was questioned as to the identity of "Sea Dog," he said that "Sea Dog" was Wong Sun. Id. The agents then went to Wong Sun's residence and arrested him. Id. Both Wong Sun and Toy were charged with transporting and concealing illegally imported heroin. The heroin was held inadmissible against Toy, but admissible against Wong Sun.

[4] Notwithstanding the fact that the testimony given before the court was highly conflicting, the court explicitly resolved the conflicts in favor of the prosecution's witness. See State v. Patterson, 58 Haw. 462, 469, 571 P.2d 745, 750 (1977). The circuit court found in relevant part: "9. Despite Mr. Poaipuni, Sr.'s testimony which now contradicted the above facts, the Court gives credence to Detective Fletcher's testimony on the above facts." The circuit court's finding that Detective Fletcher's testimony is credible will not be disturbed on appeal. See State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (citation omitted).

consented to by a third party, Mr. Poaipuni, Sr.[5] Detective Fletcher reviewed a consent-to-search form with Mr. Poaipuni, Sr. After being carefully and fully advised of his right to withhold consent, Mr. Poiaipuni, Sr. signed the consent-to-search form. See State v. Patterson, 58 Haw. 462, 469-70, 571 P.2d 745, 750 (1977). Mr. Poaipuni, Sr. was not under any duress or force of compulsion at the time he consented to the search. See id. Accordingly, the search of the toolshed was taken pursuant to a valid third-party consent.

The circumstances leading to Mr. Poaipuni, Sr.'s consent establish that Mr. Poaipuni, Sr. was a source independent of the initial illegal search. The search of the Poiapuni home was part of a criminal investigation into activities of Poaipuni.

---

[5] I would affirm the circuit court's finding that Mr. Poiaipuni, Sr. freely, voluntarily, knowingly, and intelligently consented to the search of his toolshed. A search is "reasonable" if conducted in accordance with the voluntary and uncoerced consent of the person whose property is being searched. State v. Lopez, 78 Hawai'i 433, 443, 896 P.2d 889, 899 (1995) (citing State v. Mahone, 67 Haw. 644, 646, 701 P.2d 171, 173 (1983)). "[W]hether consent to search has been given voluntarily is a question of fact to be determined by the trial court from the 'totality of the circumstances.'" Patterson, 58 Haw. at 467, 571 P.2d at 748 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)). It is difficult to conclude that, based on the record presented, the findings of fact of the circuit court were "clearly erroneous." Id. at 468-69, 571 P.2d at 749 (holding that "the findings of a trier of fact regarding the validity of consent to search must be upheld unless 'clearly erroneous.'") (citations omitted). The record reveals substantial evidence upon which the circuit court could find that Mr. Poaipuni, Sr.'s consent was in fact voluntarily given. The consent to the search arose from actions taken by Mr. Poaipuni, Sr. Mr. Poaipuni, Sr. requested a private word with the officer in charge, who was Detective Fletcher. In a private conversation with Detective Fletcher, Mr. Poaipuni, Sr. disclosed the presence of firearms in the toolshed, and expressed a desire to turn the firearms over to the police. Mr. Poaipuni, Sr. led Detective Fletcher to the toolshed and orally authorized the detectives to search therein. Detective Fletcher then explained to Mr. Poaipuni, Sr. that the police required written consent for the search. It appears from the record that if there was any coercion, it came solely from Mr. Poaipuni, Sr.'s subjective fear that he "would have been more in trouble" if the officers found the guns themselves. This is insufficient to demonstrate coercion, or a lack of voluntariness.

Although Mr. Poaipuni, Sr. was the owner of the home, until he requested to speak with Detective Fletcher, he was a passive onlooker with respect to the police search. The police had no reason to suspect Mr. Poaipuni, Sr. of any involvement in criminal wrongdoings, nor had the police uncovered evidence implicating Mr. Poaipuni, Sr. in criminal activity. Detective Fletcher was not aware of the toolshed until Mr. Poaipuni, Sr. informed him about it, and was not planning to search for firearms in the toolshed prior to Mr. Poaipuni, Sr.'s disclosure. Mr. Poaipuni, Sr. conceded that, prior to his disclosure, the officers neither inquired about the toolshed or asked him to open the toolshed. Furthermore, Mr. Poaipuni, Sr. knew that Detective Fletcher was not aware of the firearms until Mr. Poaipuni, Sr. himself revealed the information. Mr. Poaipuni, Sr.'s unilateral decision to interject himself into the investigation, therefore, cannot be said to be the result of the police search.[6]

Furthermore, Mr. Poaipuni, Sr.'s consent was not obtained by exploitation of the illegal search of the Poaipuni home. The officers did not use any knowledge gained from their illegal search of the Poaipuni home. Rather, Mr. Poaipuni, Sr. approached the officers and volunteered the information. Upon being notified about weapons, the officers obtained written consent from Mr. Poaipuni, Sr. before they opened the shed. These factors eviscerate the deterrence rationale for applying

[6] I make no comment about whether, if evidence had been found incriminating Mr. Poaipuni, Sr., such evidence would be excluded.

the exclusionary rule in this case. See United States v. Leon, 468 U.S. 897, 918-19 (1984).

