NO. 23709

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ROBERT L. TETU, Defendant-Appellant,
and NIKKO S. OZU, Defendant.
(CR. NO. 99-2427)

AND

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ROBERT L. TETU, Defendant-Appellant.
(CR. NO. 00-1-0667)

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2427)
(CR. NO. 00-01-0667)

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

Defendant-Appellant Robert L. Tetu (Tetu) appeals the two August 23, 2000 judgments of the circuit court of the first circuit,[1] that issued out of a consolidated jury trial of a complaint (Cr. No. 99-2427) and an indictment (Cr. No. 00-01-0667), and together convicted him of two counts of promoting a dangerous drug in the third degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2001)[2] (count I of Cr. No. 99-2427 and count II of Cr. No. 00-01-0667), and one

[1] The Honorable Virginia Lea Crandall, judge presiding.

[2] Hawaii Revised Statutes (HRS) § 712-1243(1) (1993) provides that "[a] person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."

count of unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993)[3] (count II of Cr. No. 99-2427).

In Cr. No. 99-2427, Tetu was sentenced to two five-year terms of probation upon terms and conditions, including the 263 days of jail he had already served. In Cr. No. 00-01-0667, Tetu was sentenced to a five-year term of probation upon terms and conditions, including the 136 days of jail he had already served. Each of the three terms of probation was to run concurrently with any other term imposed.

On appeal, Tetu asserts: (1) that the consolidation of Cr. No. 99-2427 and Cr. No. 00-01-0667 for trial prejudiced him because the jury could have relied upon drug paraphernalia evidence in Cr. No. 00-01-0667, which was not charged in Cr. No. 99-2427, to convict him of count II of Cr. No. 99-2427; (2) that the court was wrong to deny his motions to suppress all evidence recovered by the police, because the hotel security officers who first entered and searched the room in which Tetu was found in proximity to drugs and drug paraphernalia were acting as instrumentalities of the police and therefore violated the

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[3] HRS § 329-43.5(a) (1993) provides, in pertinent part:

> (a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

protections against unreasonable searches and seizures afforded Tetu by the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawaii Constitution; and (3) that the court abused its discretion by denying his motion to dismiss count I of Cr. No. 99-2427 as *de minimis*, where the amount of cocaine residue involved weighed just 0.003 grams. We disagree with Tetu's contentions and affirm.

I. Background.

Cr. No. 99-2427 involved drugs and associated paraphernalia recovered by the police at the time Tetu was first arrested. The December 13, 1999 complaint in Cr. No. 99-2427 read:

> COUNT I: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU . . . did knowingly possess the dangerous drug *cocaine*, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of Section 712-1243 of the Hawaii Revised Statutes.
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> Count II: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU . . . did use or possess with intent to use, *drug paraphernalia* to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of Chapter 329 of the Hawaii Revised Statutes, thereby committing the offense of Unlawful Use of Drug Paraphernalia, in violation of Section 329-43.5(a) of the Hawaii Revised Statutes.

(Italics supplied.) Probable cause for the complaint was found at a December 6, 1999 preliminary hearing.

Cr. No. 00-01-0667 involved drugs and associated paraphernalia recovered by the police during the later execution of a search warrant of the hotel room where Tetu was first arrested. The search warrant was based upon the items recovered and information obtained at the time Tetu was first arrested. After the execution of the search warrant, Tetu was rearrested. On April 4, 2000, the grand jury returned a true bill:

> COUNT I: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU, also known as Bobo, did knowingly possess twenty-five or more capsules, tablets, ampules, dosage units, or syrettes, containing the dangerous drug . . . *ethylenedioxymethamphetamine (MDMA)*, thereby committing the offense of Promoting a Dangerous Drug in the Second Degree, in violation of Section 712-1242 (1)(a) of the Hawaii Revised Statutes.
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> COUNT II: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU, also known as Bobo, did knowingly possess the dangerous drug *opium and opiate*, and any salt, compound, derivative, or preparation of opium or opiate, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of Section 712-1243 of the Hawaii Revised Statutes.
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> COUNT III: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU, also known as Bobo, did knowingly possess the dangerous drug *lysergic acid diethylamide (LSD)*, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of Section 712-1243 of the Hawaii Revised Statutes.
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> COUNT IV: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU, also known as Bobo, did knowingly possess the dangerous drug *methamphetamine*, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of Section 712-1243 of the Hawaii Revised Statutes.
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> COUNT V: On or about the 30th day of November, 1999, in the City and County of Honolulu, State of Hawaii, ROBERT L. TETU, also known as Bobo, did knowingly possess *marijuana*, thereby committing the offense of Promoting a Detrimental Drug in the Third

> Degree, in violation of Section 712-1249 of the Hawaii Revised Statutes.

(Italics supplied.) Over Tetu's objection, the court granted motions by the State to consolidate the two cases for trial.

On February 28, 2000, in Cr. No. 99-2427, Tetu filed a motion to suppress evidence. Tetu wanted the court to suppress every item of drugs and associated paraphernalia recovered in the hotel room by the police at any time. At the March 28, 2000 hearing on Tetu's motion to suppress in Cr. No. 99-2427, the following evidence was adduced.

On November 30, 1999, at about 1:00 a.m., security officer David Gouveia (Gouveia) was on duty at the Outrigger Hobron Hotel in Waikiki. Earlier, Gouveia had noticed Nikko Ozu (Ozu), a hotel guest registered to room 1408, "having a domestic outside on the front entrance of the hotel with an unknown individual." There had also been noise complaints about room 1408. Gouveia saw Ozu again in the elevator lobby about to go upstairs. Because Gouveia had just seen a man inquire at the front desk about Ozu in room 1408, then catch the elevator to that room, Gouveia advised Ozu that she could not have unregistered guests in her room. Ozu told him that she had some friends upstairs. Gouveia escorted her upstairs in order to evict her unregistered guests. Security officer Mike Cho (Cho) accompanied them and took along the registration card for room

1408. According to Gouveia, guests are required to display photo identification in order to register at the hotel.

When Ozu opened her hotel room door, Gouveia followed her into the room and saw several people sitting around the room, including Tetu, who was sitting on the bed holding a glass pipe and a propane torch. Gouveia asked all unregistered guests to leave, and they did. Only Ozu and Tetu remained. Gouveia remembered that Tetu remained in the room because he claimed to be Shawn Stewart, the only other guest registered to room 1408. At that point, Gouveia noticed a two ziploc bags containing a white substance on the night stand next to the bed, along with a black pocket knife. At some point, Gouveia also observed a glass pipe on top of a dresser in the room.

Tetu could not produce any identification. Gouveia had Ozu and Tetu sit on the bed, and informed them that they would be issued trespass warnings and evicted from the hotel. Cho began the trespass warning paperwork. After Tetu gave Gouveia his real name, Gouveia told him that, pursuant to standard operating procedure, the police were going to be contacted in order to verify his identity. Gouveia explained to the court that persons being given a trespass warning often give a false name. A trespass warning is therefore "useless" unless identity is confirmed. Gouveia admitted that he detained Tetu, pending the arrival of the police, also because he had seen Tetu using the glass pipe.

While the security officers were waiting for the police to arrive, Gouveia asked Tetu and Ozu to gather their belongings. Per hotel policy, Gouveia attempted to ensure that no items were left behind by checking the room for personal belongings. Gouveia opened a dresser drawer and removed a black leather jacket, under which he discovered a glass pipe and some plastic bags containing a white substance.

About five to ten minutes after Gouveia's call, Honolulu police officers Steve Posiulai (Officer Posiulai) and Edlin Kam (Officer Kam) arrived. Gouveia informed them of the circumstances and pointed out the drugs and paraphernalia he had seen about the room, at which time the police took over. Tetu and Ozu were arrested and Officer Posiulai called "narco/vice" for assistance.

The court granted in part and denied in part Tetu's motion to suppress, suppressing only the drugs and paraphernalia Gouveia found in the dresser drawer. In its April 26, 2000 order, the court held that Gouveia's was a private search, but that it was "unreasonable for [Gouveia] to open the drawer[.]"

On May 10, 2000, Tetu filed another motion to suppress, this time in Cr. No. 00-01-0667. There, Tetu argued that the evidence suppressed in response to his motion to suppress in Cr. No. 99-2427 constituted "the primary evidence used to support [probable cause for] the issuance of the search warrant[,]" the execution of which yielded the contraband supporting the charges

in Cr. No. 00-01-0667. Hence, Tetu argued, all of that contraband should be suppressed.

The court's April 26, 2000 suppression order in Cr. No. 99-2427 also spawned Tetu's May 1, 2000 motion to dismiss count I of the complaint in Cr. No. 99-2427. Chemical analysis of the residue found in the glass pipe recovered from the top of the dresser showed that it contained cocaine. The residue weighed 0.003 grams. Substantially heavier substances from several ziploc bags were also found to contain cocaine, but apparently these were the items recovered from the dresser drawer that were suppressed by the court's April 26, 2000 order. Thus, Tetu could now argue that count I was *de minimis*.

On May 25, 2000, the court held a hearing on Tetu's motion to suppress in Cr. No. 00-01-0667. Officer Kam testified that he and Officer Posiulai observed numerous items of drugs and drug paraphernalia in room 1408 other than the items located in the dresser drawer. In all, Officer Kam recovered ten items in room 1408. Officer Kam did not recover all of the items observed. Officer Kam remembered that when Honolulu police detective Jonathan Murray (Detective Murray) arrived at room 1408 to investigate, Officer Kam told him about the items that had been observed. Then, Officer Kam testified, he and Officer Posiulai "just recovered what was in plain view."

On cross-examination, Officer Kam acknowledged that a black suitcase and a black briefcase were found in the room. Officer Kam saw a plastic container inside the open briefcase. "It was closed. However, it was translucent. We could see through it. It was clear. . . . It was in plain view." Inside the plastic container were a number of pills. Officer Kam first testified that the items observed inside the briefcase were recovered later, "after the search warrant was issued." However, when Tetu's counsel sought to confirm this statement, Officer Kam stated: "No. At that time of the briefcase, the open one I recovered along with the other items that I initially found upon my arrival." But when asked whether what he had found in plain view and submitted into evidence consisted of "an intact glass pipe, a broken glass pipe and ziploc packets containing white powder and ziploc packets containing white residue[,]" Officer Kam responded, "That's correct." And on redirect examination, Officer Kam provided this inventory of what he had recovered that morning: "There was [(sic)] various glass pipes used for drug use and the white powder substances in ziploc bags and also designer type ziploc bags."

