

NO. 22898

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.  
JOYCE DELATORRE, Defendant-Appellee, and  
RICHARD SILVA, JAMES PETERS, BERNADINE ALAMEDA,  
and CORALEEN TUISALOO, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 99-1402)

MEMORANDUM OPINION

(By: Burns, C.J., and Watanabe, J.;  
and Lim, J., concurring separately)

Plaintiff-Appellant State of Hawaii (the State)  
appeals the circuit court's September 29, 1999 Order Granting  
Motion to Suppress Statements (September 29, 1999 Order), which  
states, in relevant part, as follows:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER  
GRANTING MOTION TO SUPPRESS STATEMENTS

Defendant JOYCE DELATORRE was arrested following a search conducted pursuant to a search warrant executed on July 2, 1999. She was subsequently interviewed by Honolulu Police Department (HPD) Detective John Shaw at 5:10 p.m. on July 3, 1999. At the time of the interview Defendant had been in custody since approximately 8 p.m. on July 2, 1999. The Defendant reported she had taken drugs at 9 a.m. on July 1, 1999. She also reported she has a 7th grade education. At times during the interview, the Defendant seemed confused, giving conflicting answers.

Prior to the recorded interview Detective Shaw conducted a pre-interview discussion with Defendant which was not taped, and in the Court's view should have been. The failure to record the pre-interview discussion was at [the State's] risk.<sup>1</sup>

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<sup>1</sup> The circuit court failed to identify the "risk" of which it spoke. It appears that it spoke of the risk that (a) the taped interview would be less credible because it was preceded by an untaped interview and

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The Court finds that under the totality of circumstances, [the State] did not carry its burden to show that Defendant's waiver of her right to remain silent was knowingly, intelligently and voluntarily made.

We vacate and remand.

#### BACKGROUND

At the hearing on the motion to suppress, Detective John Shaw (Detective Shaw) testified that he twice advised Defendant-Appellee Joyce Delatorre (Delatorre or Defendant) of her constitutional rights, once not recorded on tape and then again recorded on tape. At both times, Delatorre stated that she understood her rights, she was willing to give up those rights, and no one had coerced her into or offered her leniency for making a statement. At both times, Delatorre refused her right to an attorney and stated that she had been treated fairly by the police. Detective Shaw also testified that during both

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(b) Plaintiff-Appellant State of Hawai'i (the State) would not be able to satisfy its burden of proving that Defendant-Appellee Joyce Delatorre (Delatorre or Defendant) knowingly, intelligently, and voluntarily waived her right to remain silent.

At the conclusion of the hearing, the following was stated:

THE COURT: . . . .

And last but not least it certainly would be easier if the detectives taped everything rather than have the off-the-record interview that then turns into on the record 'cause it comes up in all of these cases. Right?

[DEPUTY PROSECUTING ATTORNEY]: Yes, Your Honor.

THE COURT: That's . . . a police practice, in my view a glitch, that I've taken up with the brass. But I just want to put that on the record.

interviews, Delatorre appeared to be coherent, not confused, and not under the influence of drugs or alcohol. Regarding alleged promises of leniency, Detective Shaw testified, in relevant part, as follows:

Q Now prior to this tape recorded interview taking place had you made any promises to the Defendant for leniency if she made a statement to you?

A No, ma'am.

. . . .

Q And did you specifically ask Ms. Delatorre if anyone had made any promises of leniency to her if she had made a statement?

A I asked her if anyone had made any promises to her, and there was no question in there about leniency.

Q All right. Any promises to -- and how did she reply to that question, if anyone and made any promises to her?

A She said no.

On cross-examination, Detective Shaw stated that he routinely asks people about how much education they have had. In this instance, it took a few questions to clarify that Delatorre had actually completed only the seventh grade and was "working" on her GED. Another standard question Detective Shaw asks is how many children they have and whether they are male or female. According to Detective Shaw, these questions were used "to try and establish some sort of state of mind whether or not [the interviewees] comprehend what you're talking about[.]" The tape reveals that in response to Detective Shaw's questions, Delatorre answered that she had "two boys," ages "nineteen and fifteen." Delatorre also stated, in relevant part, as follows:

JS This is Detective John Shaw . . . .

JD Joyce Lynn Delatorre.

. . . .

JS Okay is there anything else you know about this that um--we have not talked about, you'd like to mention now?

JD Yeah I know a lot of people who do--um, sell drugs and where her connection is and I can help you guys.

JS So what you're saying that if the Prosecutor's Office offered you a deal, you'd be willing to help the Prosecutor's Office and the Police get some of these dealers?

JD Yes.

JS And -- and you're saying this on your own?

JD Yeah I'm saying this on my own cause I want to get -- I want to -- clear off this one.

JS Okay.

JD Cause I don't wanna -- I -- I'm willing to change, you know. I want to go in a program like that and cause I have two (2) grandson -- I mean I have a grandson and um -- on the way so I want to be a good grandmother to them.

JS Okay.

JD And for my daughter's sake, she's against drugs.

