NO. 24807

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
RODNEY BATACAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 00-01-0131)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Rodney Batacan (Batacan) appeals the December 3, 2001 judgment of the circuit court of the fifth circuit, the Honorable Clifford L. Nakea, judge presiding, that convicted him, upon a jury's verdict, of promoting a dangerous drug (methamphetamine) in the third degree (Count 1),[1] and unlawful use of drug paraphernalia (a glass pipe) (Count 2).[2]

Upon a painstaking review of the record and the briefs submitted by the parties, and giving sedulous consideration to the arguments advanced and the issues raised by the parties, we resolve Batacan's points of error on appeal as follows:

1. Batacan contends the court erred in denying his

[1] 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."

[2] HRS § 329-43.5(a) (1993) provides, in pertinent part, that "[i]t 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."

August 2, 2001 Motion to Compel Disclosure of Confidential Informant, Or in the Alternative to Dismiss Indictment with Prejudice (the Motion to Compel). Batacan bases his contention on two arguments:

a. Batacan argues that Hawaii Rules of Evidence (HRE) Rule 510(c)(3) (1993)[3] required disclosure of the identity of the confidential informant (CI), because "there was ample reason for the court below to form the belief that the CI that Officer Barriga utilized was neither reliable nor credible." In his Motion to Compel, Batacan made several bare assertions, without more, to undergird this argument. These remain the same and similarly unadorned on appeal: (1) the execution of the search warrant on Batacan's residence turned up no drug-related evidence; (2) the CI-based affidavit in support of a previous search warrant, that culminated in the arrest of a man living on the floor above Batacan's, was very similar to the affidavit in

[3] Hawaii Rules of Evidence Rule 510(c)(3) provides:

> If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

Batacan's case, which indicates that the CI in the previous case and the CI in Batacan's case were one and the same; and (3) the CI might have gotten in trouble with the law after the execution of the previous search warrant, and no longer having recourse to the target of the previous search warrant as a bargaining chip, falsely fingered Batacan, instead. This point has no merit. "The HRE Rule 510(c)(3) exception applies only in cases where the judge believes that the CI is not reliable or credible." State v. Kapiko, 88 Hawai'i 396, 402, 967 P.2d 228, 234 (1998). Given the purely speculative and conclusory support Batacan offered for his argument, it is no surprise

> the record does not reflect that the judge was not satisfied with the information provided by the CI. Accordingly, inasmuch as the record is silent as to any challenge to the credibility or reliability of the CI by the circuit court, the HRE Rule 510(c)(3) exception did not apply and the prosecution had the privilege to refuse to disclose information that would lead to the identification of the CI.

Id.

b. Relying upon the same arguments and averments as detailed above, Batacan asserts that Hawai'i Rules of Penal Procedure (HRPP) Rule 16(e)(6)[4] mandated "[d]isclosure of the [CI's] identity . . . in order to assure that Mr. Batacan was

[4] The reference to Hawai'i Rules of Penal Procedure (HRPP) Rule 16(e)(6) is an error. The correct citation is HRPP Rule 16(e)(5)(ii):

> Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure shall not be denied hereunder of the identity of a witness intended to be produced at a hearing or trial.

able to avail himself of the full panoply of his constitutional protections prior to and during the trial." We disagree. In this case, Batacan

> was not charged with any offenses based on the information supplied by the CI to the police, the CI was not an active participant in the offenses charged, and the CI was not going to be called by the prosecution to testify at . . . trial. The charges for possession of the drugs and drug paraphernalia depended on the circumstances at the time the search warrants were executed, and not on any information supplied by the CI.

Kapiko, 88 Hawai‘i at 403, 967 P.2d at 235 (discussing the applicability there of the HRPP Rule 16(e)(5)(ii) exception). "Under the circumstances, we cannot say that the possible significance of the informer's testimony to the defense outweighed the public interest in protecting the flow of information." Kapiko, 88 Hawai‘i at 403, 967 P.2d at 235 (brackets, citation, internal quotation marks and block quote format omitted). As for Batacan's suggestion that disclosure of the identity of the CI would have enabled him to mount a pretrial attack on the finding of probable cause for the search warrant,

> neither the federal nor state constitutions dictate disclosure of an informer's identity where the sole purpose is to challenge the finding of probable cause. A trial court may, in its discretion, require disclosure if it believes that the officer's testimony is inaccurate or untruthful.

State v. Delaney, 58 Haw. 19, 24, 563 P.2d 990, 994 (1977).

2. Batacan contends the court erred in denying his August 2, 2001 Motion to Suppress Items of Evidence (the Motion to Suppress). Batacan bases his contention on two arguments:

a. Relying upon Hawaii Revised Statutes (HRS) § 803-34

(1993),[5] Batacan avers that, before the police strip-searched him, "they should have brought him before a magistrate to determine if there were enough probable cause to do so." We disagree. HRS § 803-34 refers to the contents of the warrant, and there is no authority for making its requirements mandatory or even directory for the police in their execution of search warrants. At any rate, probable cause to search Batacan was established, to the satisfaction of a magistrate, before the search warrant was issued:

> Under the safeguards of the state and federal constitutions, no search warrants shall issue except upon a finding of probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997) (citation and block quote format omitted). Batacan also avers: "to the extent that the language of the search warrant can be construed to allow a search of his person no matter where he was found, it failed to meet the constitutional requirement of particularity." This assertion lacks apposite authority and hence, is devoid of merit.

---

[5] HRS § 803-34 (1993) provides:

> The warrant shall be in writing, signed by the magistrate, with the magistrate's official designation, directed to some sheriff or other officer of justice, and commanding the sheriff or other officer to search for and bring before the magistrate, the property or articles specified in the affidavit, to be disposed of according to justice, and also to bring before the magistrate for examination the person in whose possession the property or articles may be found.

b. Relying upon HRPP Rule 41(d),[6] Batacan argues that the failure of the police to give a copy of the search warrant to Batacan's girlfriend at his residence "in and of itself rendered the subsequent resulting seizure, strip-search and arrest of Mr. Batacan at his workplace illegal." This point is of no account, for HRPP Rule 41(d) requires the police to provide a copy of the search warrant only after they have taken property under the warrant:

> We know of no rule of law that affords the person who is searched, or whose premises are searched, the right to demand to see the search warrant before the search is made. After the property is taken, however, HRPP Rule 41(d) requires that "[t]he officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant[.]"

State v. Endo, 83 Hawai'i 87, 93, 924 P.2d 581, 587 (App. 1996). The police took no items from the Batacan residence. In any event, Batacan can demonstrate no violation of his own constitutional rights during the search of his residence to justify the exclusion of evidence:

---

[6] HRPP Rule 41(d) provides:

> The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request cause to be delivered a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

> "A defendant who seeks to benefit from the protections of the exclusionary rule has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also that his own constitutional rights were violated by the search and seizure challenged." [State v.] Scanlan, 65 Haw. [159,] 160-61, 649 P.2d [737,] 738 [(1982)].

State v. Pattioay, 78 Hawai'i 455, 466, 896 P.2d 911, 922 (1995). We observe, moreover, that Batacan was given a copy of the search warrant when he was searched at his workplace.

Therefore,

IT IS HEREBY ORDERED that the court's December 3, 2001 judgment is affirmed.

DATED: Honolulu, Hawai'i, November 14, 2003.

On the briefs:

Mark R. Zenger, for defendant-appellant.

Craig A. De Costa, First Deputy Prosecuting Attorney, County of Kauai, for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge