*****FOR PUBLICATION*****

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI, Plaintiff-Appellee

vs.

JASMINE ELENEKI, Defendant-Appellant

NO. 25167

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 01-1-0223)

DECEMBER 22, 2004

MOON, C.J, LEVINSON, ACOBA, AND DUFFY, JJ.;
WITH NAKAYAMA, J., CONCURRING SEPARATELY AND DISSENTING

OPINION OF THE COURT BY ACOBA, J.

We hold that the police stop of Defendant-Appellant Jasmine Eleneki (Eleneki) was unlawful under Article I, Section 7[1] of the Hawaiʻi State Constitution, and therefore everything

[1] Article I, section 7 of the Hawaiʻi State Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Similarly, the Fourth Amendment of the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons

(continued...)

seized thereafter from her vehicle should have been suppressed. State v. Bonds, 59 Haw. 130, 138, 577 P.2d 781, 787 (1978) (stating where "[t]he stop of the vehicle constituted an unreasonable seizure[,]. . . the evidence so obtained was inadmissible). Because such evidence was illegally seized, we vacate the April 18, 2002 judgment of conviction of the circuit court of the second circuit[2] (the court) and remand the case for disposition in accordance with this opinion.

I.

On May 9, 2001, Plaintiff-Appellee State of Hawai'i (the prosecution) filed a five-count complaint in the court charging Eleneki with drug related offenses. On August 15, 2001, Eleneki filed a motion to suppress evidence recovered from Eleneki's vehicle after the stop. On November 13, 2001, and December 13, 2001, the court conducted hearings on the motion to suppress. On February 7, 2002, the court denied the motion to suppress and issued its "Findings of Fact ("findings"), Conclusions of Law ("conclusions"), and Order Denying [Eleneki's] Motion to Suppress Statements and Evidence ("order")." The court entered the following pertinent and unchallenged findings:

> 1. All events and occurrences giving rise to the charges contained in the indictments herein occurred in the County of Maui, State of Hawaii, and venue is properly in

[1](...continued)
or things to be seized.

In applying Article I, Section 7, we may consider federal caselaw.

[2] The Honorable Shackley F. Raffetto presided.

the above-entitled [c]ourt;

2. This [c]ourt has jurisdiction over Defendant and this case and cause;

3. On April 30, 2001, at about midday, Sergeant Anthony Poplardo and other officers of the MPD vice narcotics division executed two search warrants on Kihei residences located in the Uwapo Road Apartments.

4. The tenant of one of those apartments, Scott Chong ["Chong"], was arrested for the offense of Promoting a Dangerous Drug in the Third Degree, methamphetamine, as was an occupant of the second apartment that was also the subject premises of a search warrant. That the occupants of both apartments were working in conjunction to distribute methamphetamine;

5. Sergeant Poplardo spoke with . . . Chong and the other individual arrested at the Wailuku police station;

6. Sergeant Poplardo knew . . . Chong for over one year. Chong provided information on numerous occasions to both Sergeant Poplardo and other vice narcotics officers, and was considered a reliable informant;

. . . .

8. Chong and the other individual arrested at the Uwapo Apartments on April 30, 2001, both informed Sergeant Poplardo that [Eleneki] was a supplier of Crystal Methamphetamine and cocaine in the Kihei area;

. . . .

10. That on the evening of April 30, 2001, after speaking with Sergeant Poplardo, . . . Chong was released from police custody. Chong was picked up by a female in a white Chrysler PT Cruiser, and Sergeant Poplardo recognized the driver of the PT Cruiser to be the Defendant;

11. On the morning of May 1, 2001, Sergeants Anthony Poplardo and Chris Navarro were looking for . . . Chong. The purpose of seeking . . . Chong was to speak to him regarding the distribution of drugs and to serve him with an outstanding arrest warrant . . .;

12. That the officers were in an unmarked police car when they saw the white Chrysler PT Cruiser, License Number MGH 494 in the parking lot at 1900 Main Street, Wailuku, near the Minute Stop store;

13. That Sergeant Poplardo could see that [Eleneki] was the driver of the car, and that there were two other occupants in the car; however, he was unsure if . . . Chong was one of the passengers;

14. Sergeant Poplardo followed the vehicle east on Main Street, then on to Kaahumanu Avenue, then onto Wahine Pio Drive, then stopped the car using blue light and siren. The car was stopped near Keopulani Park at approximately 11:15 a.m. or 11:20 a.m.;

. . .

