NO. 25555

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
ARTHUR K. SAGAPOLU, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 02-1-0782)

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

Plaintiff-Appellant the State of Hawaiʻi (State) appeals the "Findings of Facts, Conclusions of Law, and Order Granting and Denying in Part Defendant's Motion to Suppress Items of Evidence" filed on November 27, 2002 in the Circuit Court of the First Circuit (circuit court).[1]

On appeal, the State contends the circuit court erred by (1) finding that packets recovered from Defendant-Appellee Arthur K. Sagapolu (Sagapolu) were methamphetamine and (2) concluding the State did not present clear and convincing evidence that the packets would have been inevitably discovered during a pre-incarceration inventory search of Sagapolu.

I. FACTS

On April 19, 2002, Sagapolu was charged with Promoting a Dangerous Drug in the Third Degree (cocaine), in violation of

[1/] The Honorable Reynaldo Graulty presided.

Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2001),[2] and Consumption of Liquor on Public Sidewalk in violation of HRS §§ 281-78(a) (1993)[3] and 281-102 (1993).[4] On June 27, 2002, Sagapolu filed a "Motion to Suppress Items of Evidence" (Motion to Suppress), which sought to suppress two bottles of alcohol, one clear ziploc bag, and one green ziploc bag.

At the July 22, 2002 hearing on the Motion to Suppress, Officer Ryan Kaio (Officer Kaio) testified that he arrested Sagapolu on April 8, 2002 for drinking in a public place. Prior

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[2/] Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2001) provides:

> **§712-1243 Promoting a dangerous drug in the third degree.** (1) 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) Promoting a dangerous drug in the third degree is a class C felony.
>
> (3) Notwithstanding any law to the contrary, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

[3/] HRS § 281-78(a) (1993) provides:

> **§281-78 Prohibitions.** (a) No person shall, except as permitted in section 291-3.4, consume any liquor on any public highway or any public sidewalk.

[4/] HRS § 281-102 (1993) provides:

> **§281-102 Other offenses; penalty.** If any person violates this chapter or any rule or regulation in effect by authority of this chapter, whether in connection therewith a penalty is referred to or not, for which violation no penalty is specifically prescribed, the person shall be imprisoned not more than six months or fined not more than $1,000, or both.

to placing Sagapolu into a transport vehicle, Officer Kaio patted down Sagapolu for weapons. Officer Kaio recovered a clear plastic ziploc baggy from Sagapolu's right front pocket and a green plastic ziploc bag from his left front pocket, both of which contained an off-white rock-like substance Officer Kaio believed to be rock cocaine. Officer Kaio then placed Sagapolu under arrest for the additional offense of Promoting a Dangerous Drug in the Third Degree.

On August 22, 2002, at a continuation of the hearing on the Motion to Suppress, Officer Shannon Chu testified that (1) police officers received training on searches of prisoners who were brought to the central receiving desk at the police station; (2) the officers were trained to search every prisoner in the same manner; (3) prisoners were told to stand within a painted box on the floor with their hands on the wall and their feet spread apart; (4) officers searched the prisoners' waist area first and then the prisoners' pockets were searched and emptied; (5) the prisoners' pockets were turned inside out to assure that no contraband was brought in through central receiving; (6) the officers patted down the prisoners' legs and checked inside the prisoners' socks and shoes; and (7) all property, including whatever was found in the prisoner's pockets, was inventoried. Officer Chu could not recall if he personally searched Sagapolu on the night that Sagapolu was arrested.

Sagapolu objected to the introduction of Officer Chu's testimony regarding the search procedures, but the circuit court ruled that it was relevant under Hawaii Rules of Evidence (HRE) Rule 406 to show habit or routine.

On November 27, 2002, the circuit court granted the Motion to Suppress in part and suppressed the packets found in Sagapolu's pockets. The State timely filed this appeal.

II. STANDARD OF REVIEW

A. 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, 467, 935 P.2d 1007, 1012 (1997)).

Consequently, "[w]e review the circuit court's ruling on a motion to suppress *de novo* to determine whether the ruling was 'right' or 'wrong'" as a matter of law. State v. Kauhi, 86 Hawai‘i 195, 197, 948 P.2d 1036, 1038 (1997).

> [W]hen a defendant's motion to suppress evidence is denied prior to trial, the defendant need not object at trial to

> the introduction of the evidence to preserve his or her right to appeal the pretrial denial of his or her motion to suppress and the introduction of the evidence at trial.

State v. Kong, 77 Hawai‘i 264, 266, 883 P.2d 686, 688 (App. 1994).

> [W]hen the defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial.

Id.

III. DISCUSSION

A. The circuit court erred by finding that the packets found on Sagapolu were purportedly methamphetamine.

The State contends the circuit court erred in its Finding of Fact number 6 by finding that Officer Kaio purportedly found packets of methamphetamine, instead of cocaine, while searching Sagapolu. Finding of Fact number 6 reads as follows: "6. During Defendant's arrest, Mr. Sagapolu was subsequently searched, which revealed packets purported to contain methamphetamine." Conclusion of Law number 4 also erroneously refers to methamphetamine instead of cocaine: "4. The subsequent search of Defendant and the recovery of the packets of methamphetamine exceeded the scope of a valid search incident to arrest, as it uncovered fruits of a crime for which Defendant was not arrested."

