DISSENTING OPINION OF ACOBA, J.
WITH WHOM RAMIL, J., JOINS

I believe the right result was reached by the second circuit court (the court) in suppressing the glass pipe with residue, seized by Officer Serle on February 19, 1999, and any incriminating statements made by Defendants-Appellants Kristine K. Kaleohano and Leanda M. Rawlins (collectively, Defendants), but on different grounds. I would sustain the court's order to suppress evidence for the reasons stated herein.

I.

A.

To the extent the court determined that warnings against self incrimination set forth in Miranda v. Arizona, 384 U.S. 436 (1966), should have been rendered by Officer Serle before he questioned Kaleohano about whether she had consumed alcoholic beverages, I believe the court was in error. The United States Supreme Court, in Berkemer v. McCarty, 468 U.S. 420 (1984), analogized a traffic stop to a "Terry stop," which, because of its "comparatively nonthreatening character," had never been considered by the Court to be "subject to the dictates of Miranda." Id. at 439 (referencing Terry v. Ohio, 392 U.S. 1 (1968)). In Berkemer, a motorist was stopped because his vehicle was weaving. During roadside questioning by a police officer, the defendant made incriminating statements regarding his alcohol

and drug use. He was subsequently convicted of operating a motor vehicle while under the influence of alcohol. The Court decided that the statements made by the defendant during the roadside questioning were admissible, in that the questioning was not "custodial interrogation" under Miranda. See Berkemer, 468 U.S. at 439-40.

The Court "acknowledged . . . that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle[,]" id. at 436, and that "'stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of [the Fourth] Amendment, even though the purpose of the stop is limited and the resulting detention quite brief.'" Id. at 436-37 (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)) (brackets in original). However, according to the Court, inasmuch as a traffic stop is "presumptively" temporary and brief and the circumstances of a traffic stop are not as "police dominated" as the interrogations found objectionable in Miranda, Miranda warnings were not required unless further circumstances rendered the suspect "in custody" under the federal constitution. See id. at 437-39. The Court explained that "the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Id. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

B.

In past cases, this court has also held that Miranda warnings are ordinarily not required at a traffic stop. In State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984), and State v. Kuba, 68 Haw. 184, 706 P.2d 1305 (1985), the defendants were questioned based on suspicion that they were driving under the influence of alcohol. Although not conceding that these cases are controlling, the majority uses and adopts the references to these cases. In Wyatt, warnings were not mandated prior to questioning the defendant or administering a field sobriety test. In that case, Wyatt was stopped for driving without headlights on. Upon detecting the odor of an alcoholic beverage emanating from Wyatt's car, the investigating officer proceeded to question Wyatt as to whether she had been drinking and administered a field sobriety test. This court held "the record does not reveal the intimidating or inherently coercive factors usually extant when interrogation is conducted in a custodial setting." Wyatt, 67 Haw. at 300, 687 P.2d at 550.

In Kuba, it was held that questioning which resulted in the defendant's admission that he had consumed four beers and smoked marijuana, did not rise to custodial interrogation requiring warnings. This court decided the seizure was "reasonable to investigate a traffic violation[,]" and the officer engaged in "legitimate, straightforward, and noncoercive questioning necessary to obtain information to issue a traffic citation." Kuba, 68 Haw. at 188, 706 P.2d at 1309. The

foregoing cases are on point with respect to the necessity of Miranda warnings during traffic stops for driving under the influence. I do not believe State v. Ah Loo, 94 Hawai'i 207, 10 P.3d 728 (2000), relied on by the majority, is apposite.[1] Ah Loo did not involve a traffic stop but concerned questioning of a juvenile by a police officer about underage drinking in a public place.

C.

Up to and including the point that Officer Serle questioned Kaleohano regarding her driving under the influence, Defendants were not detained beyond that period or purpose recognized as permissible in Berkemer, Kuba, and Wyatt. Accordingly, to the extent the court's ruling in conclusions of law Nos. 3 and 5 implicated questions concerning alcohol or drug use, the court was wrong in ruling that Kaleohano's Miranda rights were violated.

II.

