NO. 23970

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
FAAVESI SAVE, also known as Vauvese Save, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-01-0015)

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

Defendant-Appellant Faavesi Save, also known as Vauvese Save (Save), appeals from the December 19, 2000 Judgment, following a jury trial, convicting him of (1) Possession of a Prohibited Firearm, Hawaii Revised Statutes (HRS) § 134-8(a); (2) Promoting a Dangerous Drug in the Third Degree, HRS § 712-1243; and (3) Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a); and sentencing him to incarceration for five years for each offense and a mandatory minimum of one year for offense (2) above. Circuit Court Judge Victoria Marks was the trial judge. We affirm.

BACKGROUND

On May 10, 1998, at approximately 11:54 p.m., Police Officer James Chong observed a vehicle directly in front of him stopped at a traffic light. The vehicle, driven by Save and carrying a passenger, Lisa Barsetti (Barsetti), had expired tax

and safety check emblems. Officer Chong's police report notes only the expired tax emblem.

At the motion to suppress hearing, Officer Chong testified that he first noticed the expired safety check and was informed by dispatch that the tax emblem was also expired.[1] He pulled the car over into the parking lot of the Foodland supermarket in Pearl City. Officer Chong noted that the steering column had a white towel wrapped around it and there was a vise grip in the ignition, both of which indicated that the vehicle might have been stolen. The court denied admission of the evidence regarding the vise grip. The white towel was not discussed.

Detective Jack Snyder testified that the vehicle was stolen although it had not been reported as stolen.

Police Officer Brian Reyes arrived within one minute of Officer Chong pulling Save over. While Officer Chong, from the outside of the driver's side, radioed dispatch to verify the vehicle identification number with the license plate, Officer Reyes, from the passenger's side, saw the passenger, Barsetti, reach down between her legs toward the floor. Officer Reyes flashed a light into the vehicle toward the passenger side of the car and noticed the barrel of a shotgun protruding from under the passenger front seat towards the back floor area. Officer Reyes

[1] At trial, Police Officer James Chong testified that he saw the expired tax emblem.

yelled, "Gun," and instructed Save and Barsetti to place their hands on the "dash." Officer Chong removed and handcuffed Save and arrested him for place to keep firearm. Officer Reyes retrieved the gun from the car, had Barsetti exit the car, then handcuffed Barsetti and seated her on the ground at the rear of the vehicle.[2]

Officer Reyes then observed a gold metal box on the floor of the front passenger side. He questioned Save and Barsetti if either owned the box, and both responded "no." Officer Reyes removed the closed box from the vehicle and opened it to check "for further ammunition for the gun." The box contained drug paraphernalia. Officer Chong admitted there were no exigent circumstances, safety concerns, or concern that the evidence would be destroyed when he opened the box.

Detective Jack Snyder also observed a green plaid bag and a black bag on the rear seat of the vehicle, and a brown bag in an open compartment on the "dash," the contents of which were unknown.

Detective Snyder obtained a search warrant for the vehicle and any bags or closed containers within, based on the following probable cause: Officer Chong stopped the vehicle;

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[2] At trial, Police Officer Brian Reyes testified that he did not retrieve the gun until after Defendant-Appellant Faavesi Save, also known as Vauvese Save (Save), and Save's passenger, Lisa Barsetti (Barsetti), were removed from the car.

Officer Reyes observed the sawed-off shotgun; there was a metal box containing drug pipes with drug residue inside; there was a vise grip and punched-out ignition in the vehicle; and when Detective Snyder questioned Barsetti, she admitted to having smoked drugs with Save, and she thought the shotgun was in the trunk, leading Detective Snyder to suspect that the trunk may have contained more weapons.

Detective Snyder executed the search warrant on May 13, 1998. The green plaid bag contained two purple plastic scales commonly used for weighing drugs. A white powdery residue visible on both scales was determined, through subsequent testing, to contain methamphetamine. The black bag contained two shotgun shells and a bank card torn into two pieces that, when put together, revealed Save's name.

Save was indicted on January 4, 2000. He filed his motion to suppress on April 17, 2000. The motion does not precisely identify the items to be suppressed. The motion was heard on May 1 and 22, 2000.

At the hearing on the motion to suppress, Barsetti testified that because she was cold, she was rubbing her legs when the officers approached the vehicle, but she did not reach for the floor at any time. She did not hear the officer yell, "Gun," only the instructions, "Get out of the car slowly. Put your hands on the dash." She stated that the officers first

removed her and Save from the car before taking anything out of the car and that she was not asked if she owned any of the items in the car. She testified that she was arrested "[f]or being in the car. That's what the guy said. . . . I was being arrested for being in the car."

At the conclusion of the hearing on the motion to suppress, defense counsel argued that the testimony of the officers "wasn't true," and the gun was not in plain view, but that the officers searched the vehicle and found the gun. The warrant was, therefore, based on an illegal search and all other evidence should have been suppressed.

Plaintiff-Appellee State of Hawai‘i, (the State) argued that the stop was legitimate because there was a problem with the tax emblem. This gave the officers reasonable suspicion to pull over and approach the car to obtain necessary information. Since it was nearly midnight and street lighting was dim, it was reasonable for the officers to use flashlights. The gun was in plain view, not open view. The State did not contest that the gold metal box was a closed container, but since neither Save nor Barsetti claimed ownership, it was considered abandoned property when the officer opened it. Barsetti's statement to the police, after being advised of her Miranda rights, indicated that she had smoked methamphetamine with Save and that she believed the shotgun was in the trunk, giving further probable cause for the

search warrant, independent of the evidence obtained from searching the gold metal box.

At the conclusion of the May 22, 2000 continued hearing on the motion to suppress evidence, the court found "that the traffic stop was a legitimate, lawful stop based upon reasonable suspicion; that the gun was seen and [sic] plain view; that the box was a closed container; and that it was improperly searched. So the box and its contents [were] suppressed."[3] The court further found that the search warrant was based upon probable cause even disregarding the box and its contents and, "[t]herefore, the search warrant [was] legitimate based upon sufficient probable cause."

On June 15, 2000, the court entered "Findings of Fact, Conclusions of Law and Order Denying in Part and Granting in Part Motion to Suppress Items of Evidence." Save challenges the following:

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[3] Query whether this decision conforms to the following precedent:

> In order to assert legal standing under traditional exclusionary rule analysis, an individual's personal rights must have been violated. The United States Supreme Court ruled the "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. . . ." Alderman v. United States, 394 U.S. 165, 171-72, 89 S.Ct. 961, 965-66, 22 L.Ed.2d 176 (1969).

State v. Navaez, 68 Haw. 569, 572-73, 722 P.2d 1036, 1038 (1986). In the instant case, when Officer Reyes noted a gold metal box on the floor of the front passenger side, he questioned Save and Barsetti if either owned the box, and both responded "no."

FINDINGS OF FACT

1. On May 10, 2000 at 11:54 p.m., Officer James Chong of the Honolulu Police Department was on patrol in his subsidized police vehicle when he saw a white Oldsmobile in front of his car, stopped at a traffic light. He was driving northbound on Lehua Avenue.

2. Officer Chong saw two passengers in the white car. He saw that the tax emblem on the car was expired.

3. Officer Chong then . . . had the driver of the white car pull over into the parking lot . . . .

. . . .

7. At the same time Officer Chong approached the driver's side of the car, Officer Reyes went up to the passenger side of the car. He turned on his flashlight and used it to look into the back seat of the car because he wanted to determine if there was anyone else in the car. He saw the front part of the barrel of a shot gun on the floor of the car.

8. Officer Reyes shouted the word "Gun". [Save] and Barsetti were ordered out of the car.

9. After the two suspects were outside the car, Officer Reyes took the shotgun out of the car. Officer Reyes saw a gold colored box on the floor of the car. He picked it up and asked the two suspects if the box belonged to either of them. [Save] and Ms. Barsetti denied ownership of the box.

10. Officer Reyes opened the box and saw glass pipes, a metal pipe and eight lighters in the box.

11. The car was impounded so a search warrant could be obtained. Detective Jack Snyder of the Honolulu Police Department was assigned to the case.

12. Before he submitted the warrant and supporting documentation for review, Detective Snyder interviewed Lisa Barsetti and, after advising her of her constitutional rights, she gave a statement. She said the shotgun belonged to [Save]. She also admitted to smoking methamphetamine with [Save].

13. Detective Snyder submitted the warrant to District Court Judge Rhonda Nishimura for approval. Judge Nishimura signed the warrant on May 12, 1998.

14. The warrant was executed on the car on May 13, 1998. As a result of the search, two 12 gauge shotgun shells, drug paraphernalia and small amounts of methamphetamine were found in the car.

CONCLUSIONS OF LAW

1. The shotgun seen by Officer Reyes was in plain view. Officer Reyes used his flashlight to see into the white car to determine if there was anyone else in the car. He then saw the

> shotgun on the floor of the car. The shining of the flashlight was not an illegal search. State v. Meyer, 80 Haw. 382 (1996).
>
> 2. The box and its contents were seized by Officer Reyes without a warrant. Although he believed the box to be abandoned property, a search warrant authorizing the opening and search of the box should have been obtained before any of the police opened the box and searched it. No valid exception to the warrant requirement existed. The evidence seized from the box is suppressed.
>
> 3. The search warrant obtained by Detective Snyder was a valid warrant. Detective Snyder had sufficient probable cause to obtain the warrant based on the finding of the shotgun and Barsetti's statement in which she said [Save] used methamphetamine. As a result, the drug paraphernalia and substances containing methamphetamine found during the execution of the warrant were validly seized by the police.
>
> ACCORDINGLY IT IS HEREBY ORDERED that Defendant Faavesi Save's Motion to Suppress is hereby partially denied and partially granted. The motion is denied as to the shotgun found by the officers and as to the evidence recovered as a result of the execution of the warrant. It is granted as to the box and its contents recovered by Officer Reyes and that evidence is suppressed.

During the trial, as a witness for the State, Barsetti testified that she had no memory of her conversation with Detective Snyder, that the assertions she made in her taped statement to Detective Snyder "were used to get [herself] out of jail" and that she was telling the truth at trial. The audio tape of Barsetti's statement to Detective Snyder was played for the jury, with inadmissible parts redacted.

DISCUSSION

A.

Save argues that "[t]he evidence recovered from the [automobile] were the result of an illegal pretextual traffic stop and an illegal warrantless vehicle search." He submits three subpoints on this issue.

1.

Save argues that "[t]he photograph of the rear of the [vehicle] shows that the safety check was valid and therefore Officer Chong's stopping of the vehicle was pretextual." This point is without merit.

Based on Officer Chong's testimony, the court found that Officer Chong saw that the tax emblem on the car was expired. Officer Chong also testified that he observed the vehicle with an expired safety check and that dispatch confirmed that both emblems were expired.

Although he did not do so at the hearing on the motion to suppress or at trial, Save, in this appeal, argues that "[a] close examination of the photographs . . . reveals that the safety check on the rear bumper reads '7'. . . . '7' would stand for the month of July. The traffic stop occurred in May. Therefore, the safety check sticker was not expired." Save fails to acknowledge that the effective year is not visible in the photograph to which Save refers and that the "7," by itself, proves nothing.

2.

Save contends that "[t]he fact that Officer Reyes conducted an illegal search of the metal box makes it quite likely that he also searched the vehicle in order to find the shotgun." This point is without merit. The finding that the

shotgun was found in plain view is supported by substantial evidence.

3.

