NOS. 23224, 23225, 23226 and 23227

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee, v.
DAVID C. APAO, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 98-1433, 97-0920, 96-2208, and 96-1432)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

On November 9, 1999, after a two-day trial, a jury found Defendant-Appellant David C. Apao (Apao) guilty as charged of Count I, Promoting a Dangerous Drug in the Third Degree, Hawai‘i Revised Statutes (HRS) § 712-1243 (Supp. 2000), and Count II, Driving Without a License, HRS § 286-102 (Supp. 2000). Apao was sentenced as a repeat offender[1] to an extended term of ten (10) years of imprisonment for Count I (with a mandatory minimum of five (5) years) and one (1) year of imprisonment for Count II (with a mandatory minimum of one (1) year), to be served

[1] In support of its February 3, 2000 Judgment, the circuit court, on February 9, 2000, entered its Order Granting Motion for Sentencing of Repeat Offender and sentenced Defendant-Appellant David C. Apao (Apao) "to a mandatory minimum term of 5 years in Count I and 1 year in Count II." The stated reason was

> the Court having found that [Apao] is a repeat offender . . . based on [Apao's] prior conviction for the offenses of Criminal Property Damage in the Second Degree, . . . under Criminal No. 96-1432, Attempted Theft in the Second Degree, . . . under Criminal No. 96-2208, and Attempted Unauthorized Control of Propelled Vehicle, . . . under Criminal No. 97-0920[.]

concurrently with each other and with terms in Cr. Nos. 96-1432[2], 96-2208[3], and 97-0920[4] with credit for time served.

Apao appeals the circuit court's February 3, 2000 Judgment. We vacate the mandatory minimum of one year imposed for Count II. In all other respects, we affirm.

BACKGROUND

Apao was charged on July 2, 1998. On September 15, 1998, Apao filed a motion to suppress evidence in which he argued that a clear plastic packet containing a white crystal-like substance resembling crystal methamphetamine recovered by Police Officer John N. Gyotoku (Officer Gyotoku) during the June 24, 1998 pre-incarceration search should be suppressed as it was

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[2] On July 22, 1996, Apao was charged by Complaint in Count I with Criminal Property Damage in the First Degree, Hawaiʻi Revised Statutes (HRS) § 708-820 (Supp. 2000); in Count II with Possession of a Switchblade Knife, HRS § 134-52 (1993); and in Count III with Terroristic Threatening in the Second Degree, HRS § 707-717 (1993). On June 17, 1997, Apao pled no contest to Count I (Counts II and III were *nolle prosequied*) and, on November 5, 1997, was sentenced to five years' probation, concurrently with Cr. Nos. 96-2208 and 97-0920, and 180 days' jail confinement with credit for time served.

[3] On October 24, 1996, Apao was indicted with Attempted Theft in the Second Degree, HRS § 708-831 (Supp. 2000). On June 17, 1997, Apao pled guilty to Attempted Theft in the Second Degree and, on November 5, 1997, was sentenced to five years' probation, concurrently with Cr. Nos. 96-1432 and 97-0920, and 180 days' jail confinement with credit for time served.

[4] On April 18, 1997, Apao was charged by Complaint with Attempted Unauthorized Control of Propelled Vehicle, HRS § 708-836 (Supp. 2000). On June 17, 1997, Apao pled guilty to Attempted Unauthorized Control of Propelled Vehicle and, on November 5, 1997, was sentenced to 5 years' probation, concurrently with Cr. Nos. 96-1432 and 96-2208; 180 days' jail confinement with credit for time served.

obtained from a warrantless search and seizure of Apao's person and/or property in violation of his constitutional rights. Specifically, Apao argued that Officer Gyotoku should not have reached into Apao's pockets while Apao was handcuffed and that Apao should have been allowed to go through his own pockets and place the contents in an envelope for storage.

On September 25, 1998, Plaintiff-Appellee State of Hawaiʻi (the State) filed a memorandum in opposition to Apao's motion to suppress evidence in which it reviewed the sequence of events leading up to the discovery of the evidence in question. The State maintained that at each step in the sequence of events, the police officers acted within the scope of their authority and at no time was Apao subjected to an unreasonable search or seizure. The State's memorandum in opposition included Exhibit A, a copy of the police report by Police Officer Tai Nhan Nguyen (Officer Nguyen), and Exhibit B, a copy of the police report by Officer Gyotoku.

At a pretrial hearing on Apao's motion to suppress, the parties stipulated to the facts asserted in State's Exhibits A and B, Defendant's Exhibit No. 1 in support of Apao's motion to suppress evidence, and the transcript of the June 29, 1998 Preliminary Hearing and agreed to proceed on the basis of those facts.

On October 29, 1999, in its Order Denying [Apao's] Motion to Suppress Evidence, the court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL). With the findings and conclusions challenged in this appeal marked in bold, the FsOF and CsOL state as follows:

FINDINGS OF FACT

1. On June 24, 1998, at approximately 1:10 A.M., Officer Tai N. Nguyen (Officer Nguyen) was on routine patrol in the area of Maunakea Street and Hotel Street in Downtown Honolulu.

2. Officer Nguyen observed a gray Volkswagen bearing Hawaii license number ETW 075 traveling south on Maunakea Street.

3. Officer Nguyen observed that the safety check decal on the gray Volkswagen expired in October 1997.

4. Officer Nguyen checked with Honolulu Police Department (HPD) Dispatch and was informed that the safety check for the gray Volkswagen was expired.

5. Officer Nguyen activated his blue lights and initiated a traffic stop of the gray Volkswagen.

6. Officer Nguyen approached the driver of the gray Volkswagen and asked for his driver's license, registration and proof of no-fault insurance.

7. The driver, identified by Hawaii State Identification card as David Apao (Defendant), responded that he did not have a license and did not have any paper work for the gray Volkswagen.

8. Officer Nguyen made a driver's license check with HPD Dispatch and was informed that there was no license under [Apao's] name.

9. Officer Nguyen placed [Apao] under arrest for Driving Without License.

10. Officer Nguyen did a brief pat-down search of [Apao] for weapons and means of escape. Nothing was found.

11. [Apao] was transported to the Main Police Station where a custodial search was preformed [sic] by Officer John N. Gyotoku (Officer Gyotoku).

12. Officer Gyotoku conducted the pre-incarceration search for weapons, contraband and means of escape.

13. Officer Gyotoku recovered a clear plastic bag containing a substance resembling crystal methamphetamine from [Apao's] left front pocket.

14. [Apao] was arrested for Promoting A Dangerous Drug in the Third Degree.

15. The contents of the clear plastic bag were later determined to be methamphetamine.

CONCLUSIONS OF LAW

16. There were specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted and justified the [sic] Officer Nguyen's investigative stop of [Apao]. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977).

17. Officer Nguyen had probable cause to believe that [Apao] had committed an offense and had probable cause to arrest [Apao] after the investigatory stop. State v. Aquinaldo, 71 Haw. 57, 782 P.2d 1225 (1989); State v. Navas, 81 Hawai‘i 113, 913 P.2d 39 (1996); see also State v. Melear, 63 Haw. 488, 630 P.2d 619 (1981).

18. The warrantless arrest of [Apao] was constitutionally permissible. State v. Kearns, 75 Haw[.] 558, 569, 867 P.2d 903, 908 (1994).

19. The warrantless search of [Apao] by Officer Gyotoku after [Apao] had been arrested and was in custody was a proper and legal custodial search incident to a lawful arrest. United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427, 440-41 (1973); State v. Enos, 68 Haw. 509, 510, 720 P.2d 1012, 1014 (1986); see also State v. Paahana, 66 Haw. 499, 505 (1983).

20. Where temporary incarceration at the police station is required of an arrestee, a warrantless pre-incarceration search of the arrestee may be conducted to protect the arrestee's property and personal safety and to prevent the entry of weapons and contraband into the cellblock. State v. Langley, 62 Haw. 79, 611 P.2d 130 (1980); see also State v. Clark, 65 Haw. 488, 654 P.2d 355 (1982); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

On November 10, 1999, the judge who entered the FsOF and CsOL entered Supplemental Findings of Fact and Conclusions of Law Denying [Apao's] Motion to Suppress Evidence (Supplemental FsOF and CsOL). With the supplemental findings and conclusions challenged in this appeal marked in bold, the Supplemental FsOF and CsOL state as follows:

FINDINGS OF FACT

> 1. At the receiving desk of the Honolulu Police Department, while conducting the pre-incarceration search of [Apao], Officer John Gyotoku felt small items in the left front pocket of [Apao's] shorts.
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> 2. Officer Gyotoku reached into [Apao's] pockets to retrieve the miscellaneous items.
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> 3. After removing the items, Officer Gyotoku reached in the same pocket in order to ascertain that it was empty.
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> 4. This time Officer Gyotoku found a two-inch by two-inch clear packet which contained methamphetamine.
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> CONCLUSIONS OF LAW
>
> **1. Officer Gyotoku's pre-incarceration search of [Apao] was legal and legally conducted. See, State v. Enos, 68 Haw. 509, 510, 720 P.2d 1012, 1014 (1986); State v. Langley, 62 Haw. 79, 611 P.2d 130 (1980).**
>
> 2. A [d]efendant's entire piece of clothing (in this case, [Apao's] shorts), is not considered to be a "closed container" requiring special handling or a search warrant.
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> 3. There is no constitutional nor statutory requirement that an arrestee be given the option of stripping in order to avoid a pre-incarceration search.