However, after questioning Kaleohano, Officer Serle determined she was not under the influence of alcohol. Given the fact that Officer Serle was not trained in conducting field

[1] The court relied on State v. Blackshire, 10 Haw. App. 123, 861 P.2d 736 (1993), in finding that Miranda warnings were necessary prior to questioning Kaleohano about being under the influence. Blackshire is not dispositive in that that case did not involve a traffic stop. Moreover, Blackshire was overruled by Ah Loo, insofar as it equated "seizure" with "custody". See Ah Loo, 94 Hawai'i at 212, 10 P.3d at 733.

sobriety tests for drugs, he admitted he had no basis for arresting Kaleohano for driving under the influence of drugs. Thus, after Officer Serle initially questioned Kaleohano, further detention of Defendants themselves could only be justified by a reasonable suspicion that they were engaged in criminal activity. See Terry, 392 U.S. at 21; State v. Joao, 55 Haw. 601, 525 P.2d 580 (1974). Potential traffic risks could be avoided by other measures. See infra discussion Part III. Continuation of the original seizure, then, was unreasonable and illegal unless the officer could point to "specific and articulable facts" from which rational inferences could be drawn that criminal activity was afoot. Terry, 392 U.S. at 21.

In that regard, Officer Serle did not testify as to any such specific or articulable facts. In the absence of such facts, further detention would be illegal. Cf. State v. Silva, 91 Hawai‘i 80, 81, 979 P.2d 1106, 1107 (1999) (holding that police may not "prolong the detention of individuals subjected to brief, temporary investigative stops -- once such stops have failed to substantiate the reasonable suspicion that initially justified them -- solely for the purpose of performing a check for outstanding warrants"). In sum, if Officer Serle lacked reasonable suspicion to detain Defendants once the initial traffic stop was concluded, the evidence subsequently seized from Kaleohano's car and any incriminating statements made by the Defendants must be suppressed as "fruits of the poisonous tree." State v. Edwards, 96 Hawai‘i 224, 241, 30 P.3d 238, 255 (2001).

It is apparent Officer Serle was cognizant of this fact because he testified and the prosecution argued that Kaleohano was free to leave and was not detained.

III.

If the officers believed Kaleohano was impaired so as to make driving hazardous, they could have secured the car and parked it or moved it and called someone to pick up Kaleohano and her co-defendant or notified them they could make such calls. Officer Serle did not choose any of the courses outlined above, however, but requested consent to search the vehicle. The majority holds that

> in detaining Kaleohano for the purpose of determining if she was impaired and if she would consent to a search of her vehicle, Officer Serle did not exceed the scope of a temporary investigative stop premised upon circumstances that gave rise to a reasonable suspicion that Kaleohano was driving while impaired or that her vehicle might contain illicit substances.

Majority opinion at 25. It rests this ruling on "the record demonstrat[ing] that Officer Serle testified as to specific or articulable facts motivating his decision to continue questioning Kaleohano after he had excluded alcohol as a cause of impairment." Id. at 21 n.13 (emphasis added). The majority asserts that "the trial court specifically found that Officer Serle 'suspected that Ms. Kaleohano was impaired by an illegal drug.' This finding is also reflected in the trial court's COL." Majority opinion at 21 n.13. The fact that Officer Serle may have "suspected" Defendant was impaired does not mean that he

detained Defendant based on reasonable suspicion. Indeed, the court made no such finding, and in final argument the prosecution characterized such suspicion as "speculation," inasmuch as the officer was not trained to detect drug impairment and the officer "had no idea why she was impaired."

In fact, Officer Serle did not testify he detained Kaleohano for the purpose of obtaining her consent, or that such request for consent was pursuant to "a temporary investigative stop." Rather, the prosecution's theory at the suppression hearing was that the searches conducted by the officers were valid because Kaleohano voluntarily consented to them.

IV.

Officer Serle consistently maintained that, at the time he requested consent to search, Kaleohano was free to leave. Before Officer Serle asked for consent, he told Kaleohano she was not under arrest and could refuse a search and was free to leave. He asked for consent to search the vehicle because of his knowledge that she had been arrested for drug use before, a prior warrant was executed on her vehicle, her eyes were red and glassy, and there was no odor of liquor on her breath. Except for the third factor, his request was not based on any specific and articulable facts observed on that occasion. Even, however, as to the third factor, Officer Serle admitted that Defendant's driving that night "could be [because] she's too tired to operate a vehicle safely" and "weaving" "could also be a sign a person is

tired" as Defendant had indicated. Hence, it was the officer's position that at no time was Kaleohano detained for the purpose of obtaining her consent to search the vehicle, as the majority would argue. See majority opinion at 25.

In fact, the officer acknowledged that, inasmuch as he had no basis for arresting Defendant, he could not detain her. In that regard, he contended that Defendant herself could walk away from the scene and had she sought his aid in calling for a ride, he would have complied. Officer Serle's and the prosecution's stance had always been that Kaleohano was not detained, but was always free to leave. They realized what the majority fails either to comprehend or admit -- that in order to sustain the validity of a consent to search, Defendant must have voluntarily waived her right against a warrantless search, and an invalid detention would vitiate such consent.

V.

Officer Serle and the prosecution treated Kaleohano's consent as having a legal significance independent of the initial stop, as only they could have. Our jurisdiction has not, to this point, required that reasonable suspicion is necessary to sustain a request of a driver, following a traffic stop, to consent to a search of the vehicle. Cf. State v. Carty, 790 A.2d 903, 905 (N.J. 2002) ("We hold that, in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel must have a reasonable and articulable suspicion of

criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle.").

A consent to search is viewed as one of the exceptions to our constitutional requirement that a warrant be obtained prior to a search. See State v. Hanson, 97 Hawai'i 71, 76, 34 P.3d 1, 6 (2001) ("[C]onsent is an exception to and dispenses with the requirement of a warrant." (Citations omitted.)); State v. Ganal, 81 Hawai'i 358, 368, 917 P.2d 370, 380 (1996) ("[W]e have also recognized that the warrant requirement is subject to a few specifically established and well-delineated exceptions. One of the specific exceptions is a search conducted pursuant to consent." (Citations omitted.)); State v. Kearns, 75 Haw. 558, 570, 867 P.2d 903, 909 (1994) ("[W]e have recognized that the State may conduct an otherwise unconstitutional search if the person to be searched freely and voluntarily gives his or her consent." (Citation omitted.)). Officer Serle recognized this principle because, as he testified, had Defendant refused to consent to the search, he would have secured the vehicle and sought a warrant to search it.

VI.

At the suppression hearing, the prosecution never argued there was reasonable suspicion to detain Defendant for drug impairment. Rather, its position throughout was that because the officer could not make a drug arrest, Defendant herself was always free to leave, but not in the car. As the

prosecution emphasized, the officer "had speculated [Kaleohano] was impaired" but the officer "had no idea of why she was impaired" and "she could have been impaired because of what she said," that is, "she was tired." As the prosecution argued, the officer indicated that prior to asking for consent, Defendant was free to go and when he asked for consent Defendant was free to go. "When he asked for consent, he made it very clear that -- he told Miss Kalehano [sic] that she was free to go, that she could leave prior to asking her for consent, and that he would like to have consent." Indeed, according to the prosecution, Defendant was free to leave until the point the drug paraphernalia was recovered, and as the prosecution emphasized "over and over and over again [the officer] said that." As the prosecution reiterated, "[n]o one tried to detain her or tell her she had to stay." (Emphasis added.)

What the majority conjures up as a detention supported by reasonable suspicion for the purpose of obtaining Kaleohano's consent to search simply did not exist. The prosecution's position at the hearing was to the contrary and the accurate rendition of its position must be set out in full:

> [PROSECUTOR]: -- everyone keeps throwing out this phrase, probable cause for a crime. What crime?
>
> This officer has no specialized training in drug identification or people impaired by drugs. This officer did not have any evidence of drugs other than prior experience based on other people telling him that this individual had been stopped, her vehicle had been searched, and drugs had been found, and looking at an OBTS and prior evidence that drugs have been found.
>
> The court knows that is not probable cause. That if he came for a search warrant, he would not be allowed to get a search warrant, because that's not probable cause. It's

speculation. All he had was speculation. There is no probable cause.

