

**NOT FOR PUBLICATION**

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NO. 24841

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v.  
REYNALDO CUNTAPAY, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 01-1-0301)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant State of Hawai'i (the State) appeals from the Findings of Fact and Conclusions of Law; Order (FsOF, CsOL; Order) entered on December 19, 2001, by Judge Joseph E. Cardoza, granting Defendant's Motion to Suppress Evidence and Statements (M/S) filed on July 24, 2001. We reverse in part, vacate in part, and remand.

On Tuesday, June 5, 2001, at approximately 10:58 a.m., two uniformed police officers went to a residence to serve a bench warrant. The police officer in charge (the POIC) testified that the address on the bench warrant was not of that residence. It was the named person's "old address at his mom's house[,] " and the POIC went to that residence because "[i]n the past when I have arrested him, he's used that address as his resident address."

The POIC testified that the residence was "a single story wooden dwelling with an open garage" visible from the street. There was no fence and "no signs indicating do not enter or no trespassing[.]"

From the sidewalk, the POIC noticed approximately seven to ten adult males in the garage, some seated around a table and some standing. The officers then approached the garage. As the officers approached, the POIC saw money and playing cards on the table, and the males grabbing money from, and moving away from, the table. The POIC saw Defendant-Appellee Reynaldo Cuntapay (Cuntapay) holding a small, black object in his right hand, and walking away from him to a washroom located in the garage area. The door of the washroom was open. The POIC saw Cuntapay enter the washroom, reach behind a washing machine in the washroom, and immediately exit the washroom. Cuntapay was no longer holding anything in his right hand. The POIC then entered the washroom, looked behind the washing machine, and observed a small magnetic box, commonly used to hold keys, which had some plastic protruding out the side of the box. The POIC moved the washing machine, saw a rock-like substance in a plastic bag protruding from the magnetic box, and seized it. Cuntapay was then arrested. The police officers did not find the person named in the bench warrant at the scene.

On June 15, 2001, Cuntapay was charged by complaint for the offense of Promoting a Dangerous Drug in the Third Degree, Hawaii Revised Statutes (HRS) § 712-1243(1) (1993)<sup>1</sup>, and Prohibited Acts Related to Drug Paraphernalia, HRS § 329-43.5(a) (1993)<sup>2</sup>.

In his July 24, 2001 M/S, Cuntapay challenged the legality of the warrantless search and sought to suppress the seized contraband and tainted subsequent statements. At the conclusion of the hearings on the M/S, the court orally granted it, and subsequently entered its FsOF, CsOL; Order.

Article I, section 7 of the Hawai'i Constitution and the Fourth Amendment of the United States Constitution provide each person with a constitutionally protected expectation of privacy in situations where (1) the person exhibits an actual, subjective expectation of privacy and (2) that expectation is one that society would recognize as objectively reasonable. State v. Tau'a, 98 Hawai'i 426, 436, 49 P.3d 1227, 1237 (2002).

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<sup>1/</sup> Hawaii Revised Statutes (HRS) § 712-1243(1) (1993) states, "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."

<sup>2/</sup> HRS § 329-43.5(a) (1993) states, in relevant part, as follows:

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.

"[T]he 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 [or her] own . . . rights were violated[.]" State v. Edwards, 96 Hawai'i 224, 232, 30 P.3d 238, 246 (2001) (citations and internal quotation marks omitted).

[A] defendant must demonstrate that he [or she] personally has an expectation of privacy in the place searched, and that his [or her] expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Tau'a 98 Hawai'i at 434, 49 P.3d at 1235 (quoting Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 & n.12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978))).

[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.

. . . .

If we regard the overnight guest in Minnesota v. Olson[, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990),] as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between.

Carter, 525 U.S. at 90-91, 119 S. Ct. at 473-74.

"The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence[.]" Edwards, 96 Hawai'i at 232, 30 P.3d at 246 (citation omitted).

The State contends that the court erroneously concluded in COL No. 1 that Cuntapay "'had a legitimate expectation of

privacy protected under the fourth amendment's proscription against unreasonable searches and seizures'" because Cuntapay was not the owner, resident, or occupant of the house but was simply an infrequent guest of the garage and he, therefore, lacked standing to object to the search of the area behind the washing machine.

We conclude that (1) Cuntapay had standing to attempt to satisfy his burden of proof and (2) Cuntapay failed his burden to prove, by a preponderance of the evidence, the reasonableness of his alleged personal expectation of privacy in the place searched. The following are the relevant facts and they do not satisfy Cuntapay's burden. As a guest, Cuntapay visited that garage "[o]nce a week, sometimes twice" to play cards and darts. At approximately 10:58 a.m., Cuntapay was in that garage with seven to ten other men to play cards and darts. The place searched was a "washroom" "in the garage area." The washing machine was in that washroom, and there is no evidence as to what else was in the washroom. The door to that washroom was open and no one was in that washroom. When the door to that washroom was open, a person approaching the garage could see the washing machine inside that washroom.

Our decision on this point on appeal makes it unnecessary to address any other points on appeal.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the December 19, 2001 Order granting Defendant's Motion to Suppress Evidence and Statements filed on July 24, 2001, is hereby reversed. The first sentence of Conclusion of Law no. 1 is reversed.<sup>3</sup> The remainder of Conclusion of Law no. 1 and Conclusions of Law nos. 2, 3, 6, 7, and 8 are vacated and this case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, September 15, 2003.

On the briefs:

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| Simone C. Polak,<br>Deputy Prosecuting Attorney,<br>County of Maui,<br>for Plaintiff-Appellant. | Chief Judge |
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| Carrie Ann Y. Shirota,<br>Deputy Public Defender,<br>for Defendant-Appellee. | Associate Judge |
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<sup>3/</sup> The first sentence of Conclusion of Law no. 1 states, "The area behind the washing machine where the magnetic box was found and seized by the police was a place where Defendant had a legitimate expectation of privacy protected under the fourth amendment's proscription against unreasonable searches and seizures."