For these reasons, I would hold that the search of the toolshed and items obtained from that search cannot be said to be result of "the exploitation" of the prior illegal search of the Poaipuni home, but rather, they are the product of a waiver independent of the prior illegal search.

B.

The majority holds that "Poaipuni's purported Miranda waiver, which preceded Detective Fletcher's interrogation regarding the firearms could not, per se, purge the taint of the prior execution of the unlawful search warrant." Majority at 14. My disagreement with the majority's analysis is outlined supra, in section A of this dissent.[7] As I believe that Poaipuni's confession was not tainted by any prior illegality, I now address Poaipuni's argument regarding the waiver of his Miranda rights.

During the pre-trial voluntariness hearing, Poaipuni argued that he waived effectuation of his Miranda rights only as to questioning about the ATM theft, and not as to questions about the firearms. He argued that his statements about the firearms were therefore not voluntarily given. I would agree with the

[7] Inasmuch as I disagree with the majority's analysis regarding the confession, I also disagree with the majority that trial counsel's failure to move for suppression of Poiaipuni's confession deprived him of a potentially meritorious defense.

circuit court that Poaipuni's custodial statement was knowingly, voluntarily, and intelligently made.

Under both the fifth amendment to the United States Constitution and article I, section 10 of the Hawai‘i Constitution, "a suspect's awareness of all the possible subjects of the police questioning is not relevant to determine whether the suspect voluntarily, knowingly, and intelligently waived his Miranda rights." Colorado v. Spring, 479 U.S. 564, 577 (1987); State v. Ramones, 69 Haw. 398, 403, 744 P.2d 514, 517 (1987). In Colorado v. Spring, agents from the Bureau of Alcohol, Tobacco and Firearms (ATF) arrested John Leroy Spring in Missouri for interstate firearms transactions. 479 U.S. at 566. The agents gave Spring his full Miranda warnings. Spring also signed a written form stating that he understood and waived his rights. Initially, the agents questioned Spring about his involvement in firearms transactions. The interrogation soon turned to Spring's suspected involvement in a Colorado murder. Spring informed the officers he had "shot another guy once," but gave no further information. Approximately two months later, Colorado law enforcement officials visited Spring in his Kansas City jail cell. After reciting the Miranda warnings, the officers obtained a full confession to the Colorado murder. On appeal to the United States Supreme Court, Spring argued that his statement to ATF agents that he had "shot another guy once" was in effect compelled in violation of his fifth amendment privilege because

he signed the waiver form without being aware that he would be questioned about the homicide.

The United States Supreme Court rejected Spring's claim, concluding that his argument "strain[ed] the meaning of compulsion past the breaking point." Id. at 573. The Court reiterated that Miranda warnings serve to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." Id. at 572 (citing Miranda v. Arizona, 384 U.S. 436, 469 (1966)). The Court held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Id. at 577. Accordingly, where the totality of the circumstances reveal that a waiver "was the product of a free and deliberate choice rather than intimidation, coercion or deception" and was made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it[,]" a court may properly conclude the Miranda rights have been waived. Id. at 573 (citations omitted). As there was "no doubt" Spring's decision to waive his Miranda rights was both knowing and voluntary, the Court concluded that there was no constitutional impairment.[8] Id. at 574.

[8] Recent federal cases applying Colorado v. Spring include Barnes v. Johnson, 160 F.3d 218, 223 (5th Cir. 1998), United States v. Braxton, 112 F.3d 777, 784 (4th Cir. 1997), and United States v. Hernandez, 93 F.3d 1493, 1503 (10th Cir. 1996).

That same year, this court adopted the Spring rule in Ramones, 69 Haw. at 398, 744 P.2d at 514. Radford John Ramones was arrested upon suspicion of automobile theft. At the police station, Ramones was given his Miranda warnings and executed a Honolulu Police Department waiver of rights document. The form listed the nature of the charge as "auto theft." Ramones was subsequently indicted for the unauthorized control of a propelled vehicle. On appeal, Ramones argued that he had not validly waived effectuation of his Miranda rights because he did not know the true nature of the charges against him during the interrogation. Holding that the Miranda warnings do not require criminal suspects to be notified of the various offenses with which they might be charged prior to custodial interrogation, this court stated: "We agree with the United States Supreme Court's recent decision of Colorado v. Spring, . . . that a suspect's awareness of all the possible subjects of the police questioning is not relevant to determine whether the suspect voluntarily, knowingly, and intelligently waived his Miranda rights."[9] Ramones, 69 Haw. at 404, 744 P.2d at 517.