And if he had probable cause, for what crime? No one can even identify a crime at that point because there was no probable cause. All he was doing was just following up where the information led him to. When he asked for consent, he made it very clear that -- he told Miss Kalehano [sic] that she was free to go, that she could leave prior to asking her for consent, and that he would like to have consent.

THE COURT: Let me ask you. Is not driving under the influence of drugs a crime? Or is that a traffic offense?

[PROSECUTOR]: He had no evidence of that, [Y]our Honor. He had no evidence that she was driving under the influence of drugs. He had speculation that she was impaired, and that he did not feel it was safe for her to drive, but he had no idea why she was impaired.

She could have been impaired because of what she said. She was tired. He did not know, and he did not have specialized training to identify factors of someone who's under the influence of drugs.

He had specialized training in identifying somebody under the influence of alcohol, and he determined that she was not under the influence of alcohol. That's why he did not continue with a DUI liquor investigation.

Once he spoke to her, he realized she didn't have slurred speech, she did not have alcohol on her breath, that she was not intoxicated by alcohol, and that's all he's trained to identify. He is not trained to identify drugs.

So no, [Y]our Honor, he could not have placed her under arrest for driving under the influence of drugs because he had no training and he had no understanding -- enough to place someone under arrest with that charge.

All he knew was that he felt it was unsafe for her to drive. He did not know why she [sic] was unsafe to drive and he did not have enough to charge her with any crime. The only thing that he wanted to do is make sure she did not go back on the road because of the way she was driving, and he said -- the defense is trying to say, well, she would have been just forced to walk. No. He said he would offer her a ride if necessary. He would arrange for a ride.

If she had wanted to go somewhere, he would have arranged for a ride, but he just did not want her operating the vehicle.

THE COURT: Okay.

[PROSECUTOR]: And just one point on the grand jury examination. There was some questioning of him whether or not -- what he said and whether or not it was part of whether or not when she was free to go, but at best that's impeachment testimony on whether or not he said that, and what -- but it was never explained what he meant by that point.

But he repeatedly told this court on direct and cross-examination of both defense counsels [sic] that defendant was free to go until the point that the pipe was recovered. Over and over and over again he said that.

. . . .

[PROSECUTOR]: . . . She's free to go. He told her she was free to go. No one tried to detain her or tell her she had to stay. She was free to leave. She gave no indication that she wanted to leave.

(Emphases added.) Thus, the prosecution's representations at the suppression hearing were that (1) the officer had no probable cause to arrest for any crime despite information of a prior drug seizure from the vehicle, (2) all the officer had with respect to whether drugs were present in the vehicle was "speculation," (3) based on what the officer knew, "he would not be allowed to get a search warrant," (4) when he asked for consent, Kaleohano was free to leave "prior to" the request and was "free to go," (5) the officer "had no evidence [Kaleohano] was driving under the influence of drugs" and only had "speculation," (6) indeed the officer had "no idea why [Kaleohano] was impaired" and it could be, as Kaleohano represented, that "she was tired," (7) the officer did not know whether Kaleohano was under the influence of drugs, and he did not have "specialized training" for such a determination, (8) although he "felt it was unsafe for her to drive," he did "not know why she [sic] was unsafe to drive," (9) the officer testified "over and over and over again" that Kaleohano was free to leave, (10) "no one tried to detain her or tell her she had to stay." Plainly, "speculation" does not amount to "reasonable suspicion."[2]

---

[2] The majority characterizes as unsupported my point that the prosecution did not argue that there was reasonable suspicion to detain Defendant for drug impairment. See majority opinion at 21 n.13. This flies in the face of the prosecution's own arguments, evidenced in the lengthy passage from the transcript of proceedings outlined supra. Indeed, shortly after stating that Officer Serle believed there may be drugs in the vehicle, the prosecution argued that "there is no evidence of drugs[:]"

> THE COURT: But at that point when -- even at that point when the consent was obtained, was she not already asked whether she had anything to drink?

(continued...)

VII.

However the prosecution may characterize its position on appeal, it is bound by the theory it propounded before the trial court at the motion to suppress. The prosecution may not argue on appeal a different theory than it argued before the trial court as to why evidence should not be suppressed. See State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (holding that, on appeal, when seeking reversal of a court's granting of a motion to suppress, the State waived the argument that the exigent circumstances and good faith exceptions to the warrant requirement applied because "the State had never

---

[2](...continued)

> [THE PROSECUTOR]: She was asked before he asked for consent for the vehicle.
> THE COURT: She said no.
> [THE PROSECUTOR]: That's correct.
> THE COURT: So these incidents of these facts -- she did not have anything to drink and she said no, but even at that point was not that question incriminating in nature because the officer knew that she had a previous drug incident, her eyes were red, watery, driving was impaired? Had she not at that point become the focus of the investigation?
> [THE PROSECUTOR]: At that point I don't -- when he asked her that question, he was just doing -- performing a traffic stop to make a determination whether she was capable of driving --
> THE COURT: I see.
> [THE PROSECUTOR]: -- the vehicle. I don't think -- there is no evidence of drugs -- no sufficient evidence to charge her with any drugs at that point anyway[.]

(Emphases added.) The reality is that the prosecution believed it had to argue, in opposition to the motion to suppress Defendant's statements, that Defendant was not the focus of any investigation at the time Officer Serle asked her questions. See State v. Kauhi, 86 Hawai'i 195, 204, 948 P.2d 1036, 1045 (1997) ("While focus of the investigation upon the defendant, standing alone, will not trigger the application of the Miranda rule, it is an important factor in determining whether the defendant was subjected to custodial interrogation." (Quoting State v. Melemai, 64 Haw. 479, 481, 643 P.2d 541, 544 (1982).)). It would have obviously been inconsistent for the prosecution to argue on the one hand that Defendant was not the focus of an investigation, and to contend, on the other hand, that she was detained because there was reasonable suspicion to believe criminal activity was afoot.

presented the issue[s] . . . to the trial court" and that "[i]t is a generally accepted rule that issues not raised at the trial level will not be considered on appeal" (citations omitted)).

The majority claims that "the record is replete with indications that all of the parties, either at the initial suppression hearing or at the hearing on the motion for reconsideration, attempted to have the court consider whether Officer Serle's continued detention of Kaleohano was supported by reasonable suspicion." Majority opinion at 9 n.6. However, as previously demonstrated, the prosecution did not argue that Officer Serle had reasonable suspicion to detain Defendant, and the record is "replete" that the prosecution's fundamental stance was otherwise. See supra pages 10-12 and note 2. The prosecution's position at the suppression hearing was (1) that the officer had only "speculation" as to whether Kaleohano was under the influence of drugs and as to whether drugs were in the vehicle, (2) that Kaleohano was not detained, and (3) that the searches were validated by her consent.

VIII.

A warrantless search must be justified by some exception to the warrant requirement. See State v. Jenkins, 93 Hawai'i 87, 102, 997 P.2d 13, 28 (2000) ("Any warrantless search of a constitutionally protected area is presumptively unreasonable unless there is both probable cause and a legally recognized exception to the warrant requirement." (Internal

quotation marks, brackets, and citations omitted.)). In the case of the consent exception, the prosecution bears the burden of establishing that the consent was freely and voluntarily given. See State v. Trainor, 83 Hawai‘i 250, 261, 925 P.2d 818, 829 (1996) ("'It is well-settled that when the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving . . . that the consent was, in fact, freely and voluntarily given.'" (Quoting State v. Patterson, 58 Haw. 462, 468, 571 P.2d 745, 749 (1977).) (Ellipsis points in original.). "[W]hether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." State v. Merjil, 65 Haw. 601, 605-06, 655 P.2d 864, 868 (1982) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (quotation marks omitted).

The prosecution's theory at trial was that Defendant voluntarily consented to the search. The majority would remand the case because "the trial court made no specific findings as to voluntariness." Majority opinion at 26. However, the burden was on the prosecution to prove Kaleohano voluntarily consented to the search. The prosecution's theory was based on consent and, thus, at the hearing and in argument it sought to establish that consent was freely and voluntarily given. Accordingly, the prosecution adduced the evidence it believed supported its case. It conceded that the evidence adduced did not rest on reasonable suspicion because all the officer had was "speculation" and in

the officer's view, no detention took place. Kaleohano did not testify. Nothing more would be gained by a remand except to afford the prosecution the proverbial "second bite at the apple," inasmuch as it must carry the burden of proof.

