NO. 27492

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

Cr. No. 04-1-0017(1)
STATE OF HAWAI'I, Plaintiff-Appellant, v.
J-MAR R. RAQUENO, Defendant-Appellee

and

Cr. No. 01-1-0018(1)
STATE OF HAWAI'I, Plaintiff-Appellant, v.
VIRGILIO V. VILLADOS, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT

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

Plaintiff-Appellant State of Hawai'i (State) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying in Part and Granting in Part Defendants' Motions in Limine Regarding Exclusion of Statements" filed on July 11, 2005 in the Circuit Court of the Second Circuit (circuit court).[1/]

On appeal, the State advances 11 points of error:

(1) The circuit court was wrong "in [Conclusion of Law (COL)] 9, where it placed undue emphasis on the youth and emotional status of [Defendant-Appellee J-Mar R. Raqueno (Raqueno)],[2/] inconsistent with Michigan v. Mosley, 423 U.S.

1/ The Honorable Joel E. August presided.

2/ At the time of the alleged incident, Defendant-Appellee J-Mar R. Raqueno (Raqueno) was 20 years old and Defendant-Appellee Virgilio V. Villados (Villados) was 25 years old.

96[, 96 S. Ct. 321] (1975), factors, in determining whether the right to cut off questioning was scrupulously honored."

(2) The circuit court was wrong "in COL 11, where it placed undue emphasis on the Mosley consideration of restricting the subsequent interrogation to a crime that was not the subject of the earlier interrogation, in determining whether the right to cut off questioning was honored."

(3) The circuit court was wrong "in COL 13, in concluding that Raqueno's right to cut off questioning was not scrupulously honored."

(4) The circuit court was wrong "in COL 14, in concluding that Raqueno's statement subsequent to the third encounter should be suppressed as 'akin to fruit of the poisonous tree.'"

(5) The circuit court was wrong "in COL 16, in concluding that [[Defendant-Appellee Virgilio V. Villados (Villados)[3/]] indicated that he did not want to be questioned further about the school incident."

(6) The circuit court was wrong "in COL 17, in concluding that Villados'[s] right to cut off questioning was not scrupulously honored."

[3/] In the State's Opening Brief, Raqueno's name was erroneously used in place of Villados's name in this point of error; however, the State's argument relates to Villados on this point.

(7) The circuit court "clearly erred in its [Finding of Fact (FOF)] 9" and specifically clearly erred because no facts show that Officer Masse asked Raqueno any questions or made any attempt to make Raqueno change his mind about not providing a statement prior to placing him back in the detention cell.

(8) The circuit court "clearly erred in its FOF 12" and specifically "in failing to include the facts in the third encounter that Raqueno made no requests, was responding appropriately, and was oriented as to time, place, and person."

(9) The circuit court "clearly erred in its FOF 15" in that it failed "to include the spontaneous and volunteered nature of statement as reflected in Officer Masse's testimony that Raqueno was placed back in his cell, that Officer Masse did not say anything to Raqueno, that Raqueno made what appeared to Officer Masse to be a spontaneous comment through the intercom without any effort by Officer Masse, and that Raqueno was yelling obscenities the whole time."

(10) The circuit court "clearly erred in its FOF 24" because that finding omitted "the fact that, in the second encounter, there is no evidence that the officer continued questioning or made any comments to attempt to make Villados change his mind."

(11) The "circuit court clearly erred in its FOF 26" by failing "to include facts in FOF 26, the third encounter, that

Villados . . . responded coherently to questions, seemed sober, not overly tired, oriented to time, place, person, gave no indication of being mentally impaired, made no requests; and that no threats, force, promises or other coercion was used against Villados."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues as raised by the parties, we hold:

(1) Raqueno and Villados did not give their statements voluntarily. The State argues that the totality of the circumstances indicates that Raqueno and Villados voluntarily and knowingly waived their constitutional rights to remain silent and provided voluntary statements to Maui Police Department (MPD) Officer Masse at their respective second interrogations. The State contends each defendant's right to remain silent was scrupulously honored because interrogation ceased, a significant amount of time passed, fresh warnings were given, and no evidence of coercion existed.

The State cites Mosley in support of its argument that the factors relied on by the circuit court did not necessarily require suppression of the defendants' statements. In Mosley, the United States Supreme Court set forth a number of factors, no one of which was considered determinative, in assessing whether

the right of a criminally accused to remain silent was scrupulously honored in a particular case. 423 U.S. at 104-05, 96 S. Ct. at 326-27. After being advised of his constitutional rights, Mosley told the police officer that he wished to remain silent. 423 U.S. at 97, 96 S. Ct. at 323. Interrogation ceased. Id. Mosley did not indicate any desire to speak with an attorney during the approximately twenty-minute-long arrest completion and interrogation. Id. More than two hours later, another police officer advised Mosley of his rights and then questioned him about an unrelated homicide. 423 U.S. at 97-98 & 104, 96 S. Ct. at 323-24 & 327. During that approximately fifteen-minute interrogation, Mosley made a statement implicating himself in the homicide. Id. at 98, 96 S. Ct. at 324. In concluding that Mosley's confession was voluntary, the Supreme Court considered a variety of factors, including that Mosley was fully advised of his rights and acknowledged them before both interrogations, police ceased questioning when Mosley indicated he wanted to remain silent, the subsequent interrogation concerned a different crime and was conducted in a different place by a different officer, and the subsequent interrogation did not undercut Mosley's desire to remain silent about the matters previously questioned on. Id. at 104-05, 96 S. Ct. at 326-27. Hawai'i's appellate courts recognize other factors as well, including the accused's level of familiarity with the criminal justice system.

