

DISSENTING OPINION BY NAKAYAMA, J.
WITH WHOM MOON, C.J., JOINS

I respectfully dissent from the majority's holding that Cuntapay had a reasonable expectation of privacy in the homedweller's washroom.

Article I, section 7 of the Hawai'i Constitution protects persons against unreasonable searches and seizures. To determine if a person's expectation of privacy is reasonable, this court adopted the two-part test of Katz v. United States, 389 U.S. 347 (1967). State v. Bonnell, 75 Haw. 124, 139, 856 P.2d 1265, 1274 (1993). "First, one must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable." Id. (citations and internal quotations omitted). In a motion to suppress, the proponent of the motion bears this burden by a preponderance of the evidence. State v. Taua, 98 Hawai'i 426, 434, 49 P.3d 1227, 1235 (2002); State v. Edwards, 96 Hawai'i 224, 232, 30 P.3d 238, 246 (2001).

Even if Cuntapay exhibited an actual, subjective expectation of privacy by hiding the key holder behind the washing machine, he failed to establish that his subjective expectation was one that society would recognize as objectively reasonable. During the hearing on his motion to suppress, Cuntapay testified as follows:

[Prosecution:] Had you been to that residence before?
[Cuntapay:] Yes, but not many times.
[Prosecution:] How many times.
[Cuntapay:] Once a week, sometimes twice.
[Prosecution:] Always for the same thing, to play
cards?
[Cuntapay:] Yes, and play dart.
[Prosecution:] Cards and darts. How about to smoke
batu?

[Cuntapay:] I admit sometimes.

Relying on this testimony, the majority concludes that Cuntapay held the status of a guest and, thus, was "entitled to share in his host's security against unreasonable searches and seizures of the dwelling he was visiting." I must disagree.

Cuntapay's testimony was, at best, ambiguous, and does not establish an objective, reasonable expectation of privacy beyond the homedweller's garage. The record is devoid of any evidence that Cuntapay was a friend, relative or business associate of the homedweller, or that he was invited by the homedweller and, thus, we are left to guess as to Cuntapay's relationship with the homedweller. Moreover, the record lacks any evidence that Cuntapay was allowed to move beyond the garage into other areas of the homedweller's house, that he frequented the washroom, or that he previously stored his personal belongings in the washroom. Society would not accept as reasonable, that a person physically limited to a homedweller's garage, without more, should expect privacy in all parts of the homedweller's house. Based on the record, Cuntapay failed to meet the second prong of the Katz test and, thus, failed to establish that he had a reasonable expectation of privacy in the homedweller's washroom. As such, I would dismiss the application for writ of certiorari as improvidently granted.