NOT FOR PUBLICATION

NO. 26725

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v.
LORNA ALVAREZ, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 02-1-0419)

MEMORANDUM OPINION
(By: Burns, C.J., and Watanabe, J.; with
Fujise, J., concurring separately and dissenting)

Plaintiff-Appellant State of Hawai'i (the State) appeals from the June 28, 2004 Findings of Fact, Conclusions of Law and Order Granting in Part Defendant's Motion to Suppress Statements.[1/] We affirm.

BACKGROUND

The December 11, 2002 Indictment charges,

> On or about the 16th day of January, 2002, in the County and State of Hawaii, LORNA ALVAREZ, with the intent to hinder the apprehension, prosecution, conviction and/or punishment of another, DION ALVAREZ, for a class A, B or C felony, did render assistance to DION ALVAREZ by harboring and/or concealing him from the police, thereby committing the offense of Hindering Prosecution in the First Degree, in violation of Section 710-1029(1), Hawaii Revised Statutes, as amended.

In this case the "felony" was attempted murder. Although attempted murder is a felony, Hawaii Revised Statutes (HRS) §§ 701-107(1) (Supp. 2004), 705-502 (Supp. 2004), 707-701(2) (Supp. 2004), 707-701.5(2) (Supp. 2004), it is not "a class A, B or C" felony. On April 17, 2003, the State filed a

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1/ Judge Terence T. Yoshioka presided.

motion to strike as surplusage from the indictment the words "class A, B or C." The record on appeal does not contain an order deciding this motion.

On April 17, 2003, Defendant-Appellee Lorna Alvarez (Defendant) filed a Motion to Suppress Statements seeking

> an order suppressing and precluding from use at trial in this matter all statements made by Defendant which were obtained in violation of Defendant's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 14, of the Hawaii State Constitution.

The motion was heard and orally granted on May 8, 2003.

On May 9, 2003, the State filed a Motion for Reconsideration of Order Granting of Defendant's Motion to Suppress asking the "Court to reconsider its granting of Defendant's Motion to Suppress disallowing the State from introducing statements Defendant made to Detective Evangelista on January 16, 2002, and allow its admission at trial." The motion was heard and orally denied on May 9, 2003.[2/]

[2/] At the conclusion of the hearing, the court stated, in relevant part:

> THE COURT: . . . So what we'll do is we'll call off the jury then for the trial scheduled for next week.
>
> . . . .
>
> THE COURT: Okay. And I'll tell you this. This is an area that, you know, I'm not quite sure of.
>
> I -- when I read certain cases it seems to be going one direction. I read another case. It goes in the other direction, um, and it's a bit confusing to me.
>
> And -- and this Kaleohana case seems to add a different twist now because it seems to make a distinction between seizure and custody in that if you're seized it's okay to ask questions without Miranda, but when you're in custody it's not okay to ask questions.

On June 28, 2004, the court entered Findings of Fact, Conclusions of Law and Order Granting in Part Defendant's Motion to Suppress Statements which state, in relevant part:

FINDINGS OF FACTS

1. On January 16, 2002, Detective Evangelista received information regarding the whereabouts of DION ALVAREZ;

2. DION ALVAREZ was wanted for a felony charge occurring on December 23, 2001;

3. The information placed DION ALVAREZ at 370 Ohai Street;

4. On January 16, 2002, Defendant LORNA ALVAREZ (hereinafter "DEFENDANT"), who is the mother of DION ALVAREZ was present at 370 Ohai Street.

5. Previously, on January 3, 2002, DETECTIVE EVANGELISTA had a discussion with DEFENDANT at her residence during which he informed DEFENDANT that her son was wanted for a felony and that it was best if he turned himself in to the police. DETECTIVE EVANGELISTA also asked DEFENDANT if her son had contacted her;

6. Based on the information he received, DETECTIVE EVANGELISTA believed that DION ALVAREZ was at DEFENDANT's home.

7. On January 16, 2002, DETECTIVE EVANGELISTA, acting upon the information he had, gathered six other officers to proceed to DEFENDANT's home to seek DION ALVAREZ;

8. Upon arrival at DEFENDANT's home, the police officers surrounded it;

9. Three officers covered the back, officers were on either side and two officers approached the front of the home;

10. The police officers did not possess a warrant for the arrest of DION ALVAREZ at the time they surrounded DEFENDANT's home;

11. The police officers did not possess a search warrant for the home of DEFENDANT at the time they surrounded DEFENDANT's home;

12. All officers were armed;

13. All officers were either in uniform or clearly identified as police;

. . . .