25. At approximately 11:30 a.m., Officer William Gannon arrived with his drug detection dog "BEN", and Sergeant Poplardo turned the investigation over to him;

26. "BEN" alerted to the vehicle, and Officer Gannon then seized the vehicle and had it towed to the Wailuku Police Station;

27. That Sergeant Poplardo and Officer Gannon obtained a search warrant, Number 2001-48, the subject

> premises being the white Chrysler PT Cruiser, Hawaii License number MGH 494;
>
> 28. That on May 1, 2001, at 6:50 p.m., the search warrant was executed, and [certain] items were recovered, and photographs of same were entered into evidence for purposes of th[e] hearing[.]

(Emphases added.)

Based on its findings, the court issued the following relevant conclusion:

> 4. The [c]ourt finds that with respect to the traffic stop, Sergeant Poplardo clearly possessed information that would cause a person of reasonable caution to believe that criminal activity was afoot and that the action taken was appropriate. Taking into account Sergeant Poplardo's knowledge that Scott Chong was a user of drugs who associated with Defendant, information provided, that Defendant was a known supplier of drugs, and also the existence of an outstanding arrest warrant for Scott Chong, along with other factors, a reasonable person would clearly suspect that the criminal activity was afoot, and the appropriate action was to conduct an investigative stop of the vehicle.

(Emphasis added.)

On February 19, 2002, Eleneki entered a conditional plea of no contest to Counts I through V and reserved her right to seek appellate review of the motion to suppress. Based on the court's findings, the evidence recovered was material proof of the offenses for which she was convicted. On April 18, 2002, judgment was entered and Defendant was convicted as charged of (1) promoting a dangerous drug in the first degree, Hawai‘i Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 2002) (Count I); (2) prohibited acts related to drug paraphernalia, HRS § 329-43.5(a) (1993) (Counts II and IV); (3) promoting a dangerous drug in the second degree, HRS § 712-1242(1)(b)(i) (1993) (Count III); and (4) promoting a detrimental drug in the third degree, HRS § 712-1249(1) (1993). She was sentenced to concurrent terms of

incarceration. On June 17, 2002, Eleneki filed a notice of appeal challenging the April 18, 2002 judgment.

On appeal, Defendant challenges, inter alia, the court's conclusion 4 that "with respect to the traffic stop, Sergeant Poplardo clearly possessed information that would cause a person of reasonable caution to believe that criminal activity was afoot[.]" "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. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997) (internal quotation marks and citation omitted).

II.

It is axiomatic that "stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Hawai'i Constitution, even though the purpose of the stop is limited and the resulting detention quite brief." State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (citations omitted). A warrantless seizure is presumed invalid "unless and until the prosecution proves that the . . . seizure falls within a well-recognized and narrowly defined exception to the warrant requirement." State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717. See also State v. Barnes, 58 Haw. 333, 335-37, 568 P.2d 1207, 1209-11 (1977) (holding that warrantless arrest of a defendant, who had been in contact minutes before with an alleged drug supplier, was a valid stop

pursuant to the exception recognized in Terry v. Ohio, 392 U.S. 1 (1968)).

"In determining the reasonableness of wholly discretionary automobile stops, this court has repeatedly applied the standard set forth in Terry." Powell, 61 Haw. at 321, 603 P.2d at 147-48. The "narrowly defined exception to the warrant requirement" recognized by Prendergast is that "a police officer may stop an automobile and detain its occupants if that officer has a 'reasonable suspicion' that the person stopped was engaged in criminal conduct." Prendergast, 103 Hawai'i at 454, 83 P.3d at 717 (emphasis added) (citing State v. Bolosan, 78 Hawai'i 86, 94, 890 P.2d 673, 681 (1995)).

In that connection, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. (internal quotation marks and citations omitted); see also Powell, 61 Haw. at 321, 603 P.2d at 148 (quoting Barnes, 58 Haw. at 338, 568 P.2d at 1211). A seizure or stop based on "reasonable suspicion," then, is tied to "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity[,]" United State v. Cortez, 449 U.S. 411, 417 (1981), or "is wanted for past criminal conduct[,]" id. at 417 n.2.

III.

In this case, as mentioned, the court stated in conclusion 4 that, "with respect to the traffic stop, Sergeant

Poplardo clearly possessed information that would cause a person of reasonable caution to believe that criminal activity was afoot." Contrary to the court's conclusion, there were no specific facts articulated by the police that would warrant a person of reasonable caution to believe that criminal activity was afoot. None of the findings indicate that the police observed any criminal activity concerning the vehicle prior to the stop. None of the officers testified that criminal activity had occurred with respect to the vehicle prior to the stop. Hence, the court was wrong in concluding that the stop was justified.[3]

On appeal, in contrast to the court's conclusion 4, the prosecution argues that the stop was proper "in furtherance of [Sergeant Poplardo's] investigation to find Mr. Chong to execute a bench warrant."[4] (Emphasis added.) Assuming arguendo this was

[3] The dissenting and concurring opinion [hereinafter referred to as dissent or dissenting opinion] acknowledges that "[t]he present stop arises in circumstances factually distinguishable from those to which 'reasonable suspicion' has traditionally applied," dissenting opinion at 11, and concludes that Eleneki's seizure was "not founded upon the pressing law enforcement need to ferret out imminent or ongoing crime[.]" Dissenting opinion at 12-13.

[4] The court elicited testimony that the police were attempting to serve a warrant:

> [DPA]: Okay. And at that time were you looking for someone?
> [Sergeant Poplardo]: Yes, I was trying to relocate Scott Chong.
> Q: And for what purpose?
> A: We needed to talk to him some more, and he had an outstanding bench warrant that was not realized the day before.
> [Q]: Now, on April 30th, had you received information regarding Jasmine Eleneki?
> The Court: Excuse me. You mean you were looking for him to arrest him on the warrant.

(continued...)

a valid basis for a stop, no reasonable suspicion that Chong occupied the vehicle supported the stop. The record and the inferences to be drawn therefrom indicate that prior to the stop (1) on the evening of April 30, 2001, Chong was picked up from the station by Eleneki in her vehicle; (2) on May 1, 2001, the next day, police officers observed Eleneki's vehicle at a convenience store; (3) the officers could not identify the vehicle's other two occupants; (4) thereafter, the police followed Eleneki's car; and (5) the officers stopped the car at approximately 11:15 or 11:20 A.M.

The stop thus rested on the slender fact that Chong had been picked up by Eleneki in her vehicle at the police station on the previous night. That fact would not lead a person of reason, exercising caution, to draw a rational inference that at 11:15 or 11:20 A.M., the next day, Chong would be an occupant of Eleneki's vehicle as it was parked at a convenience store. That Chong had been arrested for promoting a dangerous drug in the third degree and had informed Sergeant Poplardo that Eleneki was a supplier of drugs, did not constitute facts from which it reasonably could be inferred that Chong would be found in Eleneki's vehicle at the time of the stop. Viewed objectively, no facts were articulated by the police to indicate Chong would remain in Eleneki's vehicle

---

[4](...continued)

[Sergeant Poplardo]: Yes.
The Court: Okay.
[DPA]: Thank you, your Honor.

(Emphases added).

from April 30, 2001, until nearly noon on the next day or that he would re-enter the vehicle before that time.

Indeed, according to the evidence received at the hearing, Sergeant Poplardo's "main intention in pulling [Eleneki] over was to inquire [as to] where Scott Chong was." (Emphasis added.) See infra note 6. The police did not testify that they believed Chong was in the vehicle because there was no basis to believe that Chong was in the car.

> [DPA]: And with respect to the occupant of the car when you stopped the white Chrysler PT Cruiser, do you know whether or not Scott Chong was seated in that car?
> [Sergeant Poplardo]: No, I didn't know. I was hoping he would be.
> [DPA]: And prior to walking up to the car, did you know he was in the car?
> [Sergeant Poplardo]: No.

(Emphases added.) Sergeant Poplardo's testimony that he saw "two passengers whose faces were obscured by the car's tinted windows," would not support an inference that Chong was one of the occupants. To the contrary, it confirms that the police had no specific or articulable basis to believe that Chong was in the vehicle.[5] Hence, the police lacked reasonable suspicion to stop Eleneki's vehicle.[6]

---

[5] The following testimony was elicited:

> [DPA]: Could you see any other occupants in the car?
> [Sergeant Poplardo]: I could tell there were two other occupants, but due to the tint, I couldn't recognize them.
> Q: Could you tell whether they were male or female?
> [Sergeant Poplado]: I thought they were both males.

(Emphasis added.)

[6] Our determination that the police did not have reasonable suspicion to stop the vehicle in this case, see dissenting opinion at 16-17 n.14, does not hinge upon Sergeant Poplardo's subjective reason for stopping Eleneki, but rather, upon the utter lack of any "objective manifestation" that (continued...)

IV.

The dissent characterizes the stop as being "'the essence of good police work'" dissenting opinion at 20, and that officers should be "free to act upon their 'common sense judgments.'" Id. (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)). In that regard, the purpose of the stop here was to "relocate" Chong "to talk to him some more" and to arrest him on the bench warrant, see supra note 4. Chong's arrest warrant was dated April 12, 2001. Arguably, good police work should have led the police to execute the warrant after they had arrested Chong and had him in their custody on April 30, 2001, or to search for Chong at his own home, once the police became aware of the outstanding bench warrant. See People v. Spencer, 646 N.E.2d 785, 789 (N.Y. 1995) (holding that automobile stop of a defendant, who police wanted to question regarding a suspect, was unreasonable, especially in light of the "fact that the officers

[6](...continued)
Eleneki was, or was about to be, "engaged in criminal activity." Cortez, 449 U.S. at 417. The sergeant's testimony merely confirms that no specific articulable basis existed to justify stopping Eleneki. Therefore, the string of cases cited by the dissent for the proposition that "subjective motives, intentions, and proclivities" of the officers should "play no role" is inapposite. Dissenting opinion at 16 n.14.

Moreover, the dissent's reliance upon Whren v. United States, 517 U.S. 806 (1996), is misplaced. In Whren, the defendants were charged with various federal drug violations after the police stopped their vehicle and observed bags of crack cocaine in the defendant passenger's hands. Id. at 808-09. The defendants challenged the legality of the stop, asserting that even though the officer had probable cause to believe the traffic code had been violated, see id. at 810, the officer's ground for approaching the vehicle was pretextual. Id. at 809. Applying the United States Constitution, the Supreme Court "flatly dismissed the idea that an ulterior motive might serve to strip [police officers] of their legal justification" and held that "the constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved." Id. at 812-13 (emphasis added). Here, in contrast to the facts in Whren, no such objective basis for the stop existed.

had not even searched for the suspect at his own home when they decided to stop defendant . . . [because defendant] was a possible or even probable source of information regarding the suspect's whereabouts" (emphasis in original)).

Additionally, an officer's "common sense judgments" must still comport with the Terry reasonable suspicion test. In Cortez, the United States Supreme Court required that the police "assessment of the whole picture must yield a particularized suspicion . . . . based upon all the circumstances." 449 U.S. at 418. The border agents in Cortez stopped a pickup truck (1) seen earlier in the evening; (2) in an area known as a crossing point for illegal aliens; and (3) as part of a two-month investigation of a particular pattern of illegal smuggling operations resulting in specific clues including shoeprint tracks left by a particular smuggler. Id. at 419. Thus, the court held that the stop was justified because "based upon the whole picture, [the officers], as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." Id. at 421-22. In this instance, however, the officers were unable to articulate any objective observations that placed Chong in the car at the time of the stop. Indeed, as mentioned previously, the police officers did not testify they believed Chong was in the vehicle or that they had observed him in the car prior to the stop.

V.

We also note that the "main" and "initial" reason for

the stop proffered by the police would not authorize the stop.[7] Where a stop is made only for the purpose of questioning the defendant about a third person, "the narrow exception of Terry, which allows investigative stops on grounds short of probable cause cannot be stretched so far as to allow detentive stops for generalized criminal inquiries." United States v. Ward, 488 F.2d 162, 169-70 (9th Cir. 1973) (en banc). See also Spencer, 646 N.E.2d at 789 (stating "that 'the Fourth Amendment does not permit the stopping of potential witnesses to the same extent those suspected of crime'") (quoting 3 Lafave, Search and Seizure § 9.2[b] at 354 [2d ed.]) and Hawkins v. United States, 663 A.2d 1221, 1226-27 (D.C. 1995) (recognizing the requirement of

---

[7] Sergeant Poplardo testified that his "main" and "initial" intention in stopping Eleneki was as follows:

> [Defense Attorney]: And your testimony this morning is that you pulled [Eleneki] over because you – the intention was for further investigation; is that correct?
> [Sergeant Poplardo]: Yes.
> Q: Okay. And this further investigation would be of the Scott Chong case or of the Jasmine Eleneki case?
> A: Scott Chong.
> Q: Okay. So your main intention in pulling [Eleneki] over was to inquire where Scott Chong was?
> A: Yes.
> . . . .
> Q: But the only intention you had in pulling her over was to find out where Scott Ching was; right?
> A: That was the initial reason for pulling her over, yes.
> Q: The initial - -
> A: Yes.
> Q: - - reason?
> A: Yes.

(Emphases added.)

The dissent concedes a stop for this reason would be invalid, stating its disagreement "with the State's rather novel contention that an investigative stop is reasonable, so long as the individual targeted is viewed by law enforcement at the time of the stop as a potential source of information concerning a non-exigent collateral law enforcement matter." Dissenting opinion at 23.

"articulable suspicion" for "seizures initiated for investigatory purpose[s] [that] focus . . . on suspects" and that the presence of "exigent circumstances" justifies police stopping witnesses).

Such a generalized detentive stop would not be valid because: (1) "founded suspicion that criminal activity is afoot is a minimum requirement for any lawful detentive stop," Ward, 488 F.2d at 169; (2) there are no crimes "afoot" with "no exigent circumstances warranting the extreme nature of a vehicular stop by a siren on a public street," id.; and (3) "the stop [is] not made pursuant to [an officer's] founded suspicion that the detainee [is] involved or about to be involved in criminal activity." Id. (emphasis in original). See also Hawkins, 663 A.2d at 1226 (stating that "the police are justified in stopping witnesses only where exigent circumstances are present, such as where a crime has recently been reported") (emphasis in original), and Spencer, 646 N.E.2d at 790 (holding that traffic stop of defendant is not justified where "there was no genuine need for so immediate and intrusive an action").

VI.

In light of the foregoing, there is no legitimate basis for creating a new exception to the warrant requirement as suggested by the dissent.[8] The dissent characterizes this new

[8] While we understand the dissent's position, we do not "announce[]" a "constitutional rule" as the dissent maintains, dissenting opinion at 1, inasmuch as (1) case law, as discussed herein, covers the circumstances and the evidence adduced in this particular case; and (2) based on such evidence, there was no "objective reason," see dissenting opinion at 1, to warrant the traffic stop of Eleneki. Further, to clarify, what "stretches the narrowly (continued...)

exception as one where "officers briefly stop a moving vehicle to investigate their reasonable suspicion that the person named in the warrant is among its occupants."[9] Dissenting opinion at 15. The dissent cites no authorities for the proposition that the stop here is authorized by the "public interests" it identifies as: (1) "the prompt apprehension of persons who disrespect the constraints upon personal liberty attendant to their probationary release"; (2) "public pursuit of rehabilitation"; and (3) "the collective desire to foster an environment of effective crime prevention [by] retaking custody of a felon who – by breaching the terms of his probation – signals his possible return to criminal behavior." Dissenting opinion at 14-15. This suggested expansion of the Terry rule "stretches the narrowly defined exception [to the warrant requirement] to cover the situation." State v. Ortiz, 67 Haw. 181, 193, 683 P.2d 822, 830 (1984) (Nakamura, J., dissenting, Wakatsuki, J., joining); see also id. at 191, 683 P.2d at 829 (explaining that the ICA "strained to place the search and seizure [of a defendant's knapsack] beyond the reach of the constitutional protections by fashioning a novel 'plain feel' rule from 'the limitations and rationale of the

[8](...continued)
defined exception to the warrant requirement," see dissenting opinion at 1, n.1, is the proposition that "public interests" authorize a traffic stop of a third person, without "suspicion that criminal activity is afoot," Ward, 488 F.2d at 169, in order to locate a probation violator who is not, under an objective view of the facts, an occupant of that vehicle.

[9] The dissent acknowledges that "private interests implicated by a vehicular stop to ascertain an obscured passenger's identity are no less significant than those infringed by other temporary vehicular detentions." Dissenting opinion at 15 n.12.

plain view rule'").

In this case (1) the stop was made after the police received information the night before that Eleneki was distributing drugs; (2) the officers did not identify the other occupants of Eleneki's car before the stop; (3) the officers detained Eleneki even after determining that Chong was not in the vehicle; (4) the detention was for the purpose of permitting a canine search for drugs unrelated to the apprehension of Chong, but related to information of drug activity the police had obtained over a two year period; and (5) the police had no search warrant for the vehicle. The expansion of Terry as proposed would permit the seizure of persons without reasonable suspicion, probable cause, or a warrant, as occurred here.

VII.

Additionally, another exception to the warrant requirement is not warranted inasmuch as the facts in this case exemplify circumstances that have already been considered under the existing Terry rule. The Supreme Court of Nebraska in State v. Colgrove, 253 N.W.2d 20 (1977), decided a case with strikingly similar facts to the one before us. In Colgrove, two officers were attempting to locate two female suspects, for both of whom the officers had outstanding arrest warrants. Id. at 21. The officers stopped defendant's car on their belief that the suspects might be in defendant's car. Id. at 22. The Colgrove court noted the following undisputed facts:

> "When the officers stopped their own cars they became aware that there were three males in the car and no women. . . . The officers acknowledged that they had observed no violations of law by the driver of the car or its occupants. Neither the car nor its occupants had done anything to arouse the suspicion of the officers. Neither were the officers investigating any crime which would give them occasion to make an investigatory stop of [defendant's] vehicle."

Id. (emphasis added). However, the officers persisted in checking the identity of the occupants of the car with the purpose of "determin[ing] that the occupants of the car were not the [two female suspects]." Id.

In beginning its analysis, the Nebraska supreme court stated that "[t]he initial question in this case is, was a stop and a brief investigation reasonable in this instance?" Id. at 23. In answering that question, the Colgrove court said that "there was nothing in the circumstances or within the officers' knowledge, as demonstrated by the record, which gave any ground whatever for an investigatory stop such as is approved by Terry." Id. (emphases added). That court struck down the stop as unreasonable, indicating that the undisputed facts "show that the actions of the defendant and his companions gave no reasonable ground to suspect, nor did the officers have information of any kind which could reasonably lead them to any conclusion that the occupants . . . were committing, or were about to commit, or had committed any crime." Id. The Colgrove court thus held "that the investigatory stop in this case was in violation of the Fourth Amendment to the Constitution of the United States, and

Article I, section 7, of the Constitution of Nebraska."[10] Id. (emphasis added).

The Ninth Circuit, in Ward, reiterated that "[i]n conformity with Terry, . . . a founded suspicion that criminal activity is afoot is a minimum requirement for any lawful detentive stop." 488 F.2d at 169. In Ward, FBI agents stopped defendant in his automobile in order to interview him about a federal fugitive. Id. at 167. The Ninth Circuit concluded the "FBI's stop of [defendant's] car to be an unreasonable intrusion under the Fourth Amendment." Id. at 170. This stop was unreasonable because: the "FBI agents did not stop defendant's car in connection with any particular crime[;] . . . .[t]here was no emergency situation nor any need for immediate action[;] . . . and most significantly, the stop was not made pursuant to the agent's founded suspicion that the [detained defendant] was involved or about to be involved in criminal activity." Id. at 169. Ultimately, the court held "that the materials discovered

[10] In light of the "initial question" posed in Colgrove, 253 N.W.2d at 23, the analysis following, and the ultimate conclusion, we do not read Colgrove as reaching the issue of "an officer's authority to stop a vehicle to investigate his or her reasonable suspicion that a person named in a valid arrest warrant is among the vehicle's occupants," as the dissenting opinion contends, see dissenting opinion at 16 n.13. Therefore, Colgrove does not "acknowledge," id., such a proposition. In the context of the opinion, the quote "[w]hen it became apparent that the persons for whom the officers were looking were not in the [defendant's] car[,] that vehicle should have been permitted to proceed," relied on by the dissent, id. at 15-16 n.13 (quoting Colgrove, 253 N.W.2d at 23, was an observation concerning the actions of the officers following what the Colgrove court had already ruled was an "investigatory stop" "in violation" of the United States and Nebraska constitutions. Colgrove, 253 N.W.2d at 23. The Colgrove dissent, to the effect that the stop was "legitimate," id. at 24, was precisely the position rejected by the majority in Colgrove. Hence, as indicated supra and contrary to the dissent's contention, the Colgrove majority did in fact hold "that the stop was unlawful at its inception." See Dissenting opinion at 16 n.13.

as a result of the stop should have been suppressed as the fruit of the unlawful stop." Id. at 170.

In Spencer, the Court of Appeals of New York considered the issue of "whether the police may stop a moving vehicle in order to request information of the driver concerning the whereabouts of a criminal suspect." 646 N.E.2d at 786. In Spencer, two New York police officers, with the complainant present, conducted an automobile stop of the defendant, whom they believed was a friend of a person they suspected had committed an assault the previous day. Id. at 786-87. The New York court held that the "police could [not] validly stop [defendant's] vehicle in order to request information of him." Id. at 787.

It explained that "[p]olice stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or about to commit a crime." Id. at 787-88. "[T]he stop, [then], was proper only if the officers had a reasonable suspicion of criminal activity." Id. at 788.

VIII.

The police engaged in a seizure bereft of reasonable suspicion or probable cause. The law prohibits the circumvention of the warrant requirement by resorting to such practices. Accordingly, the court's April 18, 2002 judgment of conviction is

vacated and the case is remanded for disposition consistent with this decision.

On the briefs:

Cindy A. L. Goodness, Deputy
Public Defender, for
defendant-appellant.

Richard K. Minatoya, Deputy
Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.