[9] Hawai'i's adoption of the rule from Colorado v. Spring is consistent with the approach adopted by numerous states. See, e.g., State v. Tibbetts, 749 N.W.2d 226, 243 (Ohio 2001); King v. State, 539 S.E.2d 783, 790 (Ga. 2000); State v. Luke, 1 P.3d 795, 798 (Idaho 2000); People v. Mahir Ghanin Daoud, 614 N.W.2d 152, 162 (Mich. 2000); Willey v. State, 712 N.E.2d 434, 443 (Ind. 1999); People v. Musselwhite, 954 P.2d 475, 486 (Cal. 1998); State v. Sirvio, 579 N.W.2d 478, 482 (Minn. 1998); State v. Callahan, 979 S.W.2d 577, 582 (Tenn. 1998); Commonwealth v. Raymond, 676 N.E.2d 824, 832 (Mass. 1997); State v. Walden, 905 P.2d 974, 989 (Ariz. 1995); People v. Jordan, 891 P.2d 1010, 1014 (Colo. 1995); State v. Reed, 627 A.2d 630, 649 (N.J. 1993); State v. Solis, 851 P.2d 1296, 1299 (Wyo. 1993); State v. Davis, 834 P.2d 1008, 1016 n.9 (Or. 1992); Alston v. State, 597 A.2d 1023, 1025 (Md. 1991); State v. Dixon, 467 N.W.2d 397, 408 (Neb. 1991); State v. Davis, 446 N.W.2d 785, 790 (Iowa 1989); State v. Chisolm, 565 A.2d 92, 94 (Me. 1989); (continued...)

It is nevertheless this court's obligation to "examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of circumstances surrounding the statement." State v. Kelekolio, 74 Haw. 479, 502, 849 P.2d 58, 69 (1993). Our examination requires a twofold analysis: (1) whether Defendant was informed of his rights under the fifth amendment within the context of the custodial interrogation; and, if so, (2) whether Defendant invoked or waived these rights. State v. Luton, 83 Hawai'i 443, 452, 927 P.2d 844, 853 (1996).

The record indicates that Poaipuni was adequately informed of his constitutional rights. Detective Holokai gave Poaipuni a warning and waiver form on which Poaipuni's constitutional rights were listed. Detective Holokai read the form to Poaipuni and inquired whether Poaipuni understood each of the rights. Poaipuni indicated that he understood his rights and placed his initials at the end of each sentence on the form. Poaipuni read the "understanding of rights" section out loud. Finally, he signed and dated the form.

The record also reflects that Poaipuni waived effectuation of his Miranda rights and that the waiver was knowing and intelligent. Detective Holokai testified that Poaipuni read the "waiver of rights" portion of the form out loud. The detective then inquired if Poaipuni would give a

[9](...continued)
Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988); but see State v. Randolph, 370 S.E.2d 741, 743 (W. Va. 1988).

statement. Poaipuni responded in the affirmative and signed the "waiver" portion of the form. In State v. Kreps, the Intermediate Court of Appeals of Hawai'i stated that evidence that a defendant has read and signed a police rights and waiver form can be sufficient basis to establish a valid waiver, provided that the court consider "whether the words used, considering the age, background, and intelligence of the individual impart a clear understandable warning of all his rights." 4 Haw. App. 72, 76-77, 661 P.2d 711, 715 (1983). In this case, the words were plain and unambiguous. The record reveals nothing about Poaipuni's age, background or intelligence that would suggest an inability to understand or effectuate his rights if he desired to do so.

Finally, Poaipuni's statement must have been voluntarily made. State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994) (citing Kreps, 4 Haw. App. at 77, 661 P.2d at 715). The conditions surrounding the interrogation do not suggest that any impermissible tactics were employed by the detectives to coerce Poaipuni into making a statement. Although Poaipuni had been in custody for approximately twelve hours at the time of the interrogation, the record indicates that Poaipuni was questioned by other detectives about unrelated investigations during this time.[10] The fact that Detective Fletcher questioned

[10] Detective Holokai had no personal knowledge as to how Poaipuni spent the day prior to the 10:00 p.m. interview. He could not testify as to whether Poaipuni had eaten or slept during the day. However, he was sure that Poaipuni had not spent the whole day inside the interrogation room.
(continued...)

Poaipuni directly upon completing the search of the Poaipuni home further indicates that there was no impermissible motive for the delay. Detective Holokai testified that Poaipuni did not indicate illness, fatigue, hunger or thirst. Detective Holokai likewise testified that he did not threaten Poaipuni and that Poaipuni was cooperative throughout the interrogation.

Accordingly, I would hold that Poaipuni was adequately appraised of his Miranda rights and knowingly, voluntarily, and intelligently waived those rights.

C.

For the foregoing reasons, I would affirm the circuit court's August 11, 1998 judgment of conviction and sentence against Poaipuni for felon in possession of a firearm.

[10](...continued)
Apparently, Poaipuni was questioned by at least one officer in connection with Poaipuni's suspected involvement in a murder. The transcripts also suggest that Poaipuni was questioned with respect to yet another investigation following the questioning by Detectives Holokai and Fletcher.