

***** NOT FOR PUBLICATION *****

NO. 24673

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant,

vs.

GREGG K. HUMEL, Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1129)

SUMMARY DISPOSITION ORDER

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

The plaintiff-appellant State of Hawaii [hereinafter "the prosecution"] appeals from the findings of fact, conclusions of law and order of the first circuit court, the Honorable Karen S.S. Ahn presiding, filed on October 30, 2001, granting the defendant-appellee Gregg K. Humel's motion to suppress items of evidence [hereinafter, "motion to suppress"]. Specifically, the prosecution contends (1) that the circuit court erred in finding that the hospital security guard, who conducted a search of Humel's fanny pack, was an agent of the police, (2) that, because the hospital security guard was not an agent of the police, the circuit court erred in concluding that there was state action, and, therefore, (3) that the circuit court erred in granting Humel's motion to suppress as a matter of law.

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, we affirm the circuit court's findings of fact, conclusions of law, and order

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granting defendant's motion to suppress items of evidence.

Searches by private individuals can invoke state and federal constitutional protections if such searches are deemed governmental in nature. State v. Locquiao, 100 Hawai'i 195, 204, 58 P.3d 1242, 1251 (2002). To determine whether government involvement is significant enough to render a private individual an agent of the state, courts must examine the totality of the circumstances. Id. at 204, 58 P.3d 1251. One factor in the totality-of-the-circumstances analysis is whether a police officer has provided direction to the private actor or is involved in the formulation of a plan later carried out by the private actor. State v. Kahoonei, 83 Hawai'i 124, 127-31, 925 P.2d 294, 297-302 (1996). Because the record supports the circuit court's finding that Honolulu Police Department (HPD) Officer Ernest Robello encouraged security officer Anthony Pascual's search of Humel's belongings, the circuit court's findings of fact were not clearly erroneous.

Moreover, one of the most important factors in the totality-of-the-circumstances inquiry is whether police stood by while a private individual "engaged in a search that the police would otherwise need a warrant to effectuate." Kahoonei, 83 Hawai'i at 131-32, 925 P.2d 301-02. When police both know that the illegal search will take place and fail to protect a defendant's rights against such a search, government involvement is significant enough to render a private actor an instrumentality of the state. Id. at 132, 925 P.2d at 302. Inasmuch as there was ample evidence in the record that Officer Robello knew that Pascual would search Humel's fanny pack, the circuit court's finding of fact to that effect was not clearly erroneous. Thus, given the totality of the circumstances (i.e.,

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Officer Robello's encouragement of Pascual, as well as his knowledge of the search and failure to prevent it), the circuit court did not err in granting Humel's motion to suppress items of evidence. Therefore,

IT IS HEREBY ORDERED that the circuit court's findings of fact, conclusions of law, and order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, September 26, 2003.

On the briefs:

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