At the trial, Officer Nguyen testified that he was "four or five length's [sic] behind [Apao's] car. So I just sped up a little bit to get behind it." "I noticed the car had an expired safety decal, so I called dispatch to confirm it."

PRECEDENT AS TO WHEN A PERSON IS "SEIZED"

> Generally, a person is "seized" if, "from an objective standpoint and given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave." Also, a person is seized "when a police officer approaches that person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information."

State v. Kauhi, 86 Hawaiʻi 195, 203, 948 P.2d 1036, 1044 (1997) (internal citations omitted).

MOTION TO SUPPRESS EVIDENCE,
WHICH PARTY HAS THE BURDEN OF PROOF?

1. The Case Where the Search Was Under a Search Warrant.

When the search was under a search warrant, the moving party has the initial burden of establishing that the search was illegal. 3 C. Wright & K. Graham, Federal Practice and Procedure: Criminal 2d § 675 (1982); State v. Tagaolo, 93 Hawai‘i 314, 2 P.3d 718 (App. 2000). In these situations,

> the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his own Fourth Amendment rights were violated by the search and seizure sought to be challenged. The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence.

State v. Balberdi, 90 Hawai‘i 16, 21, 975 P.2d 773, 778 (App. 1999) (quoting State v. Anderson, 84 Hawai‘i 462, 466-67, 935 P.2d 1007, 1011-12 (1997)).

2. The Case Where the Search Was Without a Search Warrant.

When the search was without a warrant, the burden is on the State to bring the case within one of the exceptions to the warrant requirement. 3 C. Wright & K. Graham, Federal Practice and Procedure: Criminal 2d § 675 (1982). For example, when the State asserts that a search was by consent, the burden is on the State to prove that the consent was voluntarily given. Id. at 783.

As noted by this court in State v. Crowder, 1 Haw. App. 60, 66, 613 P.2d 909, 914 (1980) (citations omitted), "[o]nce

[the defendant] challenged the lawfulness of the State's warrantless arrest and the search incidental thereto, the State had the burden of showing that the arresting officer had probable cause to make the arrest."

EVIDENCE CONSIDERED WHEN REVIEWING
DENIAL OF A MOTION TO SUPPRESS

> [W]hen the defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial. State v. Nakachi, 7 Haw.App. 28, 33 n. 7, 742 P.2d 388, 392 n. 7 (1987); State v. Uddipa, 3 Haw.App. 415, 416-17, 651 P.2d 507, 509 (1982); State v. Crowder, 1 Haw.App. 60, 66-67, 613 P.2d 909, 914 (1980).

State v. Kong, 77 Hawai‘i 264, 266, 883 P.2d 686, 688 (App. 1994).

Hawai‘i Rules of Penal Procedure Rule 12(e) states that "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." It logically follows that when the trial judge's findings on the motion to suppress are materially different from the pretrial findings on the motion to suppress, the trial judge should state those materially different findings on the record. Absent such findings, however, the appellate court must view the record in the light most favorable to the trial judge's decision to admit or suppress the evidence.

DISCUSSION

1.

Apao contends that absent probable cause or a reasonable and articulable suspicion, Officer Nguyen was not authorized to follow Apao's car, to speed up to get behind Apao's car, or to radio to check with HPD Dispatch about the safety check on Apao's car. Apao argues that the act of Officer Nguyen's speeding up to approach Apao's vehicle amounted to a traffic stop. In his view, "[t]he approach of [Apao] as well as the call on the radio amounted to an unlawful search and seizure in violation of the Fourth Amendment and Article I, Section 7 of the Hawaii Constitution."

In support of his argument, Apao cites Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979). In Prouse, the police officer pulled over the defendant for no other reason but to conduct a spot check of the defendant's license and registration. The court held that stopping an automobile constitutes a "seizure" within the meaning of the Fourth Amendment to the U.S. Constitution and, therefore, a police officer must first observe either a traffic or equipment violation to justify an investigative stop. Id. at 663. Apao contends that "[b]y allowing a police officer to follow an individual or just do random runs of one's safety checks is the equivalent of stopping a vehicle to do a random license check[.]"

We conclude that Apao misrepresents the evidence and misunderstands the law. As noted above, Officer Nguyen testified that he was "four or five length's [sic] behind [Apao's] car. So I just sped up a little bit to get behind it." Officer Nguyen further testified that "I noticed the car had an expired safety decal, so I called dispatch to confirm it." The speeding up of a little bit, the observation of the expired decal, and the calling of dispatch to confirm that fact were all lawful acts and, viewed separately or together, were not a search and/or a seizure. For obvious reasons, a safety sticker on the rear of an automobile is in open view.

As noted above, the Hawaiʻi Supreme Court in Kauhi, 86 Hawaiʻi at 203, 948 P.2d at 1044, stated that

> [g]enerally, a person is "seized" if, "from an objective standpoint and given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave." Also, a person is seized "when a police officer approaches that person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information."

