

NOT FOR PUBLICATION

NO. 26601

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

STATE OF HAWAI'I, Plaintiff-Appellant, v.
STEPHEN A. SLEPOY, Defendant-Appellee

NORMA T. YARA
 CLERK, APPELLATE COURTS
 STATE OF HAWAI'I

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APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
WAILUKU DIVISION
(CASE NOS. TB4P-TB7P: 2/20/04)

MEMORANDUM OPINION

(By: Burns, C.J., Foley and Fujise, JJ.)

This appeal is taken by Plaintiff-Appellant State of Hawai'i (State) from the "Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Suppress Evidence" (Order) filed on May 28, 2004 in the District Court of the Second Circuit, Wailuku Division.^{1/}

I. BACKGROUND

On October 15, 2003, the State filed a four-count Complaint against Defendant-Appellee Stephen A. Slepoy (Slepoy), charging him with the following:

Count One: Operating a Vehicle Under the Influence of an Intoxicant, in violation of Hawaii Revised Statutes (HRS) § 291E-61 (Supp. 2002);

^{1/} The Honorable Reinette W. Cooper presided.

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Count Two: Vehicle Entering Stop or Yield Intersection, in violation of HRS § 291C-63 (1993);

Count Three: Turning Movements and Required Signals, in violation of HRS § 291C-84(b) (1993); and

Count Four: Tail Lights on Vehicles, Motorcycles and Motor Scooters in violation of HRS § 291-31(a) (1993).

On December 17, 2003, Slepoy filed a Motion to Suppress Evidence and Statements (Motion to Suppress). On February 20, 2004, the district court orally granted the Motion to Suppress. On May 28, 2004, the district court issued the Order, which provided in relevant part as follows:

FINDINGS OF FACT

1. On September 20, 2003, at approximately 0020 hours, Maui Police Department Officer Clifford Pacheco had just completed a check in the Lipoa Center parking lot when he heard a vehicle revving its engine;

2. Thereafter, from approximately 75 yards away, Officer Pacheco observed the Defendant's vehicle exit the Lipoa Center parking lot from the North-western most exit of the parking lot and turn left onto Lipoa Street;

3. Officer Pacheco testified that the vehicle did not stop at a stop sign posted at the North-western exit of the Lipoa Center;

4. Officer Pacheco exited from the South-western exit of Lipoa Center parking lot and followed the Defendant's vehicle to the intersection of Lipoa Street and Liloa Drive where he observed the Defendant's vehicle to turn left onto Liloa Drive without using a lighted turn signal, although Officer Pacheco could not be certain that the Defendant did not use a hand signal due to the poor lighting conditions;

5. Defendant, Stephen Slepoy, testified that he did not use either a lighted turn signal nor a hand signal to signify his intention to turn left;

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6. Officer Pacheco observed the driver's side tires of the Defendant's vehicle to briefly travel left of center during the execution of his left turn onto Liloa Drive;

7. Officer Pacheco followed the vehicle to the intersection of Liloa Drive and Piikea Avenue and noticed white light emanating from the red brake/tail lights of Defendant's vehicle;

8. Defendant's vehicle made a left turn onto Piikea Avenue and Officer Pacheco initiated a traffic stop shortly thereafter;

9. On cross examination, Officer Pacheco was presented with Defense Exhibit A, a photo of the North-western exit of the Lipoa Center parking lot and he could not point to the stop sign that he believed the vehicle ran through nor could he explain the lack of a stop sign;

10. Defense Exhibit C, a photo of the brake/tail lamps on Defendant's vehicle, shows the brake/tail lights to be red with red colored tape approximately 1 inch by 1 inch covering damaged areas of red plastic brake/tail lamp lenses with no cracks in the lense [sic] being visible in the picture;

CONCLUSIONS OF LAW

1. The Fourth Amendment and the Fourteenth Amendment to the United State[s] Constitution protects individuals against unreasonable searches and seizures by government agents.

2. Similarly, Article I, Section 7 of the Hawaii State Constitution provides that "[T]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated."

3. Any warrantless search or seizure is presumed to be unreasonable, invalid, and unconstitutional, and the burden always rests with the government to prove that such actions fall within a specifically established an[d] well-delineated exception to the warrant requirement. State v. Ortiz, 67 Haw. 181, 683 P.2d 822 (1984).

4. To justify an investigative stop, short of an arrest based on probable cause, ["]the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968).

5. The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken

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was appropriate. State v. Barnes, 58 Haw. [333,] 338, 568 P.2d [1207,] 1211 (1977).

6. When the government fails to meet this burden, evidence gathered from the presumptively illegal search, State v. Moore, 66 Haw. 202, 659 P.2d 70 (1983), or seizure, State v. Joao, Jr., 56 Haw. 216, 533 P.2d 270 (1975), must be suppressed as "tainted fruits of the poisonous tree."

7. Here, Officer Pacheco seized Defendant when he conducted a traffic stop on the vehicle Defendant was driving.

8. The stop of Defendant was conducted without the authority of a warrant.

9. Based upon all the findings of fact, supra, the Court finds that the State has failed to meet its burden of proof and show that Officer Pacheco's stop of the Defendant's vehicle fell within one of the exceptions to the warrant requirement of the Fourth and Fourteenth Amendment[s] to the United States Constitution, and Article I, Section 7 of the Hawaii State Constitution.