Detective Murray testified that he obtained the information supporting the search warrant he prepared from Officers Kam and Posiulai, as well as from his own observations of additional drugs and associated paraphernalia in room 1408. He remembered that various drug capsules and pills were recovered

"on the initial arrest[.]" Detective Murray believed that among these were the pills in the plastic container recovered from the briefcase. The search warrant was executed the afternoon of November 30, 1999. Numerous additional items were recovered. Chemical analysis of those items yielded positive results for "methamphetamine, MDMA, LSD, and cocaine." Detective Murray then informed Tetu that he was being arrested again, this time "for the additional counts that stemmed from the search warrant."

At the May 25, 2000 hearing, the court also entertained Tetu's motion to dismiss count I of the complaint in 99-2427 as *de minimis*. The evidence introduced in this part of the May 25th hearing consisted primarily of transcripts of hearings on similar motions brought in other drug cases in the circuit court of the first circuit.

On June 20, 2000, the court entered an order in Cr. No. 00-01-0667 denying Tetu's motion to suppress. The court held that the search warrant had been properly supported by probable cause, the court's April 26, 2000 suppression order notwithstanding. On the same day, the court entered an order denying Tetu's motion to dismiss count I of the complaint in 99-2427 as *de minimis*. The court concluded that "0.003 grams of residue containing cocaine was not deminimus [(sic)]." (Citation omitted.) The court found that Tetu was seen "in a hotel room . . . holding a pipe and a micro-burner or torch when the

security walked in to the room. Drug paraphernalia was readily observable all over the room. A reasonable inference can be drawn that the [Tetu] was using drugs and knowingly possessed cocaine." (Citation omitted.)

Jury trial commenced on June 14, 2000. Gouveia's testimony before the jury essentially mirrored the testimony he gave at the March 28, 2000 hearing on Tetu's first motion to suppress. In addition, Gouveia told the jury that it appeared Tetu was using the glass pipe and propane torch he was holding in his hand to smoke, and that Tetu moved or hid the glass pipe when he was observed. When the police arrived, Gouveia informed them "that we have a person claiming to be a registered guest but have [(sic)] no identification and that I saw and witnessed an individual doing what appeared to be drug activity in the room."

On cross-examination, Gouveia admitted that in both of the handwritten statements he made to the police on the day of the incident, he neglected to mention that he saw Tetu holding a glass pipe in his hand. Gouveia also remembered on cross-examination that it was three males who left the hotel room when he and Officer Posiulai first entered with Ozu.

Officer Kam testified that when he and Office Posiulai entered room 1408, security personnel were already there with Tetu and Ozu. After being apprised of the situation by the security officers, Officer Kam saw a glass pipe -- "the type that they use to smoke drugs in" -- in a metal container on the

dresser. Next to those items was "a mini black torch." Officer Kam recovered the three items under police report 99419880. Officer Kam took the glass pipe directly to the criminalist for chemical analysis. The glass pipe and its metal container were received in evidence at trial as Exhibit 27. The lighter was received in evidence as Exhibit 9. Officer Kam also saw three repositories in the room, a black briefcase, a black handbag and a black suitcase. The briefcase was "wide open and inside of that in plain view" were red capsules and pink capsules along with a "blue type of pen torch." The capsules were received in evidence at trial as Exhibit 1 and the "pen torch" was received in evidence as Exhibit 10. The capsules were recovered under police report 99419882. Officer Kam took the capsules directly to the criminalist for chemical analysis. After his survey of the hotel room, Officer Kam called for his "sector sergeant" and was told to secure the scene and to detain Tetu and Ozu.

Officer Kam remembered on cross-examination that he also saw beer bottles overflowing the rubbish cans and some ziploc bags "all strewn all over the floor and on the nightstand." He admitted that he did not see a pipe on the night stand. Officer Kam acknowledged that the glass pipe on the dresser was the only suspected drug paraphernalia that he saw out in plain view. He remembered that there was residue "all within the pipe[,]" and opined that "as far as to (sic) my training and experience that's the residue left after some drugs have been

smoked in it." Officer Kam remembered that he had admitted at the preliminary hearing that the "mini black torch" could be used "for hobbies or jewelry making[.]" He also recalled, however, that he had added back then that the lighter could also be used to smoke drugs. He reiterated on redirect examination that in his training and experience, the glass pipe and the lighter are items that people employ for drug use.

Honolulu police officer Gordon Furtado (Officer Furtado) went to room 1408 on November 30, 1999 with Detective Murray to execute the search warrant. Officer Furtado was assigned to search a part of the room. There, he located "numerous articles on the floor resembling narcotics paraphernalia[,]" including ziploc packets and a cut straw (Exhibit 26), a ziploc packet containing "a green leafy substance resembling marijuana" (Exhibit 20), and a clear plastic bottle containing "approximately 49 off-white colored pills" (Exhibit 3). The vegetation was submitted under police report 99420618. The three exhibits were received into evidence at trial.

Detective Murray also testified at trial. He essentially duplicated the testimony he gave at the May 25, 2000 hearing on Tetu's second motion to suppress. He summarized: "Uh, on the dresser within the hotel room itself I saw a glass pipe with some residue, and in the corner, one corner of the room there was an open soft-side black briefcase, and within that briefcase I observed a plastic container with some pills in it."

Thereupon, Detective Murray obtained a search warrant and executed it along with three other police officers.