IX.

A.

In my view, the record is sufficient upon which to rule. I believe the prosecution failed to carry its burden of proving that Kaleohano's consent was freely and voluntarily given. Although Officer Serle indicated to Kaleohano that she could refuse the search and was free to go, he advised her that if she did not consent to the search "the standard procedure was that [the police were] obligated to apply for a search warrant." According to the officer, after Kaleohano gave her oral consent, he had her remain in her vehicle until Officer Manaois arrived and she could sign a written consent form. It was after 11 o'clock at night. Not many cars were on the road. While the officer told Kaleohano she was free to go, he had decided she would not be allowed to leave in her car. The officer testified he would not have stopped Kaleohano if she walked away.

He admitted that although it was after 11 p.m., he would be willing to allow Kaleohano to walk on the side of the road by herself. He would allow Kaleohano to do that to call for a ride. He would not stop Kaleohano, although he would not advise it. He did not know where Kaleohano lived. There is no

indication in the record that these matters were communicated to Kaleohano. The officer testified that if Kaleohano wanted to leave and wanted help to find a ride he would have helped her. There is no indication in the record that this was told to Kaleohano.

B.

The question is whether a reasonable person under these circumstances would believe he or she was free to leave. See State v. Kauhi, 86 Hawai‘i 195, 203, 948 P.2d 1036, 1044 (1997) ("Generally, a person is 'seized' if, 'from an objective standpoint and given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave.'" (Quoting Trainor, 83 Hawai‘i at 256, 925 P.2d at 824.)); Kearns, 75 Haw. at 566, 867 P.2d at 907 ("[A] person is seized if, given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave." (Citation omitted.)). An objective view of the record indicates that, although Officer Serle told Kaleohano she was free to go, she was told that if she refused consent to the search, the standard procedure was to obtain a search warrant for her vehicle.

While Kaleohano may have been able to leave on foot, she was informed she could not drive away. It was after 11 p.m. and there were few cars on the road. Although Officer Serle harbored the thought that she could walk alongside of the road on

the way to call for a ride, he would not have advised such a course. If this were apparent to Officer Serle, it is not unreasonable to infer that the inadvisability of this option was also manifest to Kaleohano. If he was asked, the officer would have helped her get a ride, but there is no indication this was communicated to Kaleohano. Objectively considering the circumstances from a reasonable person's viewpoint in Kaleohano's position, there was no realistic way for her to leave. That option was not a viable one. A reasonable person would not believe that he or she was free to leave under the foregoing circumstances. Therefore, the prosecution failed to prove that Kaleohano's consent was freely and voluntarily given.

X.

The majority contends that this opinion "attempts to usurp the role of the fact finder." Majority opinion at 26. However, 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 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) (other citation omitted); see also State v. Rapoza, 95 Hawai'i 321, 323, 22 P.3d 968, 970 (2001) ("An appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance."); State v. Pinero, 75 Haw. 282, 290, 859 P.2d 1369, 1374 (1993) (stating that "where decision below was correct, it may be

affirmed by appellate court even though [trial court] gave wrong reason for its action" (citing State v. Taniguchi, 72 Haw. 235, 240, 815 P.2d 24, 26 (1991))); State v. Rodriguez, 68 Haw. 124, 134, 706 P.2d 1293, 1300 (1985) ("[W]here the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."). The record in the instant case suffices to affirm the court's order.

Remanding this case will not accomplish anything more than what we can achieve at this level of the proceedings. I take judicial notice of the fact that The Honorable Artemio Baxa, the judge in this case, retired, effective December 28, 2001. Thus, remanding this case for a determination of whether Defendant's consent was voluntary would accomplish nothing. If on remand any judge were to consider the record as it now stands, he or she would not be in any better position than we are now to address the issues. Therefore, this court would not "usurp the role of the fact finder[,]" majority opinion at 26, in rendering a decision on the voluntariness of Defendant's consent.

XI.

Accordingly, I would sustain the court's order but on the grounds set forth herein.