10. Defendant's failure to use his turn signal, without more, was not a sufficient basis for "a man of reasonable caution" to believe that "criminal activity was afoot and that the action taken was appropriate." See, State v. Barnes, 58 Haw. at 338[, 568 P.2d at 1211].

ACCORDINGLY, IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence is granted.

On appeal, the State contends the district court erred when it concluded the police violated federal and state constitutions where a non-pretextual traffic stop was made pursuant to observed violations of law. The State secondarily contends that even if the police engaged in the traffic stop for an investigatory purpose, there was at least reasonable suspicion to support the stop.

II. STANDARD OF REVIEW

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, we "review the circuit court's ruling on a motion to suppress *de novo* to determine whether the ruling was right or wrong." State v. Eleneki, 106 Hawai'i 177, 179, 102 P.3d 1075, 1077 (2004).

III. DISCUSSION

In State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000), the Hawai'i Supreme Court wrote:

The authority of the police to stop vehicles in cases of *observed violations* is not in question.

In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.

(Brackets and ellipsis omitted; emphasis in original) (quoting State v. Bonds, 59 Haw. 130, 135, 577 P.2d 781, 785 (1978)).

The district court found that Officer Pacheco "followed the Defendant's vehicle to the intersection of Lipoa Street and

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Liloa Drive where he observed the Defendant's vehicle to turn left onto Liloa Drive without using a lighted turn signal, although Officer Pacheco could not be certain that the Defendant did not use a hand signal due to the poor lighting conditions." The district court further found that "Defendant, Stephen Slepoy, testified that he did not use either a lighted turn signal nor a hand signal to signify his intention to turn left." Slepoy was charged with violating HRS § 291C-84, which provides in relevant part:

§291C-84 Turning movements and required signals.

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section 291C-81, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.

(b) A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning; provided that for a bicycle or moped, such signal shall be given continuously during not less than the last one hundred feet traveled by the bicycle or moped before turning, and shall be given when the bicycle or moped is stopped waiting to turn; and further provided that a signal by hand and arm need not be given continuously by the driver of a bicycle or moped if the hand is needed in the braking, control, or operation of the bicycle or moped.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

Although not stated in the district court's findings of fact, the district court stated in its oral ruling granting Slepoy's Motion to Suppress:

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THE COURT: -- it's like, okay. Well, here's my problem. I have a photograph. There's no stop sign. It could very well be Pacheco figured Mr. Slepoy just blew a stop sign getting onto that -- getting out of the parking lot onto the street.

Now, you folks all know that I am a big fan of the Fourth and Fourteenth Amendment[s] and would like to be left alone, okay.

So I have a case here where Pacheco is wrong. He didn't blow off -- Mr. Slepoy didn't blow off any stop signs as far as I'm concerned, and Pacheco himself is not clear. It's like, well it was there. I don't know what happened to it.

Then he sees Mr. Slepoy hang a left at a green light from Lipoa into Liloa. Now, in my opinion less than half the population uses their turn signals -- signals in an intersection. I don't, as a rule, turn on my turn signal when I got the left green or I'm going -- I got the green.

And then he keeps following him and Officer Pacheco then says, well he also had a defective tail light, and yet I look at these photographs, and I am baffled as to how it could be defective. It doesn't look defective.

But the bottom line is I -- I don't think this is a pretext stop. I don't think Officer Pacheco is out there following people from Hapa's or Henry's out in Kihei looking for drunk drivers on purpose. I don't think it's a pretextual stop, i.e., 12:20 in the morning, sees you guys coming out of the bar area, he's going to tail you and find some excuse to pull you over.

I think he might have been mistaken though with respect to, number one, him blowing off a stop sign at the shopping center. I think your left turn was fine in my opinion, and I don't see this so called defective -- so it -- I don't think it was a pretext stop, but I do not believe it was a stop based on probable cause. I think after hearing you rev your engine in the shopping center and thinking you didn't stop getting onto Lipoa, he maybe was looking for some excuse to pull you over.

I think it's good police work, but I think it doesn't, you know, it doesn't rise to the level of probable cause though. To pull you over and go further, and then actually see you, you know, see if you were intoxicated or smelling if you were intoxicated and from there having you leave the car.

So close call. Close -- I'm going to grant the motion to suppress. I -- I don't like the stop. Okay.

(Emphasis added.)

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Officer Pacheco's stopping Slepoy's vehicle for an observed violation of HRS § 291C-84(b) was justified under Jenkins. "[T]he stop was effected in connection with an observed violation for the purpose of issuing a citation and was not merely pretextual." Jenkins, 93 Hawai'i at 101-02, 997 P.2d at 27-28 (footnotes omitted). The district court erred in applying Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), in its conclusion of law in that the district court did not find that Officer Pacheco stopped Slepoy's vehicle for an "investigatory purpose."

IV. CONCLUSION

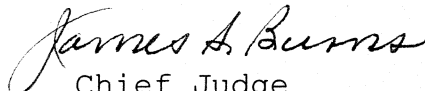
Therefore, the May 28, 2004 "Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Suppress Evidence" of the District Court of the Second Circuit, Wailuku Division, is vacated, and this case is remanded for trial.

DATED: Honolulu, Hawai'i, June 24, 2005.

On the briefs:

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Mau'i.
for plaintiff-appellant.

Joyce K. Matsumori-Hoshijo,
Deputy Public Defender,
for defendant-appellee.


Chief Judge


Associate Judge


Associate Judge