

NO. 23731

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellant

vs.

NATHANIEL PENN, Defendant-Appellee

and

MASAAKI NEMOTO, Defendant

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 00-1-0425)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Ramil, and Acoba, JJ.)

Plaintiff-Appellant State of Hawaii (the prosecution) appeals from the August 16, 2000 order of the first circuit court (the court)<sup>1</sup> granting the motion to suppress statement filed by Defendant-Appellee Nathaniel Penn (Defendant). On appeal the prosecution contends that the motion was improperly granted, inasmuch as Defendant waived his right to counsel during his interrogation by Honolulu Police Department Detective Robert Cravahlo. Defendant, however, appeared to be under the misconception that he would have to schedule an appointment with

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<sup>1</sup> The Honorable Michael A. Town presided over the hearing.

an attorney prior to being able to receive free legal services; this and other circumstances support the court's order.

"A heavy burden rests on the government to demonstrate that [a] defendant knowingly and intelligently waived his [or her] privilege against self-incrimination and his [or her] right to retained or appointed counsel." State v. Green, 51 Haw. 260, 263, 457 P.2d 505, 508 (1969) (citing Miranda v. Arizona, 384 U.S. 435, 475 (1966)) (asterisks and parentheses omitted).

"After a defendant has been adequately apprised of his [or her] Miranda rights, he [or she] may waive effectuation of these rights provided the waiver is made voluntarily, knowingly, and intelligently." State v. Gella, 92 Hawai'i 135, 143, 988 P.2d 200, 208 (1999) (internal quotation marks, brackets, and citations omitted). This court has ruled that "the validity of a waiver concerning a fundamental right is reviewed under the totality of the facts and circumstances of the particular case." State v. Friedman, 93 Hawai'i 63, 69-70, 996 P.2d 268, 274-75 (2000) (citing State v. Luton, 83 Hawai'i 443, 454, 927 P.2d 844, 855 (1996) (holding that a defendant's waiver of his or her Miranda rights is examined from entire record) (citations omitted), and State v. Merino, 81 Hawai'i 198, 221, 915 P.2d 672, 695 (1996) (noting that court looks to totality of facts and circumstances in determining whether a defendant's waiver of right to attorney was voluntary)).

With respect to the Hawai'i Constitution, this court has held that "the protections which the United States Supreme Court enumerated in Miranda have an independent source in [article I, section 10 of the Hawai'i Constitution's] privilege against self-incrimination.'" State v. Nelson, 69 Haw. 461, 467, 748 P.2d 365, 369 (1987) (quoting State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657, 664 (1971)). Noting that "[t]he Hawai'i rule is broader in scope than the federal rule," this court has chosen "not to sanction a conviction possibly premised on evidence 'procured from [a] defendant in violation of his [or her Hawai'i] constitutional rights[.]'" Id. at 468, 748 P.2d at 369 (quoting Santiago, 53 Haw. at 267, 492 P.2d at 665) (brackets omitted).

On August 16, 2000, the court filed findings of fact (findings) and conclusions of law (conclusions). The following findings and conclusions are pertinent:

FINDINGS OF FACT

1. Detective Robert Cravahlo conducted a taped interview with [Defendant] on February 23, 2000. While Detective Cravahlo was going over the HPD 81 form with the Defendant they had the following exchange:

Detective Cravahlo: You have the right to have an attorney present while I talk to you. Do you know what an attorney is?

Defendant: Like a lawyer.

Detective Cravahlo: Yeah. What does a lawyer do?

Defendant: A person that sticks by you during trial.

Detective Cravahlo: Okay, very good.

(Exhibit "C", Transcript Report No. 00-051367 Page 6)

2. Detective Cravahlo then proceeded to question the Defendant about his rights to have a free attorney appointed for him.

Detective Cravahlo: If you cannot afford an attorney, the court will appoint one for you, prior to any questioning. What does that mean?

Defendant: That if you don't have enough money, (inaudible), they'll assign you to one to -- your lawyer and you have to go see him -- I mean make an appointment to go see him.

Detective Cravahlo: And how much does it cost you?

Defendant: It's free.

Detective Cravahlo: Very good.

3. After further dialogue, Defendant waived his rights and made a statement.

4. Detective Cravahlo testified that he was trying to determine if the Defendant understood that he had a right to a free attorney. Detective Cravahlo testified that if the Defendant asked for an attorney the interview would have been terminated. Detective Cravahlo could not make any representations in this case if he would have attempted to provide the Defendant with an attorney or if he would have merely terminated the interview and sent the case to the Prosecutor's Office.

#### CONCLUSIONS OF LAW

1. Given the Defendant's incomplete description of an attorney as "[a] person who will stick by you during trial," the Detective should have accurately clarified that an attorney does much more for a client than to stick by them through a trial i.e. counsels a defendant during investigation, provides thorough legal advice, researches potential defenses, files appropriate pretrial motions, etc. ABA Standards for Criminal Justice 4-2.1, 5-2.1. See also, State v. Hoey, 77 Haw. 17, 881 P.2d 504 (1994).

2. When the Defendant said, "[Y]ou have to go see him - I mean make an appointment to go see him," the Detective should have clarified for the Defendant that he would not have to make an appointment to see an attorney, but that the Defendant would be allowed to phone an attorney and that an attorney would be brought to the Defendant. Failing to correct accurately the Defendant's statements illegally chilled the Defendant's constitutional and statutory right to an attorney. ABA Standards for Criminal Justice 4-

2.1,<sup>[2]</sup> 5-2.1.<sup>[3]</sup>

3. The Court concludes that, based upon the totality of the circumstances, the State failed to meet its "heavy burden . . . to demonstrate that the Defendant knowingly, and intelligently waived its privilege against self-incrimination and his right to retained or appointed counsel." See State v. Green, 51 Haw. 260, 263 (1969); Miranda v. Arizona, 384 U.S. 436, 475 (1966).

(Emphases added.)

"We review the circuit court's ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong.'" State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (internal quotation marks and citations omitted). In doing so, we adhere to the precepts that

factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless

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<sup>2</sup> ABA Standards for Criminal Justice [hereinafter "ABA Standards"] Standard 4-2.1 provides as follows:

**Communication.** Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

<sup>3</sup> ABA Standard 5-2.1 states:

**Systematic assignment.** The assigned-counsel component of the legal representation plan should provide for a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assigned-counsel program should be by a component staff able to advise and assist the private attorneys who provide defense services.

left with a definite and firm conviction that a mistake has been made. . . . The circuit court's conclusions of law are reviewed under the right/wrong standard.

State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999)

(internal quotations marks and citations omitted).

On appeal, the prosecution does not challenge the court's findings but challenges conclusions 1 and 2. As to conclusion 1, the prosecution maintains that Detective Cravahlo did not need to hear Defendant recite each and every duty and function of an attorney as prescribed by the American Bar Association in order to conclude that Defendant understood "what an attorney is" and to determine whether he desired the presence of an attorney. Because the court is correct as to conclusion 2, and conclusion 2 is a sufficient independent basis for suppressing Defendant's statement, the merits as to conclusion 1 need not be addressed.

On the face of the statement set forth in finding 2, it appears Defendant was under the misimpression that he had to make an appointment before having an attorney present. Defendant's uncertainty of his right to an attorney was highlighted by his question to the detective, "[I]s it best?" Detective Cravahlo testified that he knew Defendant was not required to make an appointment with an attorney prior to being provided with legal services, yet did not attempt to clarify or correct Defendant's apparent misconception because Defendant "understood the point

that [Detective Cravahlo] was trying to put to him, that the attorney is free of charge." Detective Cravahlo was asked at the hearing, "Did [Defendant] ever indicate to you that he understood that an attorney could do anything for him before a trial?" Detective Cravahlo answered, "[N]o." Defendant testified that he had just turned eighteen and had not yet graduated from high school.

Considering Defendant's age, his responses, and the prosecution's heavy burden of proof, it cannot be said that the court was wrong in concluding as it did with respect to conclusion 2. Under the totality of the circumstances -- Defendant's age, his uncertainty as to whether he should have an attorney, and his apparent misapprehension of whether he might obtain counsel's presence before making an appointment -- the court was right, under the Hawai'i Constitution, in concluding in conclusion 3 that the prosecution had failed to prove Defendant knowingly or intelligently waived his right to counsel.

As to other matters Defendant raised with the court, such as enforcement of a "plea bargain" purportedly offered by Detective Cravahlo and the alleged discriminatory nature of the prosecution's "refusal to confer upon Defendant the same plea bargain deal[] given to co-defendant Lawrence," Defendant did not cross-appeal from the court's order; thus, these issues cannot be

considered on appeal. See State v. Stocker, 90 Hawai'i 85, 93 n.9, 976 P.2d 399, 410 n.9 (1999) (stating that the court "does not reach [a particular] question" where the party has not "raise[d] the issue in a cross-appeal"). Therefore,

IT IS HEREBY ORDERED that the court's August 16, 2000 order granting Defendant's motion to suppress is affirmed.

DATED: Honolulu, Hawai'i, September 24, 2001.

On the briefs:

Donn Fudo, Deputy  
Prosecuting Attorney,  
City and County of  
Honolulu, for  
plaintiff-appellant.

Andre S. Wooten, for  
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