Save contends that "[w]ithout the evidence recovered from the metal box, there was insufficient probable cause to support the issuance of the search warrant." This point is without merit. The trial court's finding that "Detective Snyder had sufficient probable cause to obtain the warrant based on the finding of the shotgun and Barsetti's statement in which she said [Save] used methamphetamine" is supported by substantial evidence and provides the necessary probable cause.

B.

Save contends "[i]t was error to refuse to redact the irrelevant and prejudicial references to drug use and drug dealing from Barsetti's statement." On this point, Save submits two arguments in his opening brief and a third in his reply brief.

1.

Save contends that "[t]he references to Save's drug use and drug dealing went beyond the scope of direct and cross examination." This point is without merit.

Save argues that

> when the prosecutor still had Barsetti on the stand, he suggested that he would be asking her questions regarding her receiving "ice" from Save. . . . However, the prosecution never asked Barsetti the question. . . .
>
> . . . .

> . . . Since she was never directly asked the question during her examination in the State's case-in-chief, Barsetti was never given the chance to "explain or deny."
>
> . . . In Save's case, the trial court should have limited the prosecution to the matters that were expressly covered in Barsetti's direct and cross-examination.

(Record citation omitted.)

Save neglects to point out that the deputy prosecutor's statement, "I would like to get into whether or not she had received ice from [Save] in the past" was made during a bench conference. Save does not point to where in the record any of these statements were heard by the jury or where he requested the exclusion of a statement the court "refused to redact."

2.

Pretrial, on September 21, 2000, this evidence was discussed as the subject of a motion in limine. Barsetti's references to drug use and drug dealing by Save and alleged threats to Save from "scary guys" and "other people with guns . . . that might hurt them" as being the reason he brought the shotgun, etc., were argued by the State as "bear[ing] directly on [Save's] knowledge that he had the sawed-off shotgun in the car, his knowing possession. . . . And also his knowing possession of the items that were required by search warrant in his trunk. And in the backseat shotgun shells, identification, methamphetamine pipe with residue[.]" The court decided this evidence was "part of the circumstances of the alleged offense."

Save contends that the questions the detective asked Barsetti during her taped statement regarding Save's drug use and drug dealing were inadmissible as "prejudicial character evidence" and "irrelevant and prejudicial evidence of prior bad acts" because, although Barsetti admitted Save's occasional drug use, she denied his dealing in it. Save argues that "[t]he introduction of Barsetti's statement was just a tactic to shoehorn Detective Snyder's own prognostications. It wasn't really Barsetti testifying. It was Snyder." Save ignores the fact that Detective Snyder's questions are not evidence. Save also ignores Barsetti's following testimony at trial:

> Q. Did you tell Detective Snyder that Save might have to sell drugs because of his finances with his business?
>
> A. I don't remember saying that.
>
> Q. Did you read that in the transcript?
>
> A. Yes.
>
> Q. Did you dis -- do you dispute now that you told Detective Snyder that?
>
> A. I don't dispute I said that. I can't believe -- that wasn't true, but I don't dispute I said that.

3.

Save contends that "to be admissible as a prior inconsistent statement, 'a witness must testify about the subject matter of his or her prior statements so that the witness is subject to cross-examination[.]' . . . In this case, the prosecutor never asked Barsetti if she had actually seen Save

using or selling drugs." (Emphasis in original.) On its face, this point is without merit.

C.

In her taped testimony played to the jury, Barsetti testified, in relevant part, as follows:

> A. . . . .
>
> . . . So all I did was go eat. We jumped in the car to go eat something. I had no idea. I mean, when the guy told me there's a gun in there, I was shocked. I didn't know. I didn't know.
>
> Q. Oh, Okay.
>
> A. As for the drug paraphernalia, I don't know if that's [Save's] or the person who owns the car. I don't know.
>
> Q. Well -- you're talking about underneath the front seat --
>
> A. It was -
>
> Q. -- where you were sitting?
>
> A. Yeah, yeah. And the gun, that was underneath my seat. I was --
>
> Q. You didn't see either one of 'em?
>
> A. No. I didn't know -- no, sir.

Save argues that "[i]t was a violation of due process to introduce into evidence Barsetti's statement discussing the drug paraphernalia under the front seat that had previously been suppressed." We agree that the deputy prosecutor's questions indicating that "drug paraphernalia" was "underneath the front seat" was improper. We note that no objection was made at trial. In context, we conclude that the error was harmless.

D.

Save argues, "The mention of the cash found in Save's fanny pack was irrelevant and prejudicial." This point has no merit.

A trial court's decision to admit or exclude evidence after weighing its probative value against its prejudicial effect is the abuse of discretion standard. State v. Rabe, 5 Haw. App. 251, 687 P.2d 554 (1984).

The State argued to the court, outside the presence of the jury, that the amount of cash "tend[ed] to make it more likely" that Save was involved in drug dealing and, thus, possessed the items he was charged with possessing. It further argued that because the defense had intimated during trial that the police had planted evidence, the State's introduction of the cash evidence "directly rebuts the defense and it shows that it's likely that the items possessed or that we allege were possessed by Mr. Save in the green plaid bag were in fact for distribution and he was the one in the distribution business." The court responded, "Okay. You can get into the cash. I don't want you to argue dealing. It's possession. To me those things go to intent to possess those kinds of things, but I don't want to hear any argument about dealing."

E.

Save contends that "[t]he court's jury instructions on 'possession' failed to fully instruct the jury on the 'knowledge' element of possession." This point is without merit.

The jury was instructed, in relevant part, as follows:

> A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.
>
> A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.
>
> A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.
>
> A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
>
> A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
>
> A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
>
> A risk is substantial and unjustifiable if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law abiding person would observe in the same situation.
>
> . . . .
>
> A person is in possession of an object if the person knowingly procured or received the thing possessed or was aware of his control of it for a sufficient period to have terminated his possession.
>
> The law recognizes two kinds of possession. Actual possession and constructive possession.
>
> A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing for a sufficient period to terminate his possession of it, either directly or through another person or persons, is then in constructive possession of it.
>
> The fact that a person is near an object or is present or associated with a person who controls an object without more is not sufficient to support a finding of possession.

> The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing[,] possession is joint.
>
> The element of possession has been proved if you find beyond a reasonable doubt that the defendant had actual or constructive possession either solely or jointly with others.

Save argues that "[t]he court[']s instruction on 'possession' failed to adequately inform the jury of the distinction between 'knowing' as opposed to 'reckless' possession." He argues that "Defendant's Proposed Jury Instruction No.'s [sic] 2, 4 and 5 . . . would have served to elucidate the distinction between 'knowing' and 'reckless' possession."

Save wanted the following additional instructions. In his proposed jury instruction No. 2, Save sought the following instruction: "Mere proximity to an object, mere presence, or mere association with a person who does control an object, without more, is insufficient to support a finding of possession." In his proposed jury instruction No. 4, he sought the following instruction: "The word 'possession' means conscious and substantial possession, not a mere involuntary or superficial possession or a passing control fleeting and shadowy in nature." In his proposed jury instruction No. 5, Save sought the following instruction: "A Defendant's mere proximity to a prohibited item, his mere presence or mere association with the

person who controls the item is insufficient to support a finding of possession."

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted). We conclude that the instructions, read and considered as a whole, were not prejudicially insufficient, erroneous, inconsistent, or misleading, but properly instructed the jury on the elements of possession.

CONCLUSION

Accordingly, we affirm the December 19, 2000 Judgment convicting Defendant-Appellant Faavesi Save, also known as Vauvese Save, of (1) Possession of a Prohibited Firearm, HRS § 134-8(a); (2) Promoting a Dangerous Drug in the Third Degree, HRS § 712-1243; and (3) Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a).

DATED: Honolulu, Hawai‘i, July 22, 2002.

On the briefs:

Chief Judge

Dwight C. H. Lum
for Defendant-Appellant.

Associate Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge