

NOT FOR PUBLICATION

NO. 24786

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.
JUAN ABADIANO, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-0026)

MEMORANDUM OPINION

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

Defendant-Appellee Juan Abadiano (Abadiano) was charged with Unauthorized Control of Propelled Vehicle, Hawaii Revised Statutes § 708-836 (Supp. 2002).¹ Plaintiff-Appellant State of Hawaii (the State) appeals from the December 12, 2001 Order Granting Defendant's Oral Motion to Dismiss Case. It challenges the November 23, 2001 Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Suppress Evidence. We vacate, in part, and reverse.

¹ Hawaii Revised Statutes § 708-836(1) (Supp. 2002) provides, in relevant part, as follows:

A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

BACKGROUND

On January 4, 2001, the State charged Abadiano with operating a "vehicle without the consent of Florentino Paelma, owner of said vehicle, thereby committing the offense of Unauthorized Control of Propelled Vehicle, in violation of Section 708-836 of the Hawaii Revised Statutes."

On May 22, 2001, Abadiano filed a motion to suppress. On June 19, 2001, Judge Sandra Simms held a hearing on the motion to suppress.

On November 23, 2001, the court entered findings of fact and conclusions of law, in relevant part, as follows:

FINDINGS OF FACT

1. That on December 28, 2000, at about 1:14 a.m., Honolulu Police Officer Sean Asato was on routine patrol in his vehicle on Halalii Street.
2. That Officer Asato observed a blue Honda Accord . . . parked on the west side of Halalii Street.
3. That Officer [Asato] initially drove past the Honda Accord and noticed that the vehicle was occupied by two individuals sitting in the front driver's seat and passenger's seat.
4. That after noticing the individuals, Officer Asato reversed back toward the vehicle so that he could observe the license plate number and report the number to dispatch. At this point, Officer Asato did not observe any criminal activity.
5. That after reporting the license number to dispatch, Officer Asato pulled alongside the driver's side door and asked

the driver, later determined to be [Abadiano] . . . , if everything was all right.²

6. That Officer Asato remained in his vehicle while initially speaking to [Abadiano].

7. That while speaking to [Abadiano], Officer Asato heard through his police radio that the vehicle . . . was reported stolen.

8. That the time between the initial call to dispatch and the resulting report back that the vehicle was stolen was less than one minute.

9. That upon learning that the vehicle was stolen, Officer Asato noticed that the vehicle's engine was turned on and started to proceed forward. Officer Asato exited his vehicle and approached [Abadiano].

10. That Officer Asato told [Abadiano] to turn off the engine and stop the car.

11. That Officer Asato illuminated the interior of the vehicle with his flashlight and noticed two individuals in the front and two individuals in the back seat.

12. That Officer Asato asked [Abadiano] for his registration and paperwork for the vehicle but [Abadiano] did not produce any paperwork.

13. That while waiting for other officers to arrive, the individuals in the back seat exit from the vehicle. Soon after, the individuals in the front seat, including [Abadiano], exit through the passenger door. That Officer Asato eventually catches [Abadiano] and arrests him for Unauthorized Control of Propelled Vehicle.

14. That the Court finds that there is some question as to exactly what Officer Asato did. But in any event, there was a stop.³

² Officer Sean Asato (Officer Asato) testified that Defendant-Appellee Juan Abadiano (Abadiano) responded that "he was just there with his girl friend. And everything was okay, and they would be leaving the area." Abadiano testified that Officer Asato "pulled over next to me and said what are you guys doing here? And I said oh, we're just leaving."

³ The fact that Abadiano was arrested warrants the conclusion that there was a stop. However, the conclusion that "[i]n any event, there was a stop" does not answer the relevant question of when the stop occurred.

15. That because there was a stop, there was a detention of [Abadiano] whenever there is a police encounter, even in a relatively innocent one.

16. That the Court finds there was no initial observation of criminal activity of any kind when Officer Asato initially saw the occupants seated in the vehicle on the side of the road.

17. That the fact that the area where the vehicle was parked is a high crime area, where Hondas are generally stolen, is of no consequence and does not give officers free reign to stop an individual.

18. That the Court has concerns either way, whether the check of the license plate was done after the questions to [Abadiano] were asked or before the questions were asked.⁴ There appears to be no authority to perform the vehicle check at that time.

19. That the Court finds that the average citizen would not feel free to leave upon an investigation or questioning by an officer.⁵

20. That Officer Asato did not advise [Abadiano] that he was free to leave at any time or that he could decline the encounter.

21. That the Court finds it credible that [Abadiano] did not, at any point, once the officer's vehicle reversed back and pulled alongside, feel free to leave and would feel obligated to stay there until such time as the police officer affirmatively says that he was free to go.

CONCLUSIONS OF LAW

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2. A person is seized if, given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave. State v. Quino, 74 Haw. 161, 840 P.2d 358 [(1992)].

⁴ In finding of fact no. 5, the court expressly found that Officer Asato checked the license plate before approaching Abadiano and asking the question. We do not understand the court's concern with the possibility that Officer Asato asked the question before checking the license plate. We also do not know the basis for the court's reference to "questions."

⁵ This finding is not relevant. The relevant question of law is stated in conclusion of law no. 2.

3. 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. Kearns, 75 Haw. 558, 867 P.2d 903 (1994).

4. Whether the investigation has focused on the suspect and whether the police have probable cause to arrest him [or her] prior to questioning are relevant considerations in determining whether a person is "in custody." State v. Melemai, 64 Haw. 479, 643 P.2d 541 [(1982)].

(Footnotes added.)

Abadiano testified, and there was no evidence to the contrary, that when Officer Asato first approached the Honda in his police Cushman, the engine of the Honda was running.

Officer Asato testified, and there was no evidence to the contrary, that the Honda never was blocked in because there were no cars either in front of or behind the Honda.

Officer Asato testified that it is routine for police officers to run license plate checks on vehicles without first observing any illegal or criminal activity; that if Abadiano had decided to leave the area prior to Officer Asato being informed that the vehicle was stolen, Officer Asato would not have detained him; that "[b]ecause there was no suspicion of criminal activity at the time, and he didn't do anything wrong," Abadiano would have been free to leave; and that he detained Abadiano after he received information from the license plate check that the vehicle was stolen. Id.

At the conclusion of the hearing on the motion to suppress, the court orally decided as follows:

THE COURT: . . . In this instance looks like there's some question as to exactly what . . . the officer did. But in any event, there was a stop. Basically there is still a detention of the defendant whenever there is a police encounter, even in a relatively innocent one, which at least the State is making this to appear.

But it's hard for the Court to just simply say that that kind of a contact, when there is not any observation of any illegal activity or any observation of . . . or any report of any criminal activity, that an officer coming upon, you know, a set of people who are lawfully seated in a vehicle, even in a residential area, who appear to be talking, who have not indicated that they need some sort of an assistance or who've not flagged -- obviously if they were in some sort of trouble they could have very easily have seen he Cushman drive by and flagged him down, if they needed assistance.

So there didn't seem to be any [observations] of any activity. The . . . allegation this is a high crime area, where Hondas are generally stolen, is of no consequence and doesn't give the officers free reign to just stop everybody that lives in certain parts of the state, or drives certain types of cars. There being no basis to do that, I think there's a question about when this check was ran.

I have concerns either way, whether the check was ran . . . after the questions were asked, or before the questions were asked. I question it either way, whether there is any basis or authority to do that at that time.

There is a detention. The defendant in this instance is not free to leave. It's difficult to imagine that a citizen who is engaged in an interaction with police officers at 1:14 in the morning, without having called them, feels free to simply say I don't feel like talking with you at this time. I don't think that's realistic in this day and age to think that a person would feel free, the average citizen would feel free, to go under those circumstances.

And I find it more credible that [Abadiano] . . . , once the Cushman reversed back and pulled alongside, . . . would feel obligated to remain there until such time as the police officer affirmatively says you're free to go.

POINTS OF ERROR ON APPEAL

The State challenges findings of fact nos. 14, 15, 16, 17, 18, 19, 20, and 21 and conclusions of law nos. 2, 3, and 4.

STANDARDS OF REVIEW

Motion to Suppress Evidence

Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard. Furthermore . . . 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, 20-21, 975 P.2d 773, 777-78 (App. 1999) (quoting State v. Anderson, 84 Hawai'i 462, 466-67, 935 P.2d 1007, 1011-12 (1997)).

Motion to Dismiss

A court's decision to dismiss a case with or without prejudice is reviewed for an abuse of discretion. State v. Estencion, 63 Haw. 264, 269, 625 P.2d 1040, 1044 (1981).

Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d

682, 688 (1990) (citations and internal quotation marks omitted); see also State v. Murray, 63 Haw. 12, 25, 621 P.2d 334, 342-43 (1980); State v. Gaylord, 78 Hawai'i 127, 144, 890 P.2d 1167, 1184 (1995).

DISCUSSION

1. A License Plate Check Done Without Probable Cause Does Not Constitute a Violation of the Federal and/or State Constitutions.

It is well established that, "where the object observed by the police is in 'open view,' it is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution." State v. Wyatt, 67 Haw. 293, 306, 687 P.2d 544, 553 (1984). In Wyatt, the court further emphasized that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of constitutional protection." Id.

In State v. Lewis, the New Jersey Supreme Court reasoned that, "[a]fter a review of both federal and state case law on the subject . . . inasmuch as the license plates on a motor vehicle are exposed to public view, the visual inspection of the plate number and subsequent computer check of the information pertaining to those plates 'did not intrude on the legitimate privacy interests' of the owner of the vehicle or a passenger." 288 N.J. Super. Ct. App. Div. 160, 164, 671 A.2d

1126, 1127 (1996) (quoting State v. Myrick, 282 N.J. Super. Ct. Law Div. 285, 293, 659 A.2d 976, 979 (1995)).

In Abadiano's case, the State asserts that the trial court erred in its finding of fact no. 18, when it stated that "[t]here appears to be no authority to perform the vehicle check" at the time that Officer Asato performed it. We agree with the State. The license plate was in open view and there was no reasonable expectation of privacy regarding it. When the check on the Honda's license plate was made, no temporary investigative stop of Abadiano or the Honda had been made.

2. In Combination, Officer Asato's Actions and Question Prior to Being Advised That the Honda Was a Stolen Vehicle Did Not Constitute a Stop/Seizure of Abadiano and Did Not Implicate Any of Abadiano's Fourth Amendment Rights.

If a seizure within the constitutional sense has not occurred, then the relevant constitutional protections do not apply. State v. Kearns, 75 Haw. 558, 566-67, 867 P.2d 903, 907 (1994). In Kearns, 75 Haw. at 567, 867 at 907, the Hawai'i Supreme Court stated, in relevant part, as follows:

Our analyses in these cases are consistent with the proposition that

when the activities of law enforcement officials convey the impression that an investigation of specific and identifiable criminal activity has commenced and they have reason to believe that the citizen is involved or possesses relevant information, a reasonable person is more likely to believe that he or she is not free to ignore the official request and walk away.

Williamson, The Dimensions of Seizure: The Concepts of "Stop" and "Arrest", 43 Ohio St.L.J. 771, 778 (1982). Accordingly, we hold that a person is seized, for purposes of article I, section 7 of the Hawai'i Constitution, 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.

In State v. Quino, 74 Haw. 161, 165, 840 P.2d 358, 360 (1992), the Hawai'i Supreme Court stated, in relevant part, that "[a]fter observing the three men from a distance, both officers approached and stopped them. Officer Tano identified herself as a police officer and asked permission to speak with Quino and Cachola." The Hawai'i Supreme Court subsequently stated that "[i]f Quino's behavior had provided an objective basis to suspect criminal activity, a Terry stop could have been effected" and "once the stop turned from general to inquisitive questioning, a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away." Id. at 173, 840 P.2d at 363-64.

It is clear "that not every street encounter between the police and the public constitutes a 'seizure.'" State v. Tsukiyama, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974). "It is well-established that not every police encounter is a seizure as defined by the fourth amendment. \$25,000 U.S. Currency, 853 F.2d 1501, 1505 (9th Cir. 1988) (see, e.g., Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983)

(plurality); United States v. Erwin, 803 F.2d 1505, 1508 (9th Cir. 1986)). Thus, in United States v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994), the court stated, in relevant part, as follows:

We are mindful that police interrogation of automobile occupants typically involves a greater degree of intrusiveness than questioning of pedestrians and thus more readily impinges on the Fourth Amendment. Mendenhall, 446 U.S. at 556-57, 100 S. Ct. at 1877-79. However, where, as here, officers come upon an already parked car, this disparity between automobile and pedestrian stops dissipates and the driver is not clearly stopped in any sense *ab initio*, except of his own volition. See id. [FN1 (Instructively, other circuits in factually similar cases have consistently held that an officer's approach of a car parked in a public place does not constitute an investigatory stop or higher echelon Fourth Amendment seizure. See, e.g., United States v. Encarnacion-Galvez, 964 F.2d 402, 410 (5th Cir.), cert. denied, 506 U.S. 945, 113 S. Ct. 391, 121 L. Ed. 2d 299 (1992); United States v. Castellanos, 731 F.2d 979, 983-84 (D.C. Cir. 1984); United States v. Pajari, 715 F.2d 1378, 1381-83 (8th Cir. 1983). See also, Lafave, 3 Search and Seizure § 9.2(h), 408-09 (2d ed. 1987) (concluding that "if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure") (footnotes omitted).)]

Abadiano argues that he was seized in the constitutional sense, invoking his constitutional rights against warrantless searches and seizures, when Officer Asato pulled over alongside Abadiano and "asked him what was wrong[.]"⁶ In the words of defense counsel,

you got an officer who reverses and asks you a question. And you're -- it's in people's mind you're not just gonna go drive. You're not gonna drive off. And looking at that . . . there's a detainment there of at least -- even according to the officer -- of at least maybe less than a minute of some detention before he finds out that the vehicle is stolen.

⁶ As noted in finding of fact no. 5, the question was "if everything was all right[,]" not "what was wrong[?]"

The court agreed with Abadiano and orally concluded that Officer Asato stopped/seized Abadiano when "the Cushman reversed back and pulled alongside." We disagree.

The Honda was already stopped and parked on the side of the road, with its engine running. In his police Cushman, Officer Asato initially passed the Honda. Officer Asato reversed his Cushman to the rear of the Honda to see the license plate and to call it in to dispatch for a check. Then, as noted in finding of fact no. 5, he "pulled alongside the driver's side door and asked the driver, . . . if everything was all right." Abadiano was not physically prohibited from exiting the Honda and leaving the scene. Officer Asato did not block the Honda's path, forward or backward. Officer Asato's sole question was conducted in a conversational manner. Officer Asato did not ask any question, exert any physical control, or show any authority that would indicate to Abadiano that he was under investigation and not free to leave. A reasonable person in Abadiano's situation would have felt free to answer "yes," say "thanks for asking" and "goodbye," and drive away.

The defense relies heavily on State v. Bolosan wherein the court stated that "[a] stop of a vehicle for an investigatory purpose constitutes a seizure within the meaning of the constitutional protection against unreasonable searches and

seizures." 78 Hawai'i at 92, 890 P.2d at 679; see also Wyatt, 67 Haw. at 293, 687 P.2d at 544 (stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment). As stated above, Officer Asato did not stop the Honda, block its movement, or engage in any investigatory or intrusive questioning. Officer Asato's sole question was conversational. Having not been seized in a constitutional sense, Abadiano's constitutional rights were not violated.

A continuation of a temporary investigative stop after a failure to substantiate the reasonable suspicion that initially justified the temporary investigative stop is unlawful, even if the continuation is for the purpose of performing a check for outstanding warrants. State v. Silva, 91 Hawai'i 80, 979 P.2d 1106 (1999). In other words, a detainment of a person while doing a check on relevant government records requires a legal basis for the detainment.

In this case, as noted above, Officer Asato (1) passed the Honda in his police Cushman, (2) reversed his Cushman to the rear of the Honda to see the license plate and to call it in to dispatch for a check, and (3) "pulled alongside the driver's side door and asked the driver, . . . if everything was all right." Did (1) and (2) prior to (3) cause (3) to be an unlawful

detainment? In light of the question asked, our answer is no. From a reasonable person's point of view, if, after (1) and (2), Officer Asato was investigating and/or temporarily detaining Abadiano, Officer Asato would have asked an investigatory or intrusive question or would have said or done something else to indicate to Abadiano that Abadiano was being investigated and/or was not free to leave.

As noted above, the court stated, in relevant part, as follows:

There is a detention. The defendant in this instance is not free to leave. It's difficult to imagine that a citizen who is engaged in an interaction with police officers at 1:14 in the morning, without having called them, feels free to simply say I don't feel like talking with you at this time. I don't think that's realistic in this day and age that a person would feel free, the average citizen would feel free, to go under those circumstances.

And I find it more credible that [Abadiano] . . . , once the Cushman reversed back and pulled alongside, . . . would feel obligated to remain there until such time as the police officer affirmatively says you're free to go.

In response, we first note that the subjective point of view is not relevant. Second, we note that any person, at any time, is free to walk away from a police officer unless and until that police officer by words and/or actions temporarily detains that person based upon a warrant or a reasonable suspicion based on specific and articulable facts that criminal activity is afoot. See State v. Trainor, 83 Hawai'i 250, 255-56, 925 P.2d 818, 823-24 (1996) ("[T]he police may temporarily detain an

individual if they have a reasonable suspicion based on specific and articulable facts that criminal activity is afoot."). Third, police officers do not need reasonable suspicion based on specific and articulable facts that criminal activity is afoot to talk to people on the street, even at 1:14 a.m. on a Thursday.

CONCLUSION

Accordingly, we vacate the following findings of fact and conclusions of law entered on November 23, 2001: findings of fact no. 18 and conclusions of law nos. 2, 3, and 4. We reverse both the November 23, 2001 Order Granting Defendant's Motion to Suppress Evidence and the December 12, 2001 Order Granting Defendant's Oral Motion to Dismiss Case.

DATED: Honolulu, Hawai'i, September 18, 2003.

On the briefs:

Loren J. Thomas, Deputy Prosecuting Attorney, City and County of Honolulu, for Plaintiff-Appellant.	Chief Judge
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Linda C. R. Jameson, Deputy Public Defender, for Defendant-Appellee.	Associate Judge
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Associate Judge