Officer Kaio's "Affidavit in Support of Warrantless Arrest" stated that the rock-like substance he recovered from Sagapolu's pocket appeared to be crack cocaine. Officer Kaio testified at the Motion to Suppress hearing that he recovered from Sagapolu an off-white rock-like substance, which, from his previous experience and training, appeared to be rock cocaine. There is no reference to methamphetamine anywhere in the record. There is no evidence to support the circuit court's finding that the packets found in Sagapolu's pockets purportedly contained methamphetamine. Therefore, the circuit court's Finding of Fact number 6 and Conclusion of Law number 4 are clearly erroneous.

B. The circuit court erred by concluding the State did not present clear and convincing evidence that the packets found in Sagapolu's pockets would not have been inevitably discovered during a pre-incarceration inventory search.

The State contends the circuit court erred in its Conclusion of Law number 6 by concluding that the packets found in Sagapolu's pockets would not have been inevitably discovered during an inventory search of Sagapolu. The State argues that the testimony of Officer Chu regarding pre-incarceration search procedures of prisoners satisfied the clear and convincing standard of proof under State v. Lopez, 78 Hawai‘i 433, 896 P.2d 889 (1995). Conclusion of Law number 6 states:

> 6. The Court, having considered the testimony of Officer Chu, and his inability to recall any aspect of the inventory search of Defendant, find that the State has failed to establish by clear and convincing evidence that

> the packets of methamphetamine would have been recovered during the pre-incarceration inventory search in this case.

"In our view, the right to be free of 'unreasonable' searches and seizures under article I, section 5 of the Hawaii Constitution is enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances." State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974). The exclusionary rule requires that evidence seized in a tainted search be suppressed if it is to be used in a criminal prosecution. State v. Boynton, 58 Haw. 530, 535, 574 P.2d 1330, 1334 (1978). "Because we believe that the inevitable discovery exception to the exclusionary rule is a sound principle, which prevents the setting aside of convictions that would have been obtained in the absence of police misconduct, we now adopt the federal concept of inevitable discovery on the state level." Lopez, 78 Hawai‘i at 451, 896 P.2d at 907. "[W]e require the prosecution to present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means before such evidence may be admitted under the inevitable discovery exception to the exclusionary rule." Id. "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to

be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954) (cited with approval in Welton v. Gallagher, 2 Haw. App. 242, 245-46, 630 P.2d 1077, 1081 (1981)).

In State v. Silva, 91 Hawai‘i 111, 979 P.2d 1137 (App. 1999), this court held that where a defendant did not contest that a clear plastic packet was inside his pocket and not in a closed container, the packet would have been discovered in an inventory search. Id. at 121, 97 P.2d at 1147.

Sagapolu was under arrest when Officer Kaio found packets of a rock-like substance in Sagapolu's pockets. Sagapolu does not contest the fact that a clear plastic ziploc packet was found in his right front pocket and a green ziploc plastic packet was found in his left front pocket. Officer Kaio testified that he recovered a clear plastic zip-lock baggy from Sagapolu's right front pocket and a green plastic zip-lock bag from his left front pocket. Officer Chu testified that he was trained to search prisoners at the central receiving desk as of November 2001 and was working at the central receiving desk on the night Sagapolu was arrested. Officer Chu stated that during the search the prisoners put their hands on the wall with their feet spread

apart and the officers go through and empty out the prisoners' pockets. He also testified that the pockets of every prisoner are always searched for contraband.

The State contends it presented clear and convincing evidence by the testimony of Officer Chu that prisoners' pockets are properly and predictably searched for contraband at the police station receiving desk. Such a search would inevitably result in the discovery of any contraband. The packets in Sagapolu's pockets would have inevitably been found at the police station receiving desk if the testimony of Officer Chu is found to be credible.

The circuit court erred in concluding that the State "failed to establish by clear and convincing evidence that the packets of methamphetamine [sic] would have been recovered during the pre-incarceration inventory search in this case" because Officer Chu could not "recall any aspect of the inventory search of [Sagapolu]."

IV. CONCLUSION

Finding of Fact number 6, Conclusions of Law numbers 4 and 6, and any reference to methamphetamine in the November 27, 2002 "Findings of Fact, Conclusions of Law and Order Granting and Denying in Part Defendant's Motion to Suppress Items of Evidence" are vacated, and this case is remanded to the Circuit Court of

the First Circuit to consider and make additional findings and conclusions regarding the credibility of Officer Chu's testimony.

DATED: Honolulu, Hawai‘i, May 25, 2004.

On the briefs:

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellant.

Chief Judge

Edward K. Harada,
Deputy Public Defender,
for defendant-appellee.

Associate Judge

Associate Judge