Delatorre also testified on cross-examination at the hearing, in relevant part, as follows:

Q Okay. And when he asked you about your children, did you tell him that you have two sons --

A No. Why should I when I have two kids -- two daughters? I said I have two daughters.

. . . .

A . . . [H]e asked me if I have kids. I said, yeah, I have kids.

Q And then he said "Boy or girl?" And you said "Two boys"?

A Did I say that on the tape?

Q Did you?

A No, I didn't. I said as -- I said I have two girls. Why should I lie if I have --

Q Okay. But you understood his question when he asked you "How many children do you have?"

A I just answered his question.

Delatorre also testified on direct examination at the hearing, in relevant part, as follows:

Q Did you talk to Detective Shaw?

A Yes.

Q And why did you want to do that?

A 'Cause he asked me questions about what had happened on the tape recorder.

Q And . . . what was your reason for not asking for an attorney?

A Um, well, he -- he was -- he wanted me to tell him about the drug dealers who do -- um, who deal drugs at Waimanalo [Waimānalo].

Q And when did he say that?

A Before he taped me. He said he was going let me get out. Um, if I tell him, he would have let me get out. But he didn't.

Q Do you remember his exact words?

A He said, um -- what I can remember, he said if I tell him who's all the drug dealers, he will, um -- he will let me go and for turn, um, ev -- um, State evidence and turn them all in and he'll let me go.

. . . .

Q All right. And did he ask you if you understood your rights?

A Yes.

Q And did you tell him yes, that you do understand your rights?

A Yeah.

. . . .

Q Well, do you remember telling him "No, no one promised me anything to make this statement?"

A Yeah. Um, I said, "Yeah, no one promised me."

Q Okay. But it's your testimony that in fact you were promised something, is that --

A Yeah, he promised me something.

Q Okay.

A If I would tell him where -- who and who was the drug dealers then he would let me go.

Q Okay. Well, when he asked you "Did anyone promise you anything to make the statement?" why didn't you say, "Yeah. You did. You promised me if I told you who the drug dealers were you'd let me go."

A Well, he said "Don't mention nothing about it" when he was taping me, nothing about that, that thing, the promises. He said he'll just -- he said that before he even taped it, everything what I just said. And after he taped it, he told -- I mean before that he said "Don't mention about promising stuff, something to anybody."

. . . .

Q When the detective was interviewing you, asking you questions --

A Um-hmm.

Q -- with the tape recorder on, did you understand his questions?

A Yeah, I did, but he just told me about don't -- don't even mention about him -- anything what we talked about before he taped me he told me not to mention nothing about it.

Delatorre also testified that, at the time of the interview, she felt scared. However, she affirmed that during the interview, she was not suffering from any lingering effects of methamphetamine nor lack of sleep. Delatorre also admitted that in the police cell block, she talked with another arrestee who had made a deal to become an informant for Detective Shaw and who would be released because of it.

#### THE STATE'S POINTS ON APPEAL

The September 29, 1999 Order "is not supported by the court's factual findings and is also refuted by the evidence in the record and the controlling law. . . . [T]he factual findings

do not support the motions court's conclusion that [Delatorre's] waiver was invalid."

"[T]here appears to be no evidence from which to conclude that separately or collectively the aforementioned factual findings demonstrated [Delatorre] was unable to understand and voluntarily waive her right to remain silent."

The finding that Delatorre "seemed confused" "is refuted by [Delatorre's] testimony that she was not confused and denied making the statements upon which the court concluded she was confused."

#### STANDARD OF REVIEW

The Hawai'i Supreme Court has stated:

In the past, we have applied a "clearly erroneous" standard of review to the FOFs made by the court in connection with a voluntariness hearing or a motion to suppress, on which a decision to admit a confession into evidence at trial is based, pursuant to the rationale that the questions

[w]hether the defendant invoked his right to counsel and whether he waived the right are primarily questions of fact. . . .

We have also recognized that "in a . . . technical sense, waiver is a question that requires application of constitutional principles to the facts as found." Accomplishment of this task "requires us to examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of circumstances surrounding [the defendant's] statement." Thus, we apply a de novo standard of appellate review to the "ultimate issue [of the] voluntariness" of a confession.

State v. Hoey, 77 Hawai'i 17, 32, 881 P.2d 504, 519 (1994)

(citations, emphasis, and internal quotation marks omitted).<sup>2</sup>

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<sup>2</sup> In a subsequent opinion, the Hawai'i Supreme Court stated:

"[W]e apply a *de novo* standard of appellate review to the ultimate issue of the voluntariness of a confession." We thus "examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of the circumstances surrounding [the defendant's] statement."

"However, 'it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trial judge.'"

Moreover,

"[O]ur review of whether [a defendant's] statement was in fact coerced requires determination of whether the findings of the trial court are clearly erroneous."

State v. Gella, 92 Hawai'i 135, 142, 988 P.2d 200, 207 (1999) (citations omitted). In Gella, the Hawai'i Supreme Court reversed the circuit court's order granting Gella's motion to suppress notwithstanding the following findings of fact:

4. The Court[,] in viewing a photo of [Gella's] facial injuries[,] finds that the injuries are consistent with being caused by the use of force. The Court make no finding as to whether the police used excessive force.

. . . .

6. That[,] prior to being arrested[, Gella] had not slept for four days and had been up smoking methamphetamine.

7. That[,] at the time [Gella] gave his taped statement[,] he had informed Detective Coons that he felt dizzy and was in some pain from the injuries he had received.

8. That[,] because the police had used force to arrest [Gella] that resulted in injury, [Gella] felt compelled to give a statement to Detective Coons.

9. The Court finds that Detective Coons was a credible witness, that he treated [Gella] with proper respect, and that he did explain to [Gella] his constitutional rights with the assistance of a written constitutional rights form.

10. The court finds[,] based on the totality of the circumstances[,] that [Gella's] statements to Detective Theodore Coons on December 23, 1998 were made involuntarily, and therefore must be suppressed and precluded from use at trial.



In other words, with respect to questions of fact generated by the testimony at the hearing, we apply the clearly erroneous standard of review. With respect to what is on the tape, we give it an independent review and give no deference to the circuit court's review of it because the circuit court is in no better position than we are when listening to it and reading the transcript of it. With respect to the ultimate issue of waiver, we apply the right/wrong standard of review.

#### THE STATE'S BURDEN OF PROOF

It is well-settled under Hawai'i law that the State has the burden of showing that a defendant understood his or her rights and waived them before making any statement admissible in court. "The burden rests on [the State] to demonstrate that in making any statement, the defendant had knowingly and intelligently waived his [or her] privilege against self-incrimination." State v. Kreps, 4 Haw. App. 72, 76, 661 P.2d 711, 715 (1983). This burden also includes the element of voluntariness.

The Hawai'i Supreme Court has concluded that

evidence that a defendant has read and signed a police rights and waiver form can be sufficient to establish a valid waiver, provided that the court considers "whether the words used, considering the age, background, and intelligence of the individual being interrogated, impart a clear understandable warning of all of his rights."

State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994).

## DISCUSSION

The circuit court concluded that the State failed to satisfy its burden of showing that Delatorre's waiver of her right to remain silent was knowingly, intelligently, and voluntarily made. In this case, there are the following three possibilities.

The first possibility is that Delatorre did not say the right words and do the right things that must be said and done for waiver to occur. However, the record disproves this possibility.

The second possibility is that Delatorre said the right words and did the right things but lacked the capacity to validly waive. It appears that the circuit court decided that the State failed its burden to prove that, at the relevant time, Delatorre had the capacity to knowingly, intelligently, and voluntarily waive her right to remain silent. The circuit court expressly based its ruling on Delatorre's having taking crystal methamphetamine<sup>3</sup> more than two days prior thereto, her seventh grade education, and her apparent confusion evidenced in part by her conflicting answers. The one thing the circuit court did

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<sup>3</sup> In Gella, 92 Hawai'i at 145, 988 P.2d at 210 n.12, the Hawai'i Supreme Court stated:

Moreover, this court has cited the proposition that, "[w]hen a movant challenges the voluntariness of his confession alleging that he was under the influence of drugs, he must adduce testimony as to the nature of the drugs." State v. Smith, 59 Haw. 565, 570, 583 P.2d 347, 351 (1978) (citation omitted).

that this court cannot do is observe Delatorre as she testified on September 14, 1999. But the circuit court did not enter any relevant findings based on that observation. Moreover, Delatorre's condition on the day of the taped police interview, July 2, 1999, is much more relevant. Thus, the relevant record is the same for this court as it was for the circuit court. Based on the tape of the police interview of Delatorre and the transcript of the hearing, we conclude that the circuit court's decision that Delatorre did not have the capacity to make a valid waiver is wrong.

The third possibility is that Detective Shaw and Delatorre made a deal during their off-tape interview. In opposition to Detective Shaw's testimony, Delatorre testified about her off-tape promise to be an informer and not to say anything on tape about Detective Shaw's reciprocal off-tape promise to let her go. Delatorre relied on the rule that an extrinsic falsehood by the police interviewer, such as a promise of more favorable treatment in exchange for a confession, is regarded as coercive *per se* and is, thus, unusable at trial. State v. Kelekolio, 74 Haw. 479, 511, 849 P.2d 58, 73 (1993).

A relevant and unanswered question, which the circuit court did not decide, is the question of fact whether Delatorre's waiver was induced by an off-tape promise by Detective Shaw. Although the circuit court mentioned the State's "risk" at not

taping the first interview, it did not decide the credibility of Delatorre's testimony and Detective Shaw's testimony about that off-tape interview. On remand, the circuit court must answer that credibility question. "[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses . . . ; this is the province of the trial judge." State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996), (quoting Domingo v. State, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994) (citation and internal quotation marks omitted)).

#### CONCLUSION

Accordingly, we vacate the circuit court's September 29, 1999 Order Granting Motion to Suppress Statements and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, October 23, 2000.

On the briefs:

Donn Fudo,  
Deputy Prosecuting Attorney,            Chief Judge  
City and County of Honolulu,  
for Plaintiff-Appellant.

Mary Ann Barnard  
for Defendant-Appellee.                Associate Judge

Associate Judge