IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

IVAN FUKAGAWA, Defendant-Appellant.

NO. 22810

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0020(2))

DECEMBER 30, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
RAMIL, J., DISSENTING; AND ACOBA, J., DISSENTING

OPINION OF THE COURT BY MOON, C.J.

Defendant-appellant Ivan Fukagawa appeals from the judgment of conviction and sentence of the Circuit Court of the Second Circuit, adjudging him guilty of: (1) driving under the influence of intoxicating liquor, in violation of Hawai'i Revised Statutes (HRS) § 291-4 (Supp. 1998)[1] (Count One); (2) promoting a

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[1] HRS § 291-4 states in pertinent part:

> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
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> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the

(continued...)

dangerous drug in the third degree, in violation of HRS § 712-1243(1) (1993 & Supp. 1998)[2] (Count Two); and (3) prohibited acts relating to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993)[3] (Count Three). Fukagawa claims that the motions court, the Honorable Shackley F. Raffetto presiding,

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[1](...continued)

> influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
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> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath.

[2] HRS § 712-1243 states in pertinent part:

> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
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> . . . .
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> (3) Notwithstanding any law to the contrary, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

[3] HRS § 329-43.5(a) states:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

erred in denying his motion to dismiss the charge of promoting a dangerous drug in the third degree. Specifically, Fukagawa alleges that the motions court erred by: (1) admitting the testimony of the prosecution's witness, who indicated that the crystal methamphetamine residue recovered from Fukagawa's pipe may have contained a usable amount of the drug; and (2) denying Fukagawa's motion to dismiss the charge as a de minimis infraction, pursuant to Hawai'i Revised Statutes (HRS) § 702-236 (1993).[4] For the reasons discussed below, we affirm the order denying Fukagawa's motion to dismiss and the judgment of conviction and sentence of the circuit court.

I. BACKGROUND

On January 15, 1999, Fukagawa was charged by indictment with driving under the influence of intoxicating liquor, promoting a dangerous drug in the third degree, and prohibited

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[4] HRS § 702-236 provides in pertinent part:

> (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
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> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

acts relating to drug paraphernalia. On June 14, 1999, Fukagawa filed a motion to dismiss the charge of promoting a dangerous drug in the third degree, asserting that the charge constituted a de minimis infraction. A hearing on the motion was held on July 1, 1999.

At the outset of the hearing on Fukagawa's motion, the parties stipulated to the admission of the Maui Police Crime Laboratory Analysis Report Number 98-14511 (identified as "State's Exhibit 1"), prepared by Julie Wood, which indicated that the substance recovered from a glass pipe in Fukagawa's possession weighed .018 grams and contained methamphetamine. The parties also agreed that,

> if Julie Wood were called to testify, she would testify she followed normal accepted procedures in determining the information on this report, and that the pipe recovered under Maui Police Department Report Number 98-14511, after was [sic] tested there was .018 grams of crystal methamphetamine determined to be in that pipe, and it was visible to the naked eye.[5]

The defense called George Wesley Read, Ph.D., a professor of pharmacology, to testify on its behalf. Read was qualified as an expert in the field of pharmacology.[6] Read testified, inter alia, that "[m]ethamphetamine has at least three

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[5] On its face, it appears that the parties stipulated that Wood would have testified that .018 grams of crystal methamphetamine was in the pipe; however, given the content of her report, the testimony of the other witnesses, and the arguments presented, it appears that the parties intended to stipulate that Wood would have testified that the .018 grams contained crystal methamphetamine.

[6] Read explained that pharmacology is the study of the effect of chemicals on living organisms.

currently-accepted uses and possibly a fourth." According to Read, methamphetamine has been used to treat obesity, narcolepsy, attention deficit hyperactive disorder (ADHD), and fatigue. Based upon his review of the available literature, Read testified that ranges of methamphetamine dosages used to treat obesity, narcolepsy, ADHD, and fatigue are: .01 to .04 grams; .05 to .06 grams; .005 to .015 grams; and .01 to .04 grams, respectively.[7]

With respect to the abuse of methamphetamine -- i.e., use of the drug to achieve "euphoria and elation," -- Read testified that a "naive user"[8] would use between .05 and .1 grams. When asked about the purity of drugs obtained on the street, Read explained that

> there are papers in the technical literature that describe the purity, and it can be very impure, but often might be fifty percent of what is sold might be salt, but it can vary depending upon the purity, that is the conscientiousness of the lab preparing it and a lot of variables, so it is hard to speak generally about that.
>
> You almost have to talk about a specific product, some specific products that's [sic] been analyzed, and then you see very clearly what the purity is . . . .

