

NO. 22326

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALLAN LAFUENTE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0059)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Allan Lafuente (Lafuente) appeals the February 16, 1999 Judgment, upon a jury's verdict, convicting him of Promoting a Dangerous Drug in the First Degree, Hawai'i Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 1998).¹ We affirm.

Initially, Lafuente challenged the circuit court's (1) May 21, 1998 oral order denying his May 4, 1998 Motion to Unseal Affidavit in Support of Search Warrant and (2) October 20, 1998 oral order denying his October 5, 1998 Motion to Reconsider

¹ Hawai'i Revised Statutes § 712-1241(1)(a)(i) provides:

Promoting a dangerous drug in the first degree. (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

- (a) Possesses one or more preparations, compounds mixtures, or substances of an aggregate weight of:
 - (i) One ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers and salts of isomers[.]

Oral Order Denying Motion to Unseal Affidavit in Support of Search Warrant Filed on May 4, 1998.²

Now, after this court's March 2, 2000 Order of Temporary Remand for Express Compliance with the Requirements of Hawaii Rules of Evidence Rule 510(c)(3) (March 2, 2000 Order), Lafuente challenges both this court's March 2, 2000 Order and the circuit court's May 30, 2000 Order Denying Motion to Unseal Affidavit in Support of Search Warrant and Denying Motion to Reconsider Oral Order Denying Motion to Unseal Affidavit in Support of Search Warrant (May 30, 2000 Order).

FACTS

From August through November 1997, four anonymous complaints were called into Crime Stoppers reporting possible narcotics activity at Lafuente's residence. The information contained in these complaints is as follows:

1. On 08-01-97 a complaint was received alleging that there were seven to eight Filipino males living at 94-292 Kahuanani Street and that there was heavy foot traffic to the residence there between 1630 and 2400. The complainant also reported hearing gunshots coming from the residence at night. This complaint was assigned complaint #24608.
2. On 09-09-97 a complaint was received alleging that there was drug activity going on at all hours of the day and night at 94-292 Kahuanani Street. This complaint was assigned complaint #24790.
3. On 10-21-97 a complaint was received reporting that there was a Hawaiian male and nine Filipino males selling and using drugs at 94-292 Kahuanani Street. The complaint said that there was heavy vehicular traffic to this address,

² Defendant-Appellant Allan Lafuente did not expressly appeal the circuit court's implicit order denying his May 4, 1998 Motion to Suppress Evidence.

mostly between the hours of 1600 and 2300 hours. This complaint was assigned complaint #25026.

4. On 11-14-97 a complaint was received reporting that there were seven to eight Filipino males dealing drugs at 94-292 Kahuanani Street at all hours of the day and night and that there was heavy vehicular traffic to the house. This complaint was assigned complaint #24344.

The four complaints were forwarded to the Narcotics/Vice Division of the Honolulu Police Department. Detective Ray Struss (Detective Struss) was assigned to investigate the complaints.

Based upon the complaints, Detective Struss conducted an investigation of the residence at 94-292 Kahuanani Street (Kahuanani residence). During the investigation, Detective Struss obtained information regarding the Kahuanani residence from a confidential informant (CI). Detective Struss acquired information that two men, a Filipino male, approximately 5 feet 7 inches and 145 pounds, named "Alan," and a Hawaiian male approximately 5 feet 9 inches, slim build, and thirty years old, were living at the Kahuanani residence and selling methamphetamine.

Based upon the results of the investigation, Detective Struss prepared a search warrant authorizing the search of the premises and curtilage of the Kahuanani residence and an affidavit in support of a search warrant. On December 29, 1997, Judge Marcia Waldorf approved and signed the search warrant (SW) and signed a protective order sealing the affidavit.

In pertinent part, the SW states

that there is probable cause to believe that the property described herein is being concealed within the premises described below and that the foregoing grounds for application for issuance of the Search Warrant exist.

YOU ARE COMMANDED TO SEARCH:

1. The person of a male called "Alan", who is a Filipino male approximately 5'7", and 145 pounds;
2. The person of a Hawaiian male, approximately 5'9" with a slim build, whose age is approximately thirty years of age;
3. The premises and curtilage of a residence located at 92-292 Kahuanani Street in the Waipahu area; The residence is a single story wooden structure that is beige in color with brown trim; A chain link fence fronts the residence; Gold colored number plates that show the numbers 94-292 are affixed to the front of the residence; for the following property:
 1. Methamphetamine and narcotics paraphernalia commonly associated with the storage, use, sale, and transportation of Methamphetamine, consisting of, and including but not limited, to pipes, plastic bags, glass vials, scales and other weighing device, vials paper bindles, envelopes, and other closed containers where controlled substances may be stored or concealed;
 2. Records of narcotics transactions, including, but not limited to, letters, lists, notes, personal telephone lists, photographs, books, and documents of acquisition, possession, and/or distribution of controlled substances;
 3. Articles of personal property tending to establish the identity of persons in control of premises, containers, or storage areas where controlled substances may be found consisting of, and including but not limited to, personal identification, bills, bank account statements, checks photographs, rental receipts, rental agreements, keys and documents tending to establish ownership of the premises containers, or storage areas[.]

(Emphasis added.)

The SW was executed by Detective Struss and the Specialized Services Division on December 29, 1997, just before 8:00 p.m. Nine adults and five children were found at the

Kahuanani residence. The search of the residence uncovered no drugs.

During the execution of the SW, Lafuente was observed getting up from the floor of the garage and running toward the rear of the property. He was later apprehended in the backyard lying face down on the ground under the mango tree. Detective Struss and Officer Donald Marumoto (Officer Marumoto) conducted a search of Lafuente's person. In Lafuente's right pants pocket, Officer Marumoto discovered two (2) Ziplock bags containing crystal methamphetamine weighing approximately 0.8952 grams. In Lafuente's left pants pocket, Detective Struss discovered a set of keys including a key for a moped containing a .357 magnum caliber handgun. The sum of \$5,285.80 was also recovered from Lafuente's person. Located eight to ten feet from Lafuente was a "blue cut-off barrel, like a planter barrel[,] " containing a black pouch containing 44.944 grams of crystal methamphetamine.

The search of the curtilage of the residence uncovered the following items: (1) In a cabinet near the garage, a "Deering" brand black plastic scale containing 0.013 grams of methamphetamine residue, a "Tanita" brand digital electronic scale, and various Ziplock plastic packets; and (2) in a metal shed in the backyard, a purple Crown Royal pouch containing 35 "Chills" brand rolling papers.

On May 4, 1998, Lafuente filed a Motion to Suppress Evidence "recovered herein as a result of the execution of the search warrant herein."

On May 4, 1998, Lafuente filed a Motion to Unseal Affidavit in Support of Search Warrant stating in pertinent part:

6. The unsealing of the affidavit in support of the search warrant is necessary to adequately prepare a defense on behalf of [Lafuente].

7. The Court may enter protective orders regarding the unsealing of the affidavit to protect the identity of informants, if necessary, and any other orders it deems necessary and appropriate regarding the disclosure of the allegations contained in the affidavit.

8. Disclosure of the affidavit in support of search warrant is necessary to the defense of [Lafuente].

On May 18, 1998, the State filed a Memorandum in Opposition to Defendant's Motion to Unseal Affidavit in Support of Search Warrant. The main arguments were that (1) the existence of probable cause for the issuance of the search warrant was determined by Judge Waldorf upon signing the warrant and (2) the "fact that the affidavit was sealed in order to preserve the confidentiality of the informant and ongoing investigations, does not in any way hamper [Lafuente] from adequately preparing for his case."

At a May 21, 1998 hearing, the following discussion occurred:

[THE COURT:] We'll take up then the motion to unseal the affidavit. And this one, um, the Court's also had a chance to review the, um, uh, memoranda submitted by counsel and supporting documents.

And, [Lafuente's attorney], you may proceed again to argue on this motion.

[LAFUENTE'S ATTORNEY]: [State], are you going to put on evidence?

. . . .

[LAFUENTE'S ATTORNEY]: Why don't you do an offer of proof?

[STATE]: Your Honor if I may --

THE COURT: Uh-huh.

[STATE]: -- provide an offer of proof?

Present outside the courtroom is Detective Stress, and I spoke with Detective Stress as well as [Lafuente's attorney] prior to this hearing.

THE COURT: Uh-huh.

[STATE]: And basically the gist of the Detective [Stress'] testimony would be that the confidential informant that he used in this case, he's used him before, and that the information provided by this confidential informant has been reliable.

THE COURT: Okay.

[STATE]: When this search warrant was executed on December 29, 1997, the confidential informant was not present at the execution of the search warrant.

Furthermore, due to where this confidential informant is at the present time, by releasing his name would pose him -- or put him in danger. And that while the confidential informant is not at this time doing an ongoing investigation, his file is not closed. And what that means is that it's still active and that the Police Department would or could or might use this confidential informant in the future.

THE COURT: All right. The Court will accept then that as the offer with regard to the testimony of Detective Stress.

And you have no objections to that, [Lafuente's attorney]?

[LAFUENTE'S ATTORNEY]: I have no objection to that.

. . . .

THE COURT: All right. Then we'll go ahead then and proceed to argument.

[LAFUENTE'S ATTORNEY]: Your Honor, the gist of the prosecution's argument is that revealing the name of the CI would place him in danger. We're asking -- you know, you can redact his name. We are entitled to see the underlying affidavit, uh, for which the, uh, search warrant issued.

Um, and I -- as the prosecution's concern with respect to the identity of the CI, again can be protected by simply redacting his name.

You know, it's not enough to say that, you know, there must be probable cause, because a search warrant issued. You know, that argument is circular.

The defense is entitled to take a look at the, uh, supporting affidavit, the underlying facts from which the search warrant issued. And without repeating myself for the third time, --

THE COURT: Right.

[LAFUENTE'S ATTORNEY]: -- you can redact his name.

THE COURT: Okay.

[LAFUENTE'S ATTORNEY]: So I think that we are entitled to the underlying affidavit.

THE COURT: All right. [State].

[STATE]: Yes, Your Honor, just briefly ask that the Court deny this motion. And if the Court is inclined to give the defendant a redacted version, then the State would argue that not only the name be redacted, but areas and dates also be redacted. But most of all, Your Honor, the State is asking that you deny this motion.

THE COURT: All right. All right. The Court's prepared then to rule on this motion as well.

The rules, uh, don't necessarily mandate that the affidavit and -- in such an incident be provided to counsel and to provide indeed for the sealing of that affidavit and for, uh, its not being disclosed to counsel under certain circumstances.

In this particular case, certainly, uh, there is no dispute. I suppose if there was any -- that there was probable cause for the issuance of the search warrant on its face. And certainly Judge Waldorf had to be satisfied on the face of that search warrant that probable cause existed before the warrant had to go out. And as I say, it had to be on its face and clearly we have that there.

The need for probable cause isn't a circular argument with regard to a motion such as this because indeed that's what -- all that needs to be present for the warrant to be issued.

The other standard the Court needs to look at in determining whether or not this ought to be is whether this was -- was -- this will hamper the -- the defense's ability to prepare. And that's clearly not shown in this instance that there's hampering of the ability to proceed, since the documents indicate clearly, uh, the kind of information that the, uh, Police Department had in obtaining the warrant and the items seized and so forth.

So there is sufficient, um, documentation as it stands without the disclosure of the confidential informant, um, or the affidavit for counsel to prepare. So there is no prejudice. So the motion to unseal the affidavit is denied.

. . . .

THE COURT:

And, likewise, I think what also has to be -- in clarifying the Court's order, this is a denial at this point. Um, clearly the Court does not need to look at whether or not the, uh, defense is hampered, uh, by the non-disclosure. That's not shown here. Um, that's not what we have.

And, clearly, if that kind of situation, uh, were presented to the Court, then we can view this in a different light. But that's not what we have and -- and without that, um, it is sufficient to show that there is probable cause on the face of the warrant.

Uh, the -- the rules clearly provide for it being sealed and not disclosed under certain circumstances and those circumstances are present in this case. All right.

Although the circuit court ordered the State to prepare the order denying the motion, no order was entered by the circuit court.

On October 5, 1998, Lafuente filed a Motion to Reconsider Oral Order Denying Motion to Unseal Affidavit in Support of Search Warrant Filed on May 4, 1998 (Motion to Reconsider Oral Order), stating in pertinent part:

2. Disclosure of the affidavit in support of search warrant is necessary to the defense of [Lafuente] . . . to determine whether probable cause supported the issuance of search warrant.

3. At the May 21, 1998, hearing held on the Motion to Unseal Affidavit, the deputy prosecuting attorney made an offer of proof to the effect that the reason they opposed the unsealing of the motion was to protect the identity of the informant. No other reason was given why the affidavit should be unsealed. The deputy prosecuting attorney also represented that there was no ongoing investigation of [Lafuente].

4. [Lafuente] asserts that the rules governing discovery allow the Court to conduct an in camera review of the affidavit and to exclude any information regarding the identity and residence of the informant. Any other information going towards the identify [sic] can be excluded from disclosure. Exclusion of such information would cure the only objection the State has in unsealing the affidavit.

The transcript of the October 20, 1998 hearing on the Motion to Reconsider Oral Order states in relevant part as follows:

[LAFUENTE'S ATTORNEY]: Okay, Your Honor, basically, I'm asking the court to reconsider its oral order denying my motion to unseal the affidavit. As the court is aware, you know, a search warrant must be based upon probable cause in order to issue. In this particular case, the reason why I filed this motion in particular was because based upon the police report which is attached to my earlier initial motion, the officer who applied for the search warrant indicated that he got four Crime Stopper tips which basically talked about lot [sic] of traffic at the certain residence in Waipahu. It did not detail any drug transaction but, rather, talked about lot [sic] of people at this residence, lot [sic] of cars at this residence, all behavior which is consistent with innocent behavior. The other factor is that the -- I believe it was Detective Ray Struss. He claims that he conducted further investigation, and then based upon these factors, he applied for and was granted a search warrant. You know based upon my review of the police report, it does clearly seem to raise the issue of the sufficiency of the affidavit in support of the search warrant if that is, in fact, the only factors that he was able to consider.

At the initial hearing on this motion to unseal the affidavit, as an offer of proof, the prosecutor indicated that their concern was for the safety of the informant in this particular case. So what I'm asking the court, at this point, to do is I would ask the court to review the affidavit in camera, unseal it for that limited purpose so that the court can at least review the affidavit and determine whether or not there is any information regarding the identity of an informant and whether that information can be somehow redacted. That did appear to be the prosecutor's only concern at the initial hearing. And we believe that given the potential constitutional rights of Mr. Lafuente that are involved that, at least, an in-camera review by the court may solve the prosecutor's concerns about unsealing the affidavit. I think initially in granting the order to seal, the prosecutors cited also an ongoing investigation but that is no longer the case. And so it does remain -- it does appear that the only concern they have at this point is, I guess, the identity of the informant if there is indeed one. And so I would ask the court again to review the affidavit in camera.

THE COURT: Okay, [State], do you want to respond to that?

[STATE]: Yes, Your Honor, just briefly. First of all, the State will rely on the records and files. Furthermore, Your Honor, it's not the State's only concern, as to the identity, for the safety of the confidential informant. This confidential informant was not even present at the time the search warrant was present. So the confidential informant -- the State does not intend to have this confidential informant proceed to testify because he can't testify as to an event that he wasn't even

present at. So those are the two matters, Your Honor, and the State is asking you to deny this motion for reconsideration.

Furthermore, Your Honor, there has been a recent case that just came out from the Supreme Court, State of Hawai'i vs. Henry K. Kapiko (phonetic).³ The court is aware of that case, and that deals specifically with information that was used by the police in an affidavit to support a finding of probable cause. And I have only one copy here, but I will make a copy available to the court as well as to [Lafuente's attorney] if she is unaware of this case. But briefly, Your honor, that case, in it, the court, Judge Del Rosario, ordered the State to turn over information in the affidavit. The State fought it and asked for a redaction in it. The court denied it. What had happened was then the judge, upon the court's -- the State's refusal to redact it or to turn it over, then dismissed the case. We appealed and the Supreme Court found in our favor.

The court then took a brief recess so that Lafuente's attorney could review the opinion in State v. Kapiko, 88 Hawai'i 396, 967 P.2d 228 (1998). After hearing the arguments of each of the parties regarding the case, the following dialogue transpired:

THE COURT: . . . In this instance, what we're talking about is the sealed affidavit that was submitted in support of this particular search warrant. We addressed that at the hearing back in, I think it was, April. And anything else with regard to that? Because I understand your point, [Lafuente's attorney] in asking to reconsider it as well. I understand the State's position. Anything else, though, on that?

[LAFUENTE'S ATTORNEY]: Just for the record, Your Honor, in the event that my motion is not successful, I would ask the court take judicial notice of the records and files in this particular proceedings which should include a copy of the order, the affidavit and that was sealed and so forth -- the order granting the sealing as well as any affidavits in support of the prosecution's original motion to seal.

THE COURT: Okay. All right, I will so note. And having reviewed all of those before we came -- I did review your motion as well -- the court will deny the motion to reconsider, in this instance a prior ruling, I think, that was made properly. And

³ In State v. Kapiko, 88 Hawai'i 396, 967 P.2d 228 (1998), the Hawai'i Supreme Court applied Hawai'i Rules of Evidence Rule 510 and Hawai'i Rules of Penal Procedure Rule 16(e)(5)(ii) and concluded that to allow defendant to determine whether observations by a confidential informant were stale, the prosecution should have been ordered to provide a range of dates within which the observations occurred.

there isn't anything additional that would make that ruling different including in the Kapiko case which is a little bit different factual circumstances than in this case. So your motion is denied.

No order was entered. Similarly, no order was entered denying Lafuente's May 4, 1998 Motion to Suppress Evidence.

On November 12, 1998, a jury found Lafuente guilty of Promoting a Dangerous Drug in the First Degree, in violation of HRS § 712-1214(1)(a)(i). The February 16, 1998 judgment sentenced Lafuente to incarceration for twenty years, with a mandatory minimum of one year.

Hawai'i Rules of Evidence (HRE) Rule 510 provides in pertinent part:

(a) Rule of privilege. The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

. . . .

(c) Exceptions

. . . .

(2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. . . .

(3) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

"The condition under which the prosecution must disclose the identity of a CI, pursuant to HRE Rule 510(c)(2), pertains only to a situation where it is anticipated that the CI will give 'testimony necessary to a fair determination of the guilt or innocence in a criminal case.'" Kapiko, 88 Hawai'i at 402, 967 P.d at 234.

In Kapiko, the Hawai'i Supreme Court also stated:

The HRE Rule 510(c)(3) exception also did not apply to this case. The HRE Rule 510(c)(3) exception applies only in cases where the judge believes that the CI is not reliable or credible. In this case, the record does not reflect that the judge was not satisfied with the information provided by the CI. Accordingly, inasmuch as the record is silent as to any challenge to the credibility or reliability of the CI by the circuit court, the HRE Rule 510(c)(3) exception did not apply and the prosecution had the privilege to refuse to disclose information that would lead to the identification of the CI.

Id.

Restated, the HRE Rule 510(c)(3) rule is that "the prosecution has the privilege to refuse to disclose information that would lead to the identification of the CI" except "in cases where the judge believes that the CI is not reliable or credible."

In Kapiko, the court reviewed "an unredacted copy of [the CI's] affidavit." Id. at 399, 967 P.2d at 230. In Lafuente's case, the State contended that the court reviewed the CI's affidavit and Lafuente contended that the court did not review the CI's affidavit.

In our March 2, 2000 Order, we noted that the CI'S affidavit was not included in the record on appeal and that the circuit court did not do what HRE Rule 510(c)(3) required it to do before it decided Lafuente's motion to suppress. We temporarily remanded the case to the First Circuit Court and instructed the judge to do what HRE Rule 510(c)(3) and Hawai'i Rules of Penal Procedure Rule 12(e) required it to do before it decided Lafuente's Motion to Unseal Affidavit in Support of Search Warrant.

The circuit court's post-remand May 30, 2000 Order confirmed what we suspected. In the State's answering brief filed on September 21, 1999, the prosecutor's statement that the circuit court had reviewed the sealed affidavit is a misrepresentation of the record.⁴ As stated by the court at the May 22, 2000 hearing on remand, "the affidavit was not ever submitted."

⁴ We remind the attorney(s) involved that Rule 3.3(a)(1) of the Hawai'i Rules of Professional Conduct states, "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal[.]"

The circuit court's May 30, 2000 Order states in relevant part as follows:

FINDINGS OF FACT

. . . .

9. The CI was not able to give testimony necessary to a fair determination of the issue of guilt or innocence and the CI did not testify at trial.

10. An in-camera inspection of the affidavit in support of the search warrant reveals information that could likely lead to the identification of the CI.

11. The CI was reliable and credible and was reasonably believed to be reliable and credible.

12. The district court judge found that the affidavit in support of search warrant provides probable cause for the issuance of the search warrant.

CONCLUSIONS OF LAW

. . . .

2. No exception to the privilege of the identity of the informer applies.

. . . .

7. Other than to challenge probable cause, [Lafuente] raises no relevant interest in seeing the affidavit.

. . . .

9. Upon the Court's review, independent of the issuing district court judges['] opinion (De Novo), the affidavit in support of search warrant does clearly provide probable cause for the issuance of the search warrant.

10. The Court, taking into consideration the nature of the materials contained in the affidavit, is not able to fashion a redaction that would provide the information [Lafuente] seeks without likely revealing the identity of the CI.

DISCUSSION

All of the points asserted by Lafuente in his original opening brief pertain to the circuit court's pre-remand failure to comply with the applicable rules and all are moot. We will

discuss the points asserted by Lafuente in his supplemental opening brief filed on August 1, 2000.

A.

Lafuente contends that the failure of the trial court to unseal the affidavit prior to trial and prior to deciding his two motions to unseal and his motion to suppress was a violation of procedural due process.

As stated in this court's March 2, 2000 Order, the trial court initially failed to comply with HRE Rule 510(c)(3). However, the trial court's May 30, 2000 Order cured that failure.

B.

Lafuente contends that this court's March 2, 2000 Order remanding for a post-conviction compliance with HRE Rule 510(c)(3) was a violation of his constitutional right to procedural due process. He states "[t]he failure of the trial court to fulfill their obligations under Hawaii Rule of [E]vidence, Rule 510, in the first instance was a violation of procedural due process, and warrants reversal and remand for a new trial." Based on the conclusion stated in State v. Opupele, 88 Hawai'i 433, 441, 967 P.2d 265, 273 (1998),⁵ we disagree.

⁵ The conclusion in State v. Opupele, 88 Hawai'i 433, 441, 967 P.2d 265, 273 (1998), states as follows:

For the foregoing reasons, we vacate Opupele's conviction and remand for determination by the circuit court of the applicability of the informer privilege. Because there was no reversible *trial* error, the circuit court's determination may or

(continued)

C.

In the circuit court, Lafuente contended that

the confidential informant may have been able to provide relevant testimony as to the guilt or innocence of [Lafuente]. [Lafuente] was found in direct possession of a small class "C" quantity of drugs upon his person, and was found guilty by the jury of the constructive possession of a class "A" quantity of drugs found upon the property. Also found upon the property were nine adults. If the confidential informant had been able to link any person other than [Lafuente] to the possession or sale of drugs encountered in his undercover informant capacity, such testimony would have been extremely valuable in presenting to the jury another individual who may have placed the class "A" quantity of drugs on the LAFUENTE residence. Such testimony could have caused the jury to acquit [Lafuente] of the class "A" methamphetamine possession charge.

On remand, the circuit court considered this argument and decided that it lacked a factual basis. The court stated that "[t]he confidential informant was not a participant in these proceedings, the . . . confidential informant is not involved in the charged offense[.]" In Finding of Fact no. 9 and Conclusion of Law no. 4, the court decided that the CI was not able to give testimony necessary to a fair determination of the issue of Lafuente's guilt or innocence.

(continued)

may not require a retrial. If the circuit court determines that no exception to the HRE [Hawai'i Rules of Evidence] Rule 510 privilege applies, then it shall so order and reenter the judgment of conviction. If the circuit court determines that the identity of the [Confidential Informant] must be revealed, it must order the prosecution to elect whether to disclose the identity or dismiss the charges. If the prosecution elects to disclose the identity, a new trial must be held.

(Emphasis in original.)

D.

Lafuente represents that an August 23, 1988 search warrant and an August 14, 1999 search warrant both resulted in no seizures. Both subsequent search warrants authorized similar searches as was authorized by the SW. Lafuente contends that the nonproductivity of these two subsequent search warrants is evidence of the CI's lack of credibility and reliability with respect to the SW.

We note that HRE Rule 510(c)(3) does not specify what information a judge may or should use when determining whether "the information was received from an informer reasonably believed to be reliable or credible[.]" Assuming these two subsequent search warrants can be considered and were nonproductive, nothing establishes that they were based on information from the CI, and their nonproductivity does not, by itself, evidence the CI's lack of reliability or credibility.

CONCLUSION

Accordingly, we affirm the circuit court's

(a) February 16, 1999 Judgment and (b) May 30, 2000 Order Denying Motion to Unseal Affidavit in Support of Search Warrant and

Denying Motion to Reconsider Oral Order Denying Motion to Unseal
Affidavit in Support of Search Warrant.

DATED: Honolulu, Hawai'i, October 4, 2000.

On the briefs:

Jonathan E. Burge,
Craig T. Kimsel, and
R. Patrick McPherson,
for Defendant-Appellant.

Chief Judge

Associate Judge

Alexa D. M. Fujise,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee.

Associate Judge