Detective Murray also gave a rundown of the contraband he recovered from room 1408 during the execution of the search warrant. In a drawer of the night stand, he recovered "a glass pipe with yellowish residue." This was admitted into evidence at trial as Exhibit 23. Inside the black suitcase, Detective Murray saw a metal container, wherein he found "a green ziploc packet with some white powder in it." This packet was marked for identification purposes as Exhibit 24. The black suitcase held another metal container, which enclosed "two clear ziploc packets each containing a white powder." The packets were marked for identification as Exhibit 25.[4] Also recovered from the suitcase were "a black Tanita brand digital scale, a pencil torch, and a can of butane." The scale was received into evidence at trial as Exhibit 13; the pencil lighter and the fuel were received into evidence at trial as Exhibit 14. Detective Murray testified that the scale is commonly used in the drug trade to weigh drugs for sale. He also noted that the lighter and fuel are used to heat drugs "so they can be smoked."

[4] The chemical analysis of Exhibit 24 was not proffered at trial, apparently because Exhibit 24 contained cocaine, which was not the subject of a charge in the search warrant case, Civil No. 00-01-0667. Accordingly, Exhibit 24 was later withdrawn. According to the prosecutor, Exhibit 25 "didn't test out." It was nevertheless later admitted into evidence at trial.

Detective Murray also found items of clothing in the black suitcase. One of those items, "a pair of black jeans shorts with oversized pockets," contained in its right front pocket a metal container, which in turn housed "four small green ziploc packets and three small orange ziploc packets each containing a small square of paper." These packets were recovered under police report 99420617. Some of these packets, apparently the green ones, were admitted into evidence at trial as Exhibit 7; the orange packets were admitted into evidence as Exhibit 8. From the same jeans pocket, Detective Murray recovered "a large clear plastic ziploc bag that contained forty-six and a half white pills and embossed on each pill was a spade, like the card suit, design, a spade." The pills were recovered under police report 99420615. The pills were admitted into evidence at trial as Exhibit 4. The same, prolific jeans pocket yielded "seven small clear ziploc packets with a yellow design on it [(sic)]. Each packet contained one yellow pill with a clover design on it." These pills were admitted into evidence at trial as Exhibit 5. The same pocket also contained "one . . . clear green ziploc packet with the same sort of pill in it[,]" which was apparently not proffered into evidence. Two "glass pipes containing a residue" were also recovered from the jeans pocket. These pipes were recovered under police report 99420653 and admitted into evidence at trial as Exhibit 16.

Detective Murray continued his inventory of the contents of the suitcase. A "clear plastic bottle containing eight tan-colored pills" was recovered under police report 99419882 and admitted into evidence at trial as Exhibit 2. Detective Murray also recovered from the suitcase "an Altoids metal container which contained one clear ziploc packet and inside that clear ziploc packet there were numerous small ziploc packets that were red and blue in color." The Altoids container was admitted into evidence at trial as Exhibit 12. Detective Murray noted that the "numerous clean packets that were found" could be used for drug distribution. Detective Murray found three other glass pipes containing residue in the suitcase, admitted into evidence at trial as Exhibits 15, 17 and 18, respectively.

Finally, Detective Murray found a "small orange clear ziploc packet that contained two small pieces of paper" on the floor of the hotel room. He recovered this under police report 99420617. It was admitted into evidence at trial as Exhibit 6.

The contraband found in room 1408 was deposited into the police evidence room and laboratory requests were made. On cross-examination, Detective Murray confirmed that count I of Cr. No. 00-01-0667, the MDMA or "Ecstasy" charge, involved the pills found in the right front pocket of the jeans found in the black suitcase. He also confirmed that count III, the LSD charge, involved the seven green and orange ziploc packets found in the

same pocket, and the orange ziploc packet found on the floor. As to Count IV, the methamphetamine charge, Detective Murray confirmed that "everything that would be suspected of being methamphetamine was in the – inside the suitcase[.]" Detective Murray concluded his testimony with a description of how glass pipes are used to smoke methamphetamine and crack cocaine.

The State's last witness at trial was criminalist Leighton Kalapa (Kalapa). He analyzed the items recovered from room 1408. Kalapa testified that he received Exhibit 27, the glass pipe found on the dresser in the metal container under police report 99419880, directly from Officer Kam on November 30, 1999. It was tested and was found to contain 0.003 grams of a substance containing cocaine. He also received Exhibit 1, the two red capsules in a plastic container found in the black briefcase under police report 99419882, directly from Officer Kam. Kalapa tested these and found that they contained "oxycodone, which is an opiate."

On December 1, 1999, Kalapa received from an evidence custodian Exhibit 20, the "green leafy substance under Report No. 99420618" found by Officer Furtado on the floor of the hotel room. After testing, it turned out to be 0.750 grams of marijuana. That same day, Kalapa also received Exhibit 4, "forty-six and a half pills under Police Report No. 99420615" found by Detective Murray in the pocket of the jeans in the suitcase. These pills were 12.410 grams containing MDMA, or

"Ecstasy." Also on December 1, 1999, Kalapa tested Exhibits 6, 7 and 8, the pieces of paper contained in the green and orange ziploc bags, one of which was found by Detective Murray on the floor of the hotel room and the rest found by him in the pocket of the jeans in the suitcase. These pieces of paper all tested positive for the presence of LSD. The last pieces of evidence Kalapa received on December 1, 1999 were Exhibit 16, the two glass pipes recovered by Detective Murray from the pocket of the jeans in the suitcase, and Exhibit 17, one of the three glass pipes recovered by him directly from the suitcase, all recovered under police report 99420653. All told, the three glass pipes contained 0.047 grams of a substance containing methamphetamine.

Tetu testified in his own defense. He remembered that he went to room 1408 with a friend at about midnight. He claimed that there were eight to ten males in the hotel room with Ozu when he got there. Tetu admitted that he brought his briefcase and handbag with him to the room, and that the "pencil torch" recovered from his briefcase indeed belonged to him. Tetu testified that he worked at a place called The Head Shop, making "decorative ornaments, pipes, turtles, dolphins. We've all seen assorted glass ornaments." Tetu confirmed that the phone number for The Head Shop is "923-PIPE." At some point, Ozu asked Tetu to melt a broken glass pipe back together, the pipe that Officer Kam found on the dresser and identified as Exhibit 27. Apparently, he was working on the glass pipe at the dresser,

using a metal container underneath to prevent scorching, when the security officers walked in.

During settlement of jury instructions, the following colloquy occurred:

> THE COURT: Yes.
> And the State's No. 11.
> [TETU'S ATTORNEY]: Your Honor, I object to that as being an inadequate Arseo [(sic)] instruction. There are so many items of possible drug paraphernalia that have been placed into evidence, every little baggie could be considered a drug paraphernalia. This doesn't make it clear. Even mine that I have in my instructions I think it's better. Although I noticed that one case I read, the recent case I read, the court actually asked the jurors to write down which ones they agreed to specifically. I don't know if we should be doing that.
> THE COURT: Eleven is either refused or withdrawn and go with defendants [(sic)] or modifications.
> [PROSECUTOR]: Well, Your honor --
> [TETU'S ATTORNEY]: Your Honor, another thing is I'm wondering now that Count I apparently only applies -- well, there's only one -- Count II was a 1999 case. [Cr. No. 99-]2427 is the only one that charges paraphernalia.
> [PROSECUTOR]: Your, Honor [(sic)] as far as the argument goes, the same evidence and the same police reports were submitted for the preliminary hearing as well as for the grand jury. So, you know, that argument we don't buy into that the drug paraphernalia that was found after the search warrant, there's no determination between prior to the search warrant and after the search warrant made in the preliminary hearing. Everything, all the police reports and all of the evidence went in for the preliminary hearing. It was all available prior to the preliminary hearing. The search warrant was executed prior to that.
> [TETU'S ATTORNEY]: Well, I have the transcript of that hearing. That's not my recollection 'cause we were -- the defense attorneys in that hearing were very confused because you had that long list of 14 items. And we were asking the prosecutor what are you going on and he said 1 and 2. 1 being --
> [PROSECUTOR]: That doesn't mean there wasn't notice of all of this stuff, Your Honor. That's basically the purpose of that. If there was confusion about this, then a motion for a bill of particulars should have been filed. There was enough notice of all of the items that were found prior to that to go on the drug paraphernalia charge. And as far as the Arseo [(sic)] instruction I'm not -- which defense

> instruction are we talking about?
>
> [TETU'S ATTORNEY]: Number 5 I think.
>
> THE COURT: Five. It would only need Arseo [(sic)] with respect to the paraphernalia.
>
> [PROSECUTOR]: Then I don't care. I'll withdraw it and go with the defense.
>
> THE COURT: So State's 11 is withdrawn.

The State's proposed jury instruction 11 read:

> As to each Count, you, as a jury, may return a verdict of guilty only if you unanimously agree as to the underlying facts establishing the offense.

(Citation omitted.) Tetu's proposed jury instruction 5 read:

> One of the elements that the State must prove beyond a reasonable doubt is that the defendant possessed with intent to use drug paraphernalia. In order for you to find the defendant guilty of this charge, you must be unanimous as to the specific object of drug paraphernalia that the defendant possessed.

Although the record reflects that Tetu's proposed jury instruction 5 was given by agreement of the parties, the court instructed the jury as follows:

> The Defendant is charged with the offense of Unlawful Use of Drug Paraphernalia. The prosecution has introduced evidence showing that there may be more than one act of unlawful use of drug paraphernalia which [(sic)] a guilty verdict as to that offense may be based. In order to return a verdict of guilty as to that offense, it is necessary that the jury unanimously agree that the same act of unlawful use of drug paraphernalia has been proven by the prosecution beyond a reasonable doubt.

(Citation omitted.)

The court also instructed the jury on the definition of "drug paraphernalia." The instruction read, in pertinent part:

> "Drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing,

> injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance[.]

On June 21, 2000, the jury found Tetu guilty as charged on count I (cocaine) and count II (drug paraphernalia) of Cr. No. 99-2427. The jury found Tetu guilty as charged on count II (opiate) of Cr. No. 00-01-0667. Tetu was found not guilty of counts I (MDMA, or "Ecstasy"), III (LSD), IV (methamphetamine) and V (marijuana) of Cr. No. 00-01-0667.

II. Discussion.

A. The Consolidation Issue.

On appeal, Tetu first contends as follows:

> In Cr. No. [99-2427], [Tetu] was charged at Count II with [unlawful use of drug paraphernalia]. This could have been supported by the pipes in [police report] 99-418-880 (trial Exhibit 27), or the torches (trial Exhibits 9, 10) and ziplocks in [police report] 99-419-884. [Unlawful use of drug paraphernalia] could also be proven by some of the evidence seized pursuant to search warrant and charged in Cr. No. [00-01-0667], such as the pipes containing methamphetamine (Count IV, trial Exhibits 16, 17, [police report] 99-420-653) or various ziplock bags.
>
> Because of the consolidation, this potential confusion was not correctable by the jury instruction specified in State v. Arceo, 84 [Hawai'i] 1, 928 P.2d 843 (1996),[5] but could and should have been prevented

[5] In State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-875 (1996), the Hawai'i Supreme Court held that

> [w]hen separate and distinct culpable acts are subsumed within a single count charging a sexual assault -- any one of which could support a conviction thereunder -- and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity

> by separate trial or prosecutorial election.

Opening Brief at 19 (footnote supplied; original brackets here rendered as parentheses). The prejudicial problem, Tetu explains, is "the odd possibility of conviction in one case for acts committed but not charged in the other." Opening Brief at 21. Specifying, Tetu avers that

> some of the evidence which was relevant only to Cr. No. [00-01-0667], could also have constituted [drug] paraphernalia. I.e.[,] the bags containing the ecstasy in Count I, opium in Count II, LSD in Count III, or most problematic, the 3 pipes containing the methamphetamine in Count IV of Cr. No. [00-01-0667].

Opening Brief at 15.

We disagree with these contentions. Tetu was acquitted on counts I (MDMA, or "Ecstasy"), III (LSD), IV (methamphetamine) and V (marijuana) of Cr. No. 00-01-0667. He was convicted only on count II (opiate) of Cr. No. 00-01-0667.

At trial, Tetu's counsel confirmed, through her cross-examination of Detective Murray, that counts I, III and IV were all based upon items found either in the black suitcase, or in the right front pocket of the jeans found in the suitcase, or on the floor. In addition, the evidence at trial showed that the only marijuana (count V) involved in the case was found on the floor. On the other hand, the opiate (count II) Tetu was

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> instruction, *i.e.*, an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

(Footnote omitted.)

convicted for -- the only opiate involved in the case -- was found in the black briefcase that Tetu admitted he owned and brought to the hotel room.

Clearly, the jury decided that, of all the drugs and associated paraphernalia recovered pursuant to the execution of the search warrant, Tetu knowingly possessed only that contained in the briefcase that he owned and brought with him to the room. Conversely, the jury indubitably decided that he did not knowingly possess the suitcase or its contents, including the jeans, or any of the items on the floor. Hence, there is no reasonable possibility that the jury convicted Tetu of the paraphernalia found in association with the "Ecstasy," the LSD, the methamphetamine or the marijuana. By the same token, the only remaining and reasonably possible candidates -- associated with the counts charged in Cr. No. 00-01-0667 but capable of supporting conviction for unlawful use of drug paraphernalia in count II of Cr. No. 99-2427 -- were the "blue type of pen torch" found with the opiate capsules in the briefcase, and the briefcase itself. However, as Tetu concedes on appeal, these were in fact presented at the preliminary hearing under police report 99419884 and charged under Cr. No. 99-2427:

> A preliminary hearing was held on 12/6/99, and [Tetu] was charged as follows, in what ultimately became Cr. No. [99-2427].
> Count I: Promoting a Dangerous Drug in the Third Degree, a violation of [HRS] §712-1243 ([police report] 99-419-880), in which [Tetu] was ultimately found guilty at trial:
> 2. a pipe containing cocaine residue (trial Exhibit

> 27, including .003 g. cocaine) found on the drawer;
> 7. .213 g. containing cocaine from a ziploc bag -- this item was suppressed as evidence before trial;
> 8. .179 g. containing cocaine from a ziploc bag -- this item was suppressed as evidence before trial.
>
> Count II: Unlawful use of Drug Paraphernalia, a violation of [HRS] §329-43.5 [police report] 99-419-884, for the above items, and/or those listed in [police report] 99-419-884, in which [Tetu] was found ultimately guilty at trial:
> 1. Blazer Micro Torch, trial Exhibit 9;
> 2. *Blue Pencil Torch, trial Exhibit 10, found in an open briefcase*;
> 3-6. ziplock bags.

Opening Brief at 5-6 (enumeration in the original; record citations omitted; italics supplied; original brackets rendered here as parentheses).

As for Tetu's suggestion on appeal, that "the bags containing the . . . opium in Count II" could be culprits, Opening Brief at 15, there was no evidence at trial that the opiate capsules found in Tetu's briefcase were contained in "bags." Our independent review of the evidence adduced at trial turned up two references to a plastic container that held the capsules, but we do not believe there was a reasonable possibility the jury considered it as a candidate for the drug paraphernalia charge in Cr. No. 99-2427. Both references -- the first made by Detective Murray in describing his observations upon first entering the hotel room, and the second made by Kalapa in describing how he received the opiate capsules for analysis -- were merely in passing and without emphasis or further description or elaboration.

It appears fairly certain, instead, that the jury convicted Tetu of the paraphernalia charge based upon the glass pipe containing 0.003 grams of cocaine residue that was found on the dresser. The implication at trial was that this was the pipe Gouveia saw Tetu smoking. Tetu admitted at trial that he was working on this pipe at the dresser when the security officers entered the hotel room. The police officers gave extensive opinion testimony at trial that the pipe was the type used for smoking drugs. And the prosecutor elected the cocaine residue found in the pipe as the basis for count I of Cr. No. 99-2427.[6] The same reasons support, but more remotely, the candidacy of the "mini black torch" (Exhibit 9) found alongside the pipe on the

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[6] In her closing argument, the prosecutor identified the glass pipe found on the dresser as the subject of count I of Cr. No. 99-2427:

> Now, how the complaint deals specifically with this glass pipe.
>
> That on or about November 30th, 1999 in the City and County of Honolulu, State of Hawaii, the defendant possessed the dangerous drug cocaine and that the defendant did so knowingly.
>
> Now, this is the pipe that was found on the dresser. This is the pipe that [Tetu] said he got from [Ozu] that he walked to the dresser with; that he sat there with a lighter and that he was trying to mend. This was the pipe that was tested positive for .002 [(sic)] grams of cocaine.

However, with respect to the unlawful use of drug paraphernalia charge in count II of Cr. No. 99-2427, the prosecutor argued as follows:

> Count II of the complaint was the really long instruction the Court read to you on drug paraphernalia.
>
> Now, basically, what the State needs is that any one of these items was [drug] paraphernalia. But you must decide, together, that at least one of these items -- and you must be unanimous in your verdict -- was drug paraphernalia. That was admitted as an exhibit.

dresser. At any rate, we conclude there was no reasonable possibility, in this consolidated jury trial, of a "conviction in one case for acts committed but not charged in the other." Opening Brief at 21. If error there was giving rise to this prospect, it was harmless beyond a reasonable doubt. See Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(a) (2000) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); State v. Holbron, 80 Hawai‘i 27, 32 n.12, 904 P.2d 912, 917 n.12 (1995) ("the necessity of reversal under [HRPP] Rule 52(a) is determined by the application of the harmless beyond a reasonable doubt standard" (citations and internal quotation marks omitted)).

B. The Motions to Suppress.

Tetu next contends the court erred by not suppressing all of the evidence found in the hotel room. Tetu argues that private security officers Gouveia and Cho were acting as agents of the police and were therefore subject to the limits on unreasonable searches and seizures provided by the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawaii Constitution. Specifically, Tetu asserts that because Gouveia called the police for assistance in issuing the trespass warning, the actions of the security officers became State action and thus, an unconstitutional search and seizure which required exclusion of all of the evidence recovered by the

police. Such evidence includes the evidence recovered at the time of Tetu's initial arrest that was not suppressed by the court in response to Tetu's first motion to suppress, as well as that recovered pursuant to search warrant which was the subject of Tetu's unsuccessful second motion to suppress, as fruit of the poisonous tree.

We review a ruling on a motion to suppress evidence *de novo* under the right/wrong standard. State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997). The Hawai'i Supreme Court holds that the constitutional prohibition against unreasonable searches and seizures applies only to government action. State v. Boynton, 58 Haw. 530, 536, 574 P.2d 1330, 1334 (1978). The constitutional protections apply "only if the private party in light of all circumstances of the case must be regarded as having acted as an instrument or agent of the state." Id. (citations and internal quotation marks and block quote format omitted).

We first observe that if we accept, *arguendo*, Tetu's contention that Gouveia and Cho were acting as instruments or agents of the State, all we can conclude from the preceding precedent is that the constitutional prohibition against unreasonable searches and seizures applied to their actions. We cannot further conclude, without more, as Tetu does, that all evidence found in the hotel room must be suppressed, because Tetu nowhere explains how their actions violated the constitutional

prohibition. See id. at 540, 574 P.2d at 1336 (first deciding that an informant was "an arm of the government[,]" then concluding that his actions violated constitutional prohibitions, before affirming the trial court's suppression order). On this defect alone, Tetu's point must fail.

Leaving that fundamental problem to the side, we return to the only issue in fact argued by Tetu, State action. In a "totality of the circumstances" analysis, we consider "whether the governmental involvement is significant or extensive enough to objectively render an otherwise private individual a mere arm, tool, or instrumentality of the state. In doing so, we focus on the actions of the government, because, . . . the subjective motivation of a private individual is irrelevant." State v. Kahoonei, 83 Hawai'i 124, 130, 925 P.2d 294, 300 (1996).

On this issue, Tetu relies primarily upon his assertion that HRS § 708-814 (Supp. 2001)[7] does not require confirmation

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[7] HRS § 708-814 (Supp. 2001) provides, in pertinent part:

> (1) A person commits the offense of criminal trespass in the second degree if:
> . . . .
> (b) The person enters or remains unlawfully in or upon commercial premises after reasonable warning or request to leave by the owner or lessee of the commercial premises or the owner's or lessee's authorized agent or police officer[.]
>
> For purposes of this section, "reasonable warning or request" means a warning or request communicated in writing at any time within a one-year period inclusive of the date the incident occurred, which may contain but is not limited to the following information:
> . . . .

of the identity of the trespasser before issuance of a trespass warning. Tetu argues that once police involvement in confirming identity is nevertheless sought, the joint endeavor becomes State action. We disagree. Even assuming, without deciding, that the statute does not require confirmation of identity, commercial establishments are nonetheless not prohibited from involving the police in doing so, and the statute contemplates such involvement. HRS § 708-814(1)(b) & (1)(b)(iv). The mere fact of police involvement in delivering a trespass warning does not, *ipso facto*, convert private action into State action.

The totality of the circumstances in this case demonstrates that Gouveia and Cho were acting as private individuals and not as instrumentalities of the government. They were employed by a private business and were carrying out its policies. The police did not recruit, direct, pay or otherwise encourage them in any way to enter and search the hotel room. See Kahoonei, 83 Hawai‘i at 127, 925 P.2d at 297. The governmental involvement in their actions was far from "significant or extensive enough to objectively render an

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(ii) The legal name, any aliases, and a photograph, if practicable, or a physical description, including but not limited to sex, racial extraction, age, height, weight, hair color, eye color, or any other distinguishing characteristics, of the person warned;

. . . .

(iv) The signature of the person giving the warning, the signature of a witness or police officer who was present when the warning was given and, if possible, the signature of the violator.

otherwise private individual a mere arm, tool, or instrumentality of the state." Id. at 130, 925 P.2d at 300. Even if Gouveia and Cho had been, at some point, looking for drugs or contraband in furtherance of a prosecution, their motivation was largely irrelevant in this respect. Id. at 130, 925 P.2d at 300.

In sum, we conclude the court did not rule incorrectly with respect to Tetu's two motions to suppress.

C. The De Minimis *Infraction Issue*.

Tetu's final point on appeal is that the cocaine residue extracted from the glass pipe found on the dresser, which was the basis for his conviction in count I of Cr. No. 99-2427, was *de minimis* because it weighed only 0.003 grams, not a useable or saleable amount. Thus, Tetu argues that the court abused its discretion in not dismissing count I of 99-2427. HRS § 702-236 (1993) provides, in relevant part:

> (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
> . . . .
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction[.]

The decision to dismiss a charge as *de minimis vel non* lies in the sound discretion of the trial court and will not be disturbed unless the trial court abused its discretion. The trial court abuses its discretion if it clearly exceeds the bounds of reason or disregards rules or principles of law or

practice to the substantial detriment of a party litigant. State v. Ornellas, 79 Hawai'i 418, 423, 903 P.2d 723, 728 (App. 1995). First, we review the trial court's findings of fact regarding the relevant circumstances of the offense under the clearly erroneous standard. Then, we review the trial court's ultimate decision whether the infraction was *de minimis* for an abuse of discretion. State v. Viernes, 92 Hawai'i 130, 133, 988 P.2d 195, 198 (1999).

On this point, Tetu relies upon Viernes, supra. In Viernes, the Hawai'i Supreme Court decided that 0.001 grams of a substance containing methamphetamine was "infinitesimal and in fact unusable as a narcotic" and hence, was "neither useable nor saleable[.]" Id. at 134, 988 P.2d at 199 (footnote, citation and internal quotation marks omitted). This being so, the supreme court held, that amount "could not engender any abuse or social harm[,]" such that "Viernes's possession . . . did not threaten the harm sought to be prevented by HRS § 712-1243." Id. at 135, 988 P.2d at 200. Accordingly, the supreme court concluded that the trial court did not abuse its discretion in dismissing the drug charge as *de minimis*. Id.

In Viernes, the defendant presented uncontroverted expert testimony that 0.001 grams of methamphetamine cannot have any physiological effect on the human body and is not useable or saleable. Viernes, 92 Hawai'i at 131-132, 988 P.2d at 196-197. Also, the prosecution in Viernes did not present any evidence,

other than Viernes's mere possession of the substance, tending to show drug use or drug trafficking. Id. at 132, 988 P.2d at 197. By contrast, in this case the stipulated expert testimonies did not constitute conclusive evidence that 0.003 grams of cocaine residue can have no physiological effect on the body. Rather, the State offered expert testimonies to the effect that the amount of residue in the pipe could be smoked again, and that amounts as low as 0.0025 grams can have a euphoric or mood-altering effect. In any event, the Viernes court specifically held that its holding did not contradict State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979), by "applying a 'usable quantity standard' to HRS § 712-1243." Viernes, 92 Hawai'i at 135, 988 P.2d at 200. In Vance, the supreme court held that the legislative design prohibited it from adopting such a standard. Vance, 61 Haw. at 307, 602 P.2d at 944.

In this case, evidence was adduced at trial that Tetu was holding a glass pipe containing cocaine residue in his hands, along with a type of lighter typically used for smoking drugs, in a hotel room littered with drugs and drug paraphernalia. Given the foregoing, we cannot say that the court clearly erred in drawing a "reasonable inference . . . that [Tetu] was using drugs and knowingly possessed cocaine." (Citation omitted.) Or that the court abused its discretion in concluding that ".003 grams of residue containing cocaine was not deminimus [(sic)]." (Citation omitted.) The use of illicit drugs is precisely the type of harm

the legislature intended to prevent by enacting HRS § 712-1243. Vance, 61 Haw. at 307, 602 P.2d at 944. Hence, the court did not err in denying Tetu's motion to dismiss.

III. Conclusion.

Accordingly, we affirm the court's August 23, 2000 judgment in Cr. No. 99-2427, and the court's August 23, 2000 judgment in Cr. No. 00-01-0667.

DATED: Honolulu, Hawaii, August 27, 2002.

On the briefs:

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Acting Chief Judge

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Associate Judge

Associate Judge