(Emphasis added.) Additionally, Read testified that there is a difference between the drug as it is purchased and the residue that remains in a pipe after use. Read explained:

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[7] The defense offered for identification a handout, entitled "Methamphetamine Doses for Various Actions." However, the record on appeal indicates that this exhibit was not admitted into evidence.

[8] Read defined a "naive user" as "a first-time user who was not tolerant, or a person who . . . didn't have [an] opportunity to develop [a] tolerance [and] could take a lot smaller dose and achieve the same euphoria and elation."

So you might say that in a street drug it might be half, or maybe even more of the main drug, but after it is smoked, what is left might be trace amounts of the drug and hardly usable, so depends [sic] on how hard it has been smoked, too. They might put some in, light it, smoke it for awhile, use half of it, set it aside, and heat it again and use some more from it. Eventually, it becomes unusable, and because there's no drug left, that residue then might still have detectable amounts of drug in it, but we would call them trace amounts.

Read did not indicate that he performed any analysis on the substance weighing .018 grams recovered from Fukagawa's pipe. With respect to the analysis actually performed on the substance recovered from Fukagawa in the instant case, defense counsel and Read had the following exchange:

Q. [By defense counsel] In preparation for this hearing did you have a chance to view a Maui Police Department report lab analysis form?
A. [Read] Yes, I did.
Q. Do you have a copy in front of you?
A. I believe I do.
Q. Are you familiar with the procedures, examination, and analysis of substance by the crime laboratory?
A. If it is a typical one, yes. There are several different procedures. I am not sure I am familiar with the particular one used here on Maui, but they're usually fairly good tests.
Q. On this report do you see a determination of the weight of the substance?
A. I see there's .018 grams was scraped from the pipe.
Q. Doctor Read, in your expert opinion would eighteen milligrams or .018 grams produce a euphoric or pharmacological effect for an illicit user?
A. No. A person of -- average normal person I would not expect that would produce any of the effects that they would be after. If it were pure methamphetamine, even if it were pure methamphetamine, even then I don't think it would produce the high that would be sought after.
Q. In your opinion would a person be able to use that .018 grams as an item of sale?
A. Not for illicit use. If it were from a drug company and known to be pure, it would have use therapeutically. At that level it could be used, but no physician or researcher would buy an uncertified drug, so I would never buy this for research purposes, and I don't think a physician would prescribe it not knowing its purity, but the question is how much is it really. You don't know. You would not want to prescribe an amount of a drug that you don't know how

> much active ingredients is [sic], because that might be one-tenth that amount, might be half that methamphetamine, so you'd get an unpredictable response not knowing how much drug is actually there.

(Emphasis added.)

On cross-examination, Read stated that he had neither met nor examined Fukagawa and that his testimony regarding the effects of various doses of methamphetamine did not account for Fukagawa's individual physical characteristics. Read testified that drugs are diluted in larger body sizes, explaining that a person weighing twice as much as another individual would have to take approximately twice as much drug to get the same response as his lighter counterpart. Read also stated that the dose response results alluded to in his testimony were proportional to a person weighing seventy kilograms, or about 150 pounds. Upon examination by the court, Read testified that he did not know the weight of the children who participated in the studies he reviewed regarding the use of methamphetamine to treat ADHD.

Maui Police Department Officer Dennis Lee testified on behalf of the prosecution. Lee stated that he had received training in the identification and testing of illegal drugs and drug paraphernalia. Specifically, Lee testified that he had received "eight hours of specialized training from Bectin Dickinson instructors in the field testing of illegal drugs" and "forty hours of basic investigation and drug identification from the Drug Enforcement Administration." Lee stated that he: (1)

was certified by the Maui Police Department to field test evidence for the presence of illegal drugs; (2) had experience field testing evidence for the presence of illegal drugs; and (3) had tested evidence for the presence of methamphetamine well over a hundred times in the past.

Lee testified that, on May 26, 1998, he received an assignment to field test evidence recovered from Fukagawa, which had been sealed in an evidence packet recorded under Maui Police Report Number 98-14511. Lee stated that he removed a glass pipe from the evidence packet, which he identified as the kind of pipe normally used to smoke crystal methamphetamine. Lee testified that the field test on a sample of the residue contained in the glass pipe, performed in accordance with his training and experience, indicated the presence of amphetamines. However, Lee stated that the test he had performed did not indicate the amount of methamphetamine contained in the substance tested. Lee also testified that methamphetamine is classified as a dangerous drug.

On direct examination, Lee had the following exchange with the prosecutor:

> Q. [By the prosecutor] Through your training and experience, do you know how crystal methamphetamine is used in a pipe like the one you tested?
> A. [Lee] Yes.
> Q. How?
> A. They smoke it.
> Q. How is it used? How is that pipe, itself, used?
> A. What they do is on this pipe on the bulbous end, there's a little hole. They drop a granule of ice in there, and with a high-intensity torch or lighter, they heat it up and they smoke it.

> Q. Can you tell me if the residue in the pipe you tested prior to your scraping and field testing was of an amount sufficient to be used by somebody?
> A. Possibly, yes.

At that point, defense counsel objected, arguing that Lee was not qualified to answer the prosecutor's question. The court overruled the objection, stating, "Goes to weight." On cross-examination, Lee testified that he had not received any Bachelor of Science degree in any physical chemistry sciences and that his associate's degree was not in a scientific field.

The motions court denied Fukagawa's motion to dismiss, stating:

> The amount that was actually measured here in the lab which apparently was less than the actual amount of amphetamine because of the -- apparently was tested twice is actually more than the maximum dosage used for -- to correct attention deficit hyperactivity disorder. It is more than the maximum dose recommended by one of the studies, one of the three studies for obesity, and it is more than the maximum dosage recommended by one of the four studies for the treatment of narcolepsy, so it is obvious that while one might debate how much is enough to get a person high, that this was an amount that was usable, and then, also, the evidence shows that it was in a pipe and so on.
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> It was obviously there to be used by the defendant. He probably used it, in fact. So it was not the kind of situation where a person borrowed a car and just happened to be something in the ashtray. It was a very small amount, and we are looking at a fact situation where be [sic] really a miscarriage of justice for the person to end up with [a] felony conviction because of inadvertence or something like that.
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> Here we have a person who had the equipment to use it, no doubt was using it, and that is the very harm that the statute is designed to address.
>
> Now the case as pointed out talks about the possibility of applying the de minimis standard if there's -- the amount is microscopic or infinitesimal, and in fact unusable as a narcotic. I am reading the word narcotic to include with -- what do you call it -- stimulant, and what I am assuming the Court means a drug that has, at least, potential for and affects the central nervous system or the mind, and here I think the amount clearly could do that, and that the de minimis standard would be inappropriate to apply, and I am going to deny the motion.

A written order denying Fukagawa's motion to dismiss was filed on July 12, 1999.

Pursuant to a plea agreement with the prosecution, Fukagawa withdrew his original plea of not guilty and entered a conditional plea of no contest to all three counts of the indictment, reserving his right to appeal the issues raised in this case. The circuit court accepted Fukagawa's no contest pleas, and, on August 31, 1999, Fukagawa was sentenced to, inter alia, a five-year indeterminate maximum term of imprisonment, subject to a thirty-day mandatory minimum term, for Count Two and a five-year indeterminate maximum term of imprisonment for Count Three, the two terms to run concurrently. Fukagawa filed a timely notice of appeal on September 13, 1999.

II. STANDARDS OF REVIEW

A. Admission of Expert Testimony

"'Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion.'" State v. Fukusaku, 85 Hawai'i 462, 472, 946 P.2d 32, 42 (1997) (quoting State v. Maelega, 80 Hawai'i 172, 180, 907 P.2d 758, 766 (1995)). "An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." State

v. Vliet, 95 Hawai‘i 94, 108, 19 P.3d 42, 56 (2001) (internal quotation marks and citations omitted).

B. Decision Not to Dismiss a Charge as a De Minimis Infraction

A trial court's decision under HRS § 702-236, governing de minimis infractions, is reviewed for an abuse of discretion. State v. Viernes, 92 Hawai‘i 130, 133, 988 P.2d 195, 198 (1999) (citations omitted).

III. DISCUSSION

A. Admission of Lee's Testimony

Fukagawa argues that Lee was not qualified to testify that the residue contained in the pipe recovered from Fukagawa may have been an amount sufficient to be used because Lee's qualifications to testify as to the use, ingestion, or pharmacological effects of methamphetamine were not established. We disagree.

Hawai‘i Rules of Evidence (HRE) Rule 702 (1993) states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

With respect to an expert's qualifications, this court has noted,

> It is not necessary that the expert witness have the highest possible qualifications to testify about a particular matter, . . . but the expert witness must have such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would probably aid the trier of fact in arriving at the truth. . . . Once the basic requisite qualifications are

> established, the extent of an expert's knowledge of the subject matter goes to the weight rather than the admissibility of the testimony.

State v. Toyomura, 80 Hawai'i 8, 26 n.19, 904 P.2d 893, 911 n.19 (1995) (quoting Larsen v. State Sav. & Loan Ass'n, 64 Haw. 302, 304, 640 P.2d 286 288 (1982)).

In the present case, Lee testified that he received field training in the testing and identification of illegal drugs and drug paraphernalia. Additionally, Lee testified that, through his training and experience, he knew how a pipe, like the one recovered from Fukagawa, is used and explained how crystal methamphetamine is smoked in such a pipe. Thus, the prosecution had laid a sufficient foundation establishing Lee's knowledge and experience in how crystal methamphetamine is smoked in a pipe like that recovered from Fukagawa. Moreover, Lee was never asked any questions regarding the pharmacological effect of the methamphetamine recovered. Therefore, the circuit court, in allowing Lee's testimony, did not exceed the bounds of reason or disregard rules or principles of law or practice to the substantial detriment of a party. Accordingly, we hold that the circuit court did not err in allowing Lee to testify that the residue contained in the pipe recovered from Fukagawa may have been an amount sufficient to be used.

B. Decision Not to Dismiss a Charge as a De Minimis Infraction

Fukagawa argues that the circuit erred in denying his motion to dismiss because the amount of methamphetamine recovered

was neither useable nor saleable and, therefore, constituted a de minimis infraction.[9] We disagree.

As noted supra, de minimis infractions are defined by HRS § 702-236, which states that a court may dismiss a prosecution if, considering "the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct. . . . [d]id not actually cause or threaten the harm or evil sought to be prevented[,] . . . or did so only to an extent too trivial to warrant the condemnation of conviction[.]" Regarding the application of HRS § 702-236, this court recently explained:

> Prior to resolving whether an offense is de minimis, pursuant to HRS § 702-236, the trial court must undertake factual determinations. See State v. Park, 55 Haw. 610, 616-17, 525 P.2d 586, 591 (1974) (noting that, "before the code's § 236 can be properly applied in a criminal case, all of the relevant facts bearing on the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge" so that the judge may "consider all of the facts on this issue").

Viernes, 92 Hawai'i at 133, 988 P.2d at 198 (citation omitted). Dismissing a charge without any indicators from the surrounding circumstances to demonstrate a de minimis infraction would be an

[9] In his statement of points of error on appeal, Fukagawa challenges various findings of fact by the motions court. However, no corresponding argument appears in the argument section of the opening brief. We therefore deem these allegations of error to be waived. See Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2000).

abuse of discretion. See Park, 55 Haw. at 617, 525 P.2d at 591-92. Additionally, "as this court's de minimis cases attest, the defendant must establish that his or her conduct neither caused nor threatened to cause the harm or evil that the statute, under which he or she is charged, seeks to prevent." State v. Oughterson, No. 23075, slip op. at 23 (Haw. Sept. 16, 2002) (citations and underscoring omitted).

With specific reference to HRS § 712-1243, this court has noted that Hawai'i's drug laws were intended to control the use and sale of illicit drugs, State v. Vance, 61 Haw. 291, 307, 602 P.2d 933, 944, reh'g denied, 61 Haw. 661, 602 P.2d 933 (1979), and to address related social harms, including property and violent crimes. Viernes, 92 Hawai'i at 134, 988 P.2d at 199. In determining whether a defendant's conduct caused or threatened the evils sought to be prevented by drug laws, this court has considered the amount of drugs a defendant possessed as one of the relevant circumstances to be considered. See id. at 134-35, 988 P.2d at 199-200; Vance, 61 Haw. at 307, 602 P.2d at 944. Specifically, in Viernes, this court noted, inter alia, the "uncontroverted evidence that .001 grams of methamphetamine[] could not produce any pharmacological action or physiological effect[.]" Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (emphasis omitted). However, quantity is only one of the surrounding circumstances a court must consider. Vance, 61 Haw. at 307, 602

P.2d at 944 ("the possession of a microscopic amount in combination with other factors indicating an inability to use or sell the narcotic, may constitute a de minim[i]s infraction"); see also Viernes, 92 Hawai'i at 135, 988 P.2d at 200 (upholding the circuit court's dismissal of a charge as de minimis based upon the uncontroverted evidence that .001 grams of methamphetamine was neither useable nor saleable and the circuit court's findings of fact establishing that it had considered all of the relevant circumstances); State v. Sanford, 97 Hawai'i 247, 256, 35 P.3d 764, 773 (App.), cert. denied, 97 Hawai'i 247, 35 P.3d 764 (2001) (upholding the circuit court's denial of a motion to dismiss a charge as de minimis based upon, inter alia, "the juxtaposition of drug repositories, smoking device and smoked residue, and especially the possession of such depleted drug contraband by one engaged in shoplifting"). Before dismissing a charge as a de minimis infraction, a court must consider the amount of drugs possessed and the surrounding circumstances to determine if the defendant's conduct caused or threatened the harm or evil sought to be prevented by the law defining the offense sufficiently to warrant the condemnation of conviction.

Justice Acoba's dissenting opinion implies that the term "narcotic effect," as used in Vance, supports the "illicit effect" standard he advocates in this case. We expressly reject any such implication. In defining a "dangerous drug" for

purposes of, inter alia, promoting a dangerous drug in the third degree, HRS § 712-1240 (1993) refers to the drug schedules contained in HRS chapter 329, the Uniform Controlled Substances Act. HRS chapter 329 defines a "narcotic drug" as

> any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
>
> (2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), but not including the isoquinoline alkaloids of opium.
>
> (3) Opium poppy and poppy straw.
>
> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

HRS § 329-1 (1993). Thus, under our drug statutes, the term "narcotic drug" refers to a specific class of drugs.[10] Accordingly, with respect to our statutory scheme, a "narcotic effect" simply denotes the effect of those substances statutorily designated as narcotic drugs.

The defendants in Vance possessed cocaine and secobarbital. Vance, 61 Haw. at 304-05, 602 P.2d at 942-43. Both secobarbital and cocaine are Schedule II substances and, thus, "dangerous drugs." HRS § 712-1240. However, of the two

[10] We are cognizant that the statutory definition of a "narcotic drug" conflicts with Dr. Read's testimony in this case regarding the pharmacological definition of the same term.

substances, only cocaine is designated a "narcotic drug." HRS §§ 329-16, 329-1 (1976 and Supp. 1999). In Vance, this court noted:

> In the present case, appellant John Vance was found in possession of .7584 gram of white powder analyzed to contain approximately 17.5 percent cocaine or a total of .1327 gram of the narcotic drug. Appellant Michael Vance was found in possession of three tablets identified as the dangerous drug secobarbital.

Vance, 61 Haw. 304-05, 602 P.2d 942-43. The foregoing evinces this court's recognition of the narrow statutory definition of "narcotic drug."

Nevertheless, to the extent Vance may be misinterpreted to support the illicit effect standard Justice Acoba now advocates, we reinforce that, with respect to the amount of drugs possessed, the proper inquiry in de minimis cases is whether the amount possessed could produce a pharmacological or physiological effect. See State v. Hironaka, 99 Hawai'i 198, 209, 53 P.3d 806, 817 (2002); State v. Balanza, 93 Hawai'i 279, 283-85, 1 P.3d 281, 285-87 (2000); Viernes, 92 Hawai'i at 134, 988 P.2d at 199. We note that Justice Acoba has, on occasion, agreed with this standard. See Hironaka, 99 Hawai'i at 209, 53 P.3d at 817 (Acoba, J. concurring) (concurring with his characterization of this court's opinion "requiring a defendant to establish 'that the amount of the drug he or she possessed is incapable of producing any pharmacological or physiological effect.'"); but see State v. Carmichael, 99 Hawai'i 75, 95, 53 P.3d 214, 234 (2002) (Acoba, J. dissenting) (stating that "[i]t follows from

Vance that a useable amount, which disqualifies a defendant from HRS § 702-236 consideration, is one which produces the subject drug's characteristically desired effect: in Vance, a narcotic effect, or, in this case, according to the uncontroverted testimony of Read, one of euphoria or elation."). Moreover, given that the proper standard to apply in de minimis cases has been established by precedent, the trial court in the instant case was bound to adhere to it and, thus, could not have properly adopted an "illicit effect" standard. See State ex rel. Price v. Magoon, 75 Haw. 164, 186, 858 P.2d 712, 723, reconsideration denied, 75 Haw. 580, 961 P.2d 735 (1993) (citation omitted).

In the present case, the defense stipulated that the aggregate weight of the substance recovered from Fukagawa's pipe weighed .018 grams. As previously stated, Read testified that, with respect to methamphetamine, doses as low as .005 grams, less than one-third the amount recovered from Fukagawa's pipe, were used to treat ADHD. Thus, according to Read's testimony, .018 grams of methamphetamine is sufficient to produce a pharmacological effect. With respect to Fukagawa's argument that the entire substance recovered was not methamphetamine and contained only trace amounts of the drug, Read testified that: (1) because of the difficulty in speaking generally about the purity of drugs obtained on the street, "[y]ou almost have to talk about a specific product, some specific products that's

[sic] been analyzed"; (2) he performed no analysis of the substance recovered in the instant case; and (3) he did not know how much methamphetamine remained in the substance recovered from the pipe. Read did not testify that the substance recovered in the instant case could not produce a pharmacological effect. Accordingly, the circuit court's finding that the residue contained a sufficient amount of methamphetamine to produce a pharmacological effect is a reasonable inference from the record.[11] Additionally, the court's determination that "this was an amount that was usable" is supported by Lee's testimony that the substance recovered from Fukagawa's pipe may have constituted an amount sufficient to be "used" by someone. Moreover, Fukagawa does not challenge the circuit court's finding he, in fact, used the methamphetamine, and use is one of the evils sought to be prevented by HRS § 712-1243.

Furthermore, it is well-settled that "'[a]n appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance.'" State v. Dow, 96 Hawai'i

[11] We note that the motions court's findings may be interpreted to indicated that it believed the entire recovered substance was methamphetamine. However, inasmuch as the evidence adduced at trial supports the finding that the recovered substance contained a sufficient amount of methamphetamine to yield a not insignificant pharmacological effect, the motions court's misstatement was harmless.

320, 326, 30 P.3d 926, 932 (2001) (quoting State v. Ross, 89 Hawai‘i 371, 378 n.4, 974 P.2d 11, 18 n.4 (1998)). As previously indicated, the defendant bears the burden of establishing that "his or her conduct neither caused nor threatened to cause the harm or evil that the statute, under which he or she is charged, seeks to prevent." Oughterson, slip op. at 23. In advancing a motion to dismiss a charge as a de minimis offense, the defendant must address both "the nature of the conduct alleged and the nature of the attendant circumstances." HRS § 702-236(1) (emphasis added). Further, as we have indicated supra, dismissal of a prosecution without any indicators from the surrounding circumstances that demonstrate a de minimis infraction would constitute an abuse of discretion. See Park, 55 Haw. at 617, 525 P.2d at 591-92. In the present case, however, the defense focused solely upon the amount of methamphetamine possessed and presented neither testimony nor other evidence regarding the circumstances attendant to Fukagawa's possession of drug paraphernalia and the substance containing methamphetamine.

In light of the defendant's burden to prove that his conduct constituted a de minimis infraction and the evidence adduced in this case, we hold that the court did not abuse its discretion in refusing to dismiss the charge of promoting a dangerous drug in the third degree.

IV. CONCLUSION

Based upon the foregoing, we affirm the order denying Fukagawa's motion to dismiss and the judgment of conviction and sentence of the circuit court.

On the briefs:

Theodore Y. H. Chinn,
Deputy Public Defender,
for defendant-appellant

Richard K. Minatoya,
Deputy Prosecuting Attorney,
for plaintiff-appellee