Prior to Officer Nguyen's observation of the expired safety sticker, a reasonable person in Apao's situation would not have believed that he was not free to leave. After Officer Nguyen observed the expired safety sticker, he was authorized to stop Apao.

> In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. . . . Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop

> and examine vehicles *when license plates or inspection stickers have expired*, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

State v. Jenkins, 93 Hawaiʻi 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Bonds, 59 Haw. 130, 135, 577 P.2d 781, 785 (1978) (quoting South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976) (emphasis in original)). Apao does not challenge the fact that he was driving without a valid driver's license and, therefore, Officer Nguyen had probable cause to arrest Apao based on the commission of that offense.

2.

Apao also challenges Supplemental CsOL No. 1 stating that "Officer Gyotoku's pre-incarceration search of [Apao] was legal and legally conducted." He cites State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). In Kaluna, during a pre-incarceration search, the defendant handed to the police matron a tissue which was folded into a square. The matron opened the tissue and found four red capsules, later found to be Seconal, a barbiturate. The defendant was subsequently charged with the unlawful possession of those capsules. The trial court granted the defendant's motion to suppress the evidence seized during the search and the State appealed. The Hawaiʻi Supreme Court affirmed explaining that "probing the contents of the defendant's packet was unnecessary to accomplish the ends of warrantless inventory search, it follow[ed] necessarily that that search was

'unreasonable' under the Hawaiʻi Constitution." Id. at 375, 520 P.2d at 62. The Hawaiʻi Supreme Court further stated, in relevant part, as follows:

> We hold that the police have full authority to prohibit the entry of weapons, drugs or other potentially harmful items into jail. To this end, they may require internees to surrender any possible repositories for such items prior to incarceration. However, a concomitant of this wide authority to prohibit the entry of personal belongings which may harbor forbidden contents is a complete absence of authority to conduct a general exploratory search of the belongings themselves. This absence of authority derives from the lack of any justification for such a further search inherent in the exception itself. . . .
>
> . . . .
>
> Nor did the need to inventory the defendant's possessions serve as a justification for probing the contents of the packet. The government's interest in protecting itself against fraudulent post-incarceration claims of loss or damage to property is at best a tenuous reason for infringing the privacy of an individual's belongings. Consequently, an inventory search should be rigidly circumscribed in scope, perhaps more so than any other type of justified warrantless search. . . . For example, all of the defendant's belongings could have been tabulated and placed, unopened, into a sealed envelope at the time of her booking; the police might even have required the defendant to sign a waiver releasing them of responsibility for the contents of unopened items, thereby affording her a choice whether to relinquish her right of privacy in the packet's contents.

Id. at 373-75, 520 P.2d at 61-62 (internal footnote omitted).

Apao argues that instead of having Officer Gyotoku search him, the officer "should have given [Apao] the option of depositing all of his items in a sealed envelope for which he would waive his right to compensation if anything was missing upon return of the sealed envelope." We disagree. The opinion in Kaluna prohibits the "further search" and the "subsequent search into the contents of the packet[.]" Id. at 374, 520 P.2d at 61. Following Apao's procedure would violate the "full authority [of the police] to prohibit the entry of weapons, drugs

or other potentially harmful items into jail" that was recognized by Kaluna.

In this case, Apao was searched, after a valid warrantless arrest, prior to incarceration. As noted by the court in its Supplemental CsOL No. 2, which Apao does not challenge on appeal, "[a] [d]efendant's entire piece of clothing (in this case, [Apao's] shorts), is not considered to be a 'closed container' requiring special handling or a search warrant." Although the clear plastic packet was itself a closed container, the packet was found incident to a lawful search and the substance resembling methamphetamine was in plain view within the packet. Therefore, Officer Gyotoku's actions did not violate the mandate of Kaluna disallowing the investigation of the contents of a closed container and we agree with the court's Supplemental CsOL No. 1 that "Officer Gyotoku's pre-incarceration search of [Apao] was legal and legally conducted."

3.

The penalty for Driving Without a License, HRS § 286-102 (Supp. 2000), is a fine of not more than $1,000 and/or imprisonment of not more than thirty days. HRS § 286-136 (Supp. 2000). Therefore, it is not a felony, HRS § 701-107(2) (1993), qualifying for the imposition of a mandatory minimum sentence on a repeat offender. HRS § 706-606.5 (Supp. 2000).

CONCLUSION

Accordingly, we vacate the mandatory minimum of one year imposed for Count II. In all other respects, we affirm the circuit court's February 3, 2000 Judgment convicting Apao of Promoting a Dangerous Drug in the Third Degree and Driving Without a License.

DATED: Honolulu, Hawaiʻi, March 30, 2001.

On the briefs:

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Chief Judge

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City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge