

NO. 22890

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

DIZON R. DOMINGO, Defendant-Appellant.

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APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 96-0738(2))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and  
Ramil, JJ. and Intermediate Court of Appeals  
Associate Judge Lim, in place of Acoba, J., recused)

Defendant-appellant Dizon R. Domingo appeals the October 5, 1999 Judgment of Conviction and Sentence entered in the Second Circuit Court, the Honorable Shackley F. Raffetto, presiding, for the offenses of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243(1) (1993) (Count I), and prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993) (Count II).

Domingo contends that the trial court erred by: (1) denying his Motion to Quash Indictment based upon failure to

substantially comply with the "fair cross section" jury selection requirements of HRS chapter 612; (2) denying his motion to suppress evidence of items obtained during a search of his person because his consent was not legally valid due to (a) the arresting officer's failure to inform Domingo that he would be "free to leave" if he refused to consent to the search and (b) the failure of the prosecution to prove that Domingo had been advised of his Miranda rights prior to being asked to consent to the search; (3) refusing to permit Domingo to cross-examine the police department's evidence custodian concerning general security problems in the police evidence facility, in violation of his right to confront adverse witnesses; and (4) refusing to permit a merger instruction on Counts I and II, in violation of HRS § 701-109(1)(e) (1993).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that the trial court did not err in: (1) denying Domingo's Motion to Quash Indictment because Domingo did not adduce any evidence that the jury venire failed to represent a fair cross section of the population of the area served by the court and thereby prejudiced him, see HRS § 612-23(b) (1993); (2) denying Domingo's motion to suppress because Domingo's consent was valid due to the fact that (a) unlike State v. Trainor, 83 Hawai'i 250,

925 P.2d 818 (1996), upon which Domingo relies and which involved consensual investigative encounters between police and citizens, Domingo was not required to be informed that he was "free to leave" at the time he consented to the search as he was lawfully detained at the time pursuant to a validly authorized search warrant of the premises and (b) Domingo's Miranda claim was not properly preserved in the trial court and is deemed waived on appeal, see State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992); (3) refusing to permit Domingo to cross-examine the evidence custodian concerning general security problems in the police evidence facility unrelated to his case because, although Domingo's proffered testimony was marginally relevant, the trial court's refusal to admit the testimony was not an abuse of discretion, see Hawai'i Rules of Evidence Rule 403 and State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) ("The scope of cross-examination is generally within the sound discretion of the trial court." (Internal quotation omitted.)), and, unlike the defendant in Alford v. United States, 282 U.S. 687 (1931), a case upon which Domingo relies, Domingo did not proffer that the witness's testimony was biased; and (4) refusing to give Domingo's requested merger instruction because HRS § 701-109(1)(e) is inapplicable where, as here, it is different conduct on the part of the defendant that gives rise to two

distinct statutory offenses. See State v. Hoopii, 68 Haw. 246, 251-52, 710 P.2d 1193, 1197 (1985). Accordingly,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, July 5, 2001.

On the briefs:

Philip H. Lowenthal and  
Graham Daniel Mottola  
(of Lowenthal & August),  
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for plaintiff-appellee