And those distinctions are very difficult to make in terms of what constitutes seizure and custody.

15. Upon approaching the home, the officers heard voices indicating people were within the home;

16. OFFICER FELICIANO was one of the officers assigned to contact the occupants;

17. As OFFICER FELICIANO approached the porch area, he heard a female voice say "Ya Dion" and laughter in a conversational tone;

18. OFFICER FELICIANO and another uniformed officer knocked on DEFENDANT's door;

19. The door was opened and eventually contact was made with DEFENDANT who appeared to be nervous;

20. OFFICER FELICIANO asked DEFENDANT if DION ALVAREZ was there;

21. DEFENDANT responded . . . "No, he not here, rumors were he was in Puna";

22. OFFICER FELICIANO requested permission to enter the home and DEFENDANT refused entry;

23. OFFICER FELICIANO then left the front porch area and conferred with Detective Evangelista in the front of DEFENDANT's home;

24. OFFICER FELICIANO informed DETECTIVE EVANGELISTA of what he had heard and saw including his conversation with DEFENDANT;

25. DETECTIVE EVANGELISTA, . . . , suspected that DEFENDANT was harboring DION ALVAREZ;

. . . .

27. DETECTIVE EVANGELISTA went to the porch area and was standing near the front door;

28. Another uniformed officer was stationed on the steps leading to the porch and OFFICER FELICIANO was stationed in front of the porch area;

29. DETECTIVE EVANGELISTA knocked on the door and DEFENDANT answered same;

30. DEFENDANT was requested by DETECTIVE EVANGELISTA to come out of the house on to the front porch;

31. DEFENDANT complied with the request of DETECTIVE EVANGELISTA;

32. DETECTIVE EVANGELISTA . . . questioned DEFENDANT about DION ALVAREZ;

33. DEFENDANT was on the front porch during questioning by DETECTIVE EVANGELISTA;

34. During the questioning by DETECTIVE EVANGELISTA, DEFENDANT informed DETECTIVE EVANGELISTA, "No, you can't come into my house. He's not here. He's in Puna,"

35. DETECTIVE EVANGELISTA requested permission to search the home and DEFENDANT denied same;

36. During the questioning of DEFENDANT, DETECTIVE [EVANGELISTA] told DEFENDANT that if he had to seek a search warrant and DION was found in DEFENDANT's home, DEFENDANT could be arrested for Hindering Prosecution;

37. DEFENDANT told DETECTIVE EVANGELISTA, "well, go do that then,";

38. DETECTIVE EVANGELISTA then questioned DEFENDANT as to who was in the house;

39. DEFENDANT, her younger son, an adult female and two minor children were asked to exit the home and stand on the porch at the request of DETECTIVE EVANGELISTA;

. . . .

42. After conferring with rank, DETECTIVE EVANGELISTA was instructed to seek a search warrant;

43. At no time was DEFENDANT given her Miranda rights.

CONCLUSIONS OF LAW

. . . .

2. OFFICER FELICIANO's questioning was reasonably designed to confirm or dispel as briefly as possible and without any coercive connotations his suspicions of criminal activity and therefore Miranda Rights were not required; State v. Ah Loo, 94 Hawai'I 207, 10 P.3d 728 (2000);

. . . .

4. The Court concludes that DETECTIVE EVANGELISTA did not have probable cause to arrest DEFENDANT at the time he obtained her statements. State v. Kaleohano, 99 Hawai'I 370, 56 P.3d 138 (2002);

. . . .

6. Given the totality of the circumstances including the police officer's behavior and knowledge, DETECTIVE EVANGELISTA's questioning became expressly and/or implicitly accusatory and his questions were sustained and coercive, therefore requiring Miranda warnings to have been given to DEFENDANT. State v. Ah Loo, 94 Hawaii, 207 at 212; State v. Ketchum, 97 Hawai'I 107, 34 P.3d 1006 and State v. Kaleohano, 99 Hawai'i 370, 56 P.3d 138 (2002).

ORDER

> IT IS HEREBY ORDERED that DEFENDANT's Motion to Suppress Statements is GRANTED IN PART. ACCORDINGLY, DEFENDANT's Statements: 1) "No, you can't come into my house. He's not here. He's in Puna," (Findings of Fact No. 34) after Detective Evangelista requested permission to enter the house, and (2) "well, go do that then," (Findings of Fact No. 37) after Detective Evangelista informed her that he may get a search warrant for the house and that she may be arrested for hindering prosecution, shall be suppressed.

Although there is evidence on the record to support additional findings relevant to the circuit court's decision in this case, the circuit court did not enter those findings and neither party asked the circuit court for additional findings or requested this court to remand for additional findings.

The evidence relevant to findings of fact (FOF) nos. 30, 33, and 39 quoted above is the following testimony by Detective Evangelista. On direct examination by the deputy prosecuting attorney, Detective Evangelista testified that, on January 16, 2002, he questioned Defendant after Officer Feliciano had questioned her, and that

> [w]hen I came around to the front of the house to also speak to Lorna Alvarez she had told me that Dion wasn't there, that we could not come into her residence in order to look for him. She told me that he was in Puna and that she had given the police that information that he was in Puna. I explained to her that I had information that led me to believe otherwise. And that if, you know, I would apply for a search warrant[3/] and if he was found in there, there's a chance that she could get arrested for hindering prosecution.

(Footnote added.)

3/ There are differences between a "search warrant" and an "arrest warrant". Hawaii Revised Statutes (HRS) §§ 803-31 through -37 (1993 and Supp. 2004) govern search warrants. HRS §§ 803-1 through -11 (1993 and Supp. 2004) and Hawai'i Rules of Penal Procedure Rule 3 (2005) govern arrest warrants.

On cross-examination by defense counsel, Detective Evangelista testified, in relevant part:

> Q. Now upon your approach to the residence you walked up the stairs; correct?
>
> A. Yes.
>
> . . . .
>
> Q. [Defendant] opened the door?
>
> A. Yes.
>
> Q. And upon her opening the door it is correct that you instructed her to come out onto the porch; correct?
>
> A. I requested.
>
> . . . .
>
> Q. And on the porch -- other officers were also visible from the porch area; correct?
>
> A. Yes.
>
> Q. In fact, there was an officer at the bottom of the stairs; correct?
>
> A. Correct.
>
> Q. There was an officer in the front part of the stairs towards the lawn; correct?
>
> Q. Yes.
>
> . . . .
>
> [DEFENSE COUNSEL] Q. We clearly established then that you don't know exactly what you told [Defendant]; correct?
>
> Q. Correct.
>
> . . . .
>
> Q. Now you stated earlier on your direct examination that she was free to go. Did you tell her that she was free to go?
>
> A. No.
>
> Q. Why not?
>
> A. She wasn't in custody.
>
> . . . .

[DEFENSE COUNSEL] Q. She came outside because you wanted her outside; correct?

A. Correct.

. . . .

Q. It is also correct that you had other people come out of the home; correct?

A. Yes.

Q. And that was by your direction; correct?

A. Once again I asked them to come out.

. . . .

[DEFENSE COUNSEL]: Q. Isn't it correct, . . . , detective, that you wanted to see the other people in the home; correct?

A. Yes.

Q. And to accomplish this purpose you had them come outside; correct?

A. Yes.

On July 1, 2003, the court entered Findings of Fact, Conclusions of Law and Order denying State's Motion for Reconsideration of Order Granting of Defendant's Motion to Suppress.[4/]

On July 26, 2004, the State filed a notice of appeal. This case was assigned to this court on April 22, 2005.

[4/] Although the record and the evidence supports additional relevant findings, this court is not permitted to add findings and to consider evidence as additional facts unless such facts are admitted, stipulated or judicially noticed. In this case, the question on appeal is not whether the findings are supported by the evidence. The question is whether the findings support the relevant conclusions. When answering this question, we are not permitted to view the evidence in the light most favorable to one side or the other.

POINT OF ERROR

The State's sole point of error is that conclusion of law (COL) no. 6 is wrong because the suppressed statements were not obtained as a result of "custodial interrogation" by the police.

DISCUSSION

In State v. Blackshire, 10 Haw. App. 123, 131-33, 861 P.2d 736, 741-42 (1993), this court concluded that, when deciding whether a pre-arrest "custodial interrogation" has occurred, (1) "custodial" pertains to the person's freedom to leave[5/] and includes not only arrests, but also "temporary investigative detentions" and "seizures"; and (2) "interrogation" pertains to the officer's inquiry[6/] and includes sustained and coercive questioning but not on-the-scene brief and casual general questioning reasonably designed to confirm or dispel the officer's reasonable suspicion.

In State v. Ah Loo, 94 Hawai'i 207, 211, 10 P.3d 728, 732, reconsideration denied, 94 Hawai'i 207, 10 P.3d 728 (2000), State v. Ketchum, 97 Hawai'i 107, 34 P.3d 1006 (2001), and State v. Kaleohano, 99 Hawai'i 370, 56 P.3d 138 (2002), the Hawai'i Supreme Court disagreed. In Ketchum, the supreme court stated,

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[5/] Would a reasonable person in the suspect's position believe that he or she was deprived of movement in any significant way and was not at liberty to terminate the interrogation and leave?

[6/] Would a reasonable person in the officer's position believe that his or her inquiry was likely to elicit an incriminating response?

in relevant part:

> 1. Interrogation
>
> Generally speaking, "'interrogation,' as used in a Miranda context, [means] 'express questioning or its functional equivalent.'" Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731 (quoting Melemai, 64 Haw. at 481 n. 3, 643 P.2d at 544 n. 3 (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980))) (some internal quotation signals omitted) (brackets in original). However, whether a police officer has subjected a person to "interrogation" is determined by objectively assessing the "totality of the circumstances." Id.; see also Ikaika, 67 Haw. at 567, 698 P.2d at 284. With a focus upon the conduct of the police, the nature of the questions asked, and any other relevant circumstance, the ultimate question becomes "whether the police officer should have known that his [or her] words or actions were reasonably likely to elicit an incriminating response" from the person in custody. Ikaika, 67 Haw. at 567, 698 P.2d at 284.
>
> . . . .
>
> Accordingly, we reaffirm the principle that "interrogation" consists of any express question--or, absent an express question, any words or conduct--that the officer knows or reasonably should know is likely to elicit an incriminating response. See, e.g., Ikaika, 67 Haw. at 567, 698 P.2d at 284; State v. Paahana, 66 Haw. 499, 503, 666 P.2d 592, 595 (1983). The totality of the circumstances must be considered to determine whether "interrogation" has occurred, with a focus upon the officer's conduct, the nature of the question (including whether the question is a "routine booking question", and any other relevant circumstance.
>
> . . . .
>
> 2. Custody
>
> "To determine whether 'interrogation' is 'custodial,' we look to the totality of the circumstances, focusing on 'the place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police, and [any] other relevant circumstances.' " Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731 (quoting Melemai, 64 Haw. at 481, 643 P.2d at 544) (brackets in original). Again, the question to be answered, once it is determined that a defendant has been "interrogated" within the meaning of article I, section 10, is whether the defendant, at the time of the "interrogation," was "in[ ] custody or otherwise deprived of his [or her] freedom . . . in any significant way[.]" Hoey, 77 Hawai'i at 33, 881 P.2d at 520 (citations omitted).

As we recently noted in Ah Loo, "no precise line can be drawn" delineating when "custodial interrogation," as opposed to non-custodial "on-the-scene" questioning (which is outside the protection against self-incrimination that article I, section 10 affords to an accused), has occurred. 94 Hawai'i at 210, 10 P.3d at 731 (citations, internal quotation signals, and original brackets omitted). Rather, the question whether a person has been significantly deprived of his or her freedom, such that he or she is "in custody" at the time he or she is "interrogated," must be addressed on a case-by-case basis "because each case must necessarily turn upon its own facts and circumstances." Patterson, 59 Haw. at 362, 581 P.2d at 756.

Nonetheless, we discern a point along the spectrum "beyond which on-the-scene [questioning]" becomes "custodial," such that article I, section 10 precludes the prosecution from adducing a defendant's resulting statement at trial unless the question has been preceded by the requisite Miranda warnings. Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731; Patterson, 59 Haw. at 362, 581 P.2d at 755-56. On one side of that point is the situation in which a person subjected to lawful investigative detention, which is brief in duration and during which the officer poses questions that are designed to confirm or dispel the officer's reasonable suspicion that criminal activity is afoot, has not had his or her liberty infringed to such a significant degree as to render the detainee "in custody" for purposes of triggering the prosecution's burden--under article I, section 10 of the Hawai'i Constitution--of establishing that the requisite Miranda warnings were first properly administered as an evidentiary precondition to the admissibility of the detainee's responses to the officer's questions at trial. See Ah Loo, 94 Hawai'i at 212, 10 P.3d at 733; State v. Hoffman, 73 Haw. 41, 54, 828 P.2d 805, 813 (1992); Patterson, 59 Haw. at 362-63, 581 P.2d at 755-56.

As we reaffirmed in Ah Loo, a person

> temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and [has] become sustained and coercive (footnote omitted).

Hoffman, 73 Haw. at 54, 828 P.2d at 813 (quoting Melemai, 64 Haw. at 482, 643 P.2d at 544); Patterson, 59 Haw. at 362-63, 581 P.2d at 755-56 (quoting People v. Manis, 268 Cal.App.2d 653, 669, 74 Cal.Rptr. 423 (1969)). In other words, "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." Melemai, 64 Haw. at 481, 643 P.2d at 544; see also Patterson, 59 Haw. at 361-63, 581 P.2d at 755-56.

94 Hawai'i at 210, 10 P.3d at 731. In essence, therefore, Ah Loo reiterates the basic principle that when an officer lawfully

conducting an investigative detention lacks probable cause to arrest the detainee and--so long as his or her questions remain brief and casual and do not become sustained and coercive--has not impliedly accused the detainee of committing a crime, the officer has not significantly infringed upon the detainee's liberty, such that the detainee is "in custody" and has thus been transformed into an "accused" to whom the protection against self-incrimination attaches.

But, under Ah Loo, once a detainee becomes expressly or impliedly accused of having committed a crime--because the totality of the circumstances reflects either that probable cause to arrest the detainee has developed or that the officer's questions have "become sustained and coercive," the officer's investigation having focused upon the detainee and the questions no longer being designed to dispel or confirm the officer's reasonable suspicion--, then Miranda warnings, as well as a valid waiver the detainee's related constitutional rights, are required before the fruit of further questioning can be introduced in a subsequent criminal proceeding against the detainee. Id. at 212, 10 P.3d at 733.

. . . .

However, determining the precise point at which a temporary investigative detention has ripened into a warrantless arrest is no more susceptible to a bright-line rule than is determining when a suspect is "in custody." See, e.g., United States v. Sharpe, 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) (observing that there are "difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest" and declining to adopt a "bright line" rule demarcating one from the other); Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir.1996) ("[t]here is no bright-line rule to determine when an investigatory stop becomes an arrest" (citing United States v. Parr, 843 F.2d 1228, 1231 (9th Cir.1988))); see also Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731. Nevertheless, it is self-evident that a temporary investigative detention in the absence of sustained and coercive questioning is "noncustodial," whereas an arrest is "custodial." See Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731. Accordingly, an arrestee is obviously "in custody" whether or not, in retrospect, the arresting officer had probable cause to effect the arrest in the first place. Cf. State v. Delmondo, 54 Haw. 552, 557, 512 P.2d 551, 554 (1973) (observing that an officer's failure to state, "I place you under arrest," does not preclude an arrest from occurring where an officer's action makes it clear to the defendant that he or she is not free to leave and holding that an officer who had probable cause to arrest took custody of the defendant by ordering him to leave a toilet stall, stand up against a wall, and remain subject to his commands); State v. Ortiz, 4 Haw.App. 143, 662 P.2d 517 ("[a]n arrest occurs where the defendant clearly understands that he [or she] is not free to go and no 'magic words' such as, 'I place you under arrest,' are required" (citations omitted)), affirmed, 67 Haw. 181, 683 P.2d 822 (1984). So long as an objective assessment of the totality of the circumstances reflects that "the point of arrest" has arrived, the arrestee, at that point, is "in custody" for purposes of article I, section 10.

Although there is no simple or precise bright line delineating when "the point of arrest" has arrived, it is well settled that a temporary investigative detention must, of necessity, be truly "temporary and last no longer than is necessary to effectuate the purpose of the [detention]"--i.e., transpire for no longer than necessary to confirm or dispel the officer's reasonable suspicion that criminal activity is afoot. Sharpe, 470 U.S. at 684, 105 S.Ct. 1568 (quoting Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)); see also State v. Melear, 63 Haw. 488, 493, 630 P.2d 619, 624 (1981) (observing that "[a] brief stop of a suspicious individual, in order to determine his [or her] identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at that time" (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972))). In other words, a temporary investigative detention must "be reasonably related in scope to the circumstances which justified [the detention] in the first place," State v. Silva, 91 Hawai'i 80, 81, 979 P.2d 1106, 1107 (1999) (quoting Sharpe, 470 U.S. at 682, 105 S.Ct. 1568), and, thus, must be "no greater in intensity than absolutely necessary under the circumstances," see Silva, 91 Hawai'i at 81, 979 P.2d at 1107 (quoting State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974)).

Moreover, while no single factor, in itself, is dispositive as to when a temporary investigative detention has morphed into an arrest, the potential attributes of "arrest" clearly include such circumstances as handcuffing, leading the detainee to a different location, subjecting him or her to booking procedures, ordering his or her compliance with an officer's directives, using force, or displaying a show of authority beyond that inherent in the mere presence of a police officer, as well as any other event or condition that betokens a significant deprivation of freedom, "such that [an] innocent person could reasonably have believed that he [or she] was not free to go and that he [or she] was being taken into custody indefinitely," Kraus v. County of Pierce, 793 F.2d 1105, 1109 (9th Cir.1986). See also Delmondo, 54 Haw. at 557, 512 P.2d at 554 (observing that officer "took custody of the defendant and his cohort by obliging them to leave the toilet stall, stand against a wall, and generally to remain subject to his directions" and holding that "[t]his type of action, despite the absence of the magic words ('I place you under arrest' etc.), is an arrest, where the defendant clearly understands that he [or she] is not free to go"); State v. Crowder, 1 Haw.App. 60, 64-65, 613 P.2d 909, 912-13 (1980) (holding that defendant "was arrested ... when the police officer took physical custody of him" by "grabbing his arm" and "returned him to the hotel for detention there"). Cf. State v. Groves, 65 Haw. 104, 649 P.2d 366 (1982) (holding that "no valid arrest had taken place before the search of the [defendant's] person was conducted," even though, prior to that point, a police officer had approached the defendant, displayed his badge, informed the defendant of his suspicions that the defendant's luggage contained drug contraband, informed the defendant of his constitutional rights, and detained the defendant for twenty minutes, after he had "accompanied the officers to" a police "office" located in the airport); Patterson, 59 Haw. at

> 363, 581 P.2d at 756 (holding that the defendant was not "in custody" and observing that "[n]o guns were drawn and kept upon the defendant" and that "he [had not been] confronted and subjected to an overbearing show of force"). We agree with the United States Court of Appeals for the Ninth Circuit that, "when determining whether an arrest has occurred, a court must evaluate all the surrounding circumstances, 'including the extent to which liberty of movement is curtailed and the type of force or authority employed.' " United States v. Torres-Sanchez, 83 F.3d 1123, 1127 (9th Cir.1996) (quoting United States v. Robertson, 833 F.2d 777, 780 (9th Cir.1987)).
>
> In summary, we hold that a person is "in custody" for purposes of article I, section 10 of the Hawai'i Constitution if an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "de facto " arrest without probable cause to do so.

State v. Ketchum, at 119-26, 34 P.3d at 1018-25 (footnotes omitted).

A significant problem in interpreting the precedent quoted above is caused by its last paragraph. First, although it is a summation, it does not indicate whether the "person" involved must be the subject of a temporary investigative detention.

Second, when does an objective assessment of the totality of the circumstances reflect that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that the questions are no longer reasonably designed briefly to confirm or dispel the reasonable suspicion of the police? "Sustain" means "prolong" which means "to lengthen in time[.]" Merriam-Webster's

Collegiate Dictionary (11th ed, 2003) at 1260, 994. "Coerce" means "to compel to an act or choice[.]" Id. at 240. There is a significant gap between (1) the place where questions by the police are "reasonably designed briefly to confirm or dispel the reasonable suspicion of the police[,]" and the (2) place where "the questions of the police have become sustained and coercive[.]" In situations where the police know or reasonably suspect that the person being questioned is lying, when does "(1)" end and "(2)" begin?

In this case, for example, even if the questioning of Defendant by the police became sustained and coercive, as long as Defendant continued to deny that Dion Alvarez (Dion) was in the house, the police continued to disbelieve her, and nothing else happened, the police would not be able to confirm or dispel their reasonable suspicion that Dion was in the house and Defendant was harboring Dion. Indeed, the police would not be able to confirm or dispel their reasonable suspicion by questioning Defendant unless and until Defendant (a) allowed them to search the residence, or (b) admitted that Dion was in the residence.

In this case, there are the following two "custody" possibilities before the suppressed answers were uttered: (1) Defendant was impliedly accused of committing a crime because the questions of the police had become sustained and coercive, such that they were no longer reasonably designed briefly to confirm

or dispel their reasonable suspicion; or (2) the point of arrest had arrived because probable cause to arrest had developed.

COL no. 4 concludes that possibility no. 2 had not occurred.

> Probable cause refers to the "state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." State v. Naeole, 80 Hawai'i 419, 424, 910 P.2d 732, 737 (1996). Moreover, "probable cause is generally based upon a combination of factors, which together form a sort of mosaic, of which any one piece by itself often might not be enough to constitute probable cause, but which, when viewed as a whole, does constitute probable cause." State v. Chong, 52 Haw. 226, 231, 473 P.2d 567, 571 (1970).

State v. Ferrer, 95 Hawai'i 409, 430-31, 23 P.3d 744, 765-66 (App. 2001)

The answer to the question whether, after Officer Feliciano questioned Defendant, the police had probable cause to believe that Defendant was committing the offense of Hindering Prosecution in the First Degree depends on the answer to the question whether the police had probable cause to believe that Dion was within the residence. Absent additional evidence of the factual basis for the belief by the police that Dion was in the residence, it must be concluded that the evidence is insufficient to support findings supporting a conclusion that the police had probable cause to believe that Dion was within the residence.

In COL no. 6, the circuit court concluded that possibility no. 1 had occurred. We agree. This COL is supported by the following facts. Detective Evangelista and six uniformed and armed police officers were at Defendant's residence. Police

Officer Feliciano and another police officer went up the steps to the porch and knocked on the door of Defendant's residence. After the door was opened, Officer Feliciano questioned Defendant. At that point, Defendant was not impliedly accused of committing a crime. Defendant answered all of Officer Feliciano's questions. Defendant's answers to Officer Feliciano's questions may not have been the answers any or all of the police wanted and may not have confirmed or dispelled the reasonable suspicions of all or any of the police, but they were Defendant's answers. Defendant then denied Officer Feliciano's request to enter the residence.

Officer Feliciano left the porch, went down the steps to where Detective Evangelista was, and informed Detective Evangelista about what he did, said, heard, and saw during his conversation with Defendant.[7/] In light of what he knew, Detective Evangelista reasonably did not believe Defendant's answer that Dion was not in the residence. His reasonable suspicion not having been confirmed or dispelled by what Officer Feliciano had told him, Detective Evangelista then went up the

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7/ This is the detective's actual knowledge, not the imputed knowledge discussed in State v. Augafa, 92 Hawai'i 454, 992 P.2d 723 (App. 1999), State v. Bunker, 67 Hawai'i 174, 681 P.2d 984 (1984), State v. Pestana, 59 Haw. 375, 581 P.2d 758 (1978), State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977), State v. Pokini, 45 Haw. 295, 367 P.2d 499 (1961), United States v. Bianco, 189 F.2d 716 (3d Cir. 1951), Williams v. United States, 113 U.S. App. D.C. 371, 308 F.2d 326 (D.C.Cir. 1962); United States v. Pitt, 382 F.2d 322 (4th Cir. 1967)).

steps to the porch. Another uniformed officer was on the steps and Officer Feliciano was on the front part of the porch. At the request of Detective Evangelista, Defendant came out of the house on to the porch and Detective Evangelista began questioning Defendant. All questions Detective Evangelista asked Defendant essentially repeated the questions Officer Feliciano had asked Defendant and Defendant had answered.

While she was being questioned by Detective Evangelista, Defendant uttered the statement described in FOF no. 34. Detective Evangelista then (a) requested and was denied permission to search the residence, and (b) told Defendant that if he had to seek a "search warrant" and Dion was found in the home, Defendant could be arrested for hindering prosecution. Thereafter, Defendant uttered the statement attributed to her in FOF no. 37.

When was Defendant impliedly accused of committing a crime? When was Defendant impliedly accused of committing a crime because the questions of the police had become sustained and coercive, such that they were no longer reasonably designed briefly to confirm or dispel their reasonable suspicion? We conclude that both occurred after Defendant had answered Officer Feliciano's questions and before she responded to Detective Evangelista questions and statement. Therefore, we conclude that Officer Feliciano's questions were all the questions the police

were allowed to ask prior to being required to give Miranda advice and warnings.

There is only one "interrogation" possibility. In Ketchum, the Hawai'i Supreme Court stated, in relevant part:

> Accordingly, we reaffirm the principle that "interrogation" consists of any express question--or, absent an express question, any words or conduct--that the officer knows or reasonably should know is likely to elicit an incriminating response. See, e.g., Ikaika, 67 Haw. at 567, 698 P.2d at 284; State v. Paahana, 66 Haw. 499, 503, 666 P.2d 592, 595 (1983). The totality of the circumstances must be considered to determine whether "interrogation" has occurred, with a focus upon the officer's conduct, the nature of the question (including whether the question is a "routine booking question"), and any other relevant circumstance.

(Footnotes omitted.) In light of the facts, we conclude that Defendant was subjected to "interrogation" prior to the time she uttered the statements to Detective Evangelista attributed to her in FOF nos. 34 and 37. By that time, Defendant had already answered Officer Feliciano's questions. Clearly, Detective Evangelista knew or reasonably should have known that his questioning of Defendant, which essentially repeated Officer Feliciano's questions, was likely to elicit one or more incriminating responses. Detective Evangelista admitted as much when, after Defendant told him that Dion was not there and that the police could not come into the residence to look for him, Detective Evangelista explained to her that he had information that led him to believe otherwise and, if the residence was lawfully searched and Dion was found in the residence, Defendant could get arrested for hindering prosecution.

CONCLUSION

Accordingly, we affirm the June 28, 2004 Findings of Fact, Conclusions of Law and Order Granting in Part Defendant's Motion to Suppress Statements.

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James S. Burns
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