State v. Gella, 92 Hawai'i 135, 143, 988 P.2d 200, 208 (1999). Neither the United States Supreme Court nor Hawai'i jurisprudence establishes any rule as to when a trial court must conclude that the right to silence has been scrupulously honored. The very nature of reviewing circumstances in their totality demands that this court weigh the relevant factors on a case-by-case basis and avoid a formulaic application of a rigid test.

(2) The circuit court's FOFs are not clearly erroneous. We accept the factual findings underlying a lower court's determination regarding the voluntariness of a confession unless they are clearly erroneous. See State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996). Here, the State challenges five of the circuit court's FOFs: 9, 12, 15, 24, and 26. None of those findings are clearly erroneous. Inasmuch as all of the challenged findings relate to the testimony of Officer Masse, this court will not pass on her credibility because the circuit court was in the best position to make that evaluation. Gella, 92 Hawai'i at 142, 988 P.2d at 207.

(a) FOF 9 is not clearly erroneous. The State does not argue that the finding is unsupported by the record, but merely argues the circuit court should have found additional facts. This method of challenging a circuit court finding lacks any merit. Officer Masse clearly testified that she removed Raqueno from his cell at around noon for questioning, she advised

Raqueno of his rights using MPD Form 103 (which Raqueno signed), and then she returned Raqueno to his cell after he indicated he did not want to make a statement.

(b) FOF 12 is not clearly erroneous. The State simply argues the circuit court should have found additional facts, without challenging the actual basis for the circuit court's findings. Officer Masse testified she did remove Raqueno from his cell at 4:15 p.m. and take him to another part of the station for questioning about the same case, again using MPD Form 103; Raqueno appeared angry, but sober; and she did not attempt to coerce or deceive Raqueno.

(c) FOF 15 is not clearly erroneous. Officer Masse testified that, at some point after being placed in the detention cell, Raqueno yelled into the intercom "where are the other two guys? They should be in jail too."

(d) FOFs 24 and 26 are not clearly erroneous. The State simply argues the circuit court should have found additional facts, without challenging the actual basis for the circuit court's findings.

(3) The circuit court's COLs are not wrong. The State challenges COLs 9, 11, 13, 14, 16 and 17.

(a) COL 9 is not wrong. The State argues that COL 9 was wrong because the circuit court should not have emphasized the youth and emotional state of Raqueno and Villados

in assessing the totality of the circumstances. The State cites In re Doe, 90 Hawai'i 246, 253-54, 978 P.2d 684, 691-92 (1999), and a number of other cases in support of the proposition that youth and mental state do not necessarily counter voluntariness. However, none of the cases cited by the State preclude the circuit court from emphasizing the factors it considers most relevant. The United States Court of Appeals for the Ninth Circuit has stated "[t]here is no talismanic definition of voluntariness that is mechanically applicable. Rather, we must assess the totality of all the surrounding circumstances." Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) (internal quotation marks and citations omitted). "Courts that address this issue look at factors such as the declarant's state of mind, the physical environment in which the statement was given, and the manner in which the declarant was questioned." Pollard v. Galaza, 290 F.3d 1030, 1033 (9th Cir. 2002).

(b) COL 11 is not wrong. The State argues the circuit court was wrong in COL 11 to emphasize the fact that the defendants here were subsequently questioned on the same crimes (as distinguished from Mosley where Mosley was subsequently questioned and ultimately confessed to a different crime). The relevant cases make it abundantly clear the circuit court and this court may consider whatever factors they deem relevant in a

particular case. Clark, 331 F.3d at 1072; Pollard, 290 F.3d at 1033.

(c) COL 13 is not wrong. The State asserts the circuit court's prior erroneous COLs 9 and 11 led it to wrongly conclude the defendants' statements were not voluntary. However, since this court has already determined the circuit court did not err in COL 9 or 11, it follows that these two COLs could not have caused the circuit court to err in COL 13. The State also claims the circuit court wrongly concluded that Raqueno was subjected to repeated rounds of questioning. Although appearing as part of a COL, the finding that repeated rounds of questioning took place is actually an FOF and therefore the "clearly erroneous" standard applies. State v. Walker, 106 Hawai'i 1, 9, 100 P.3d 595, 603 (2004). Merriam-Webster's Collegiate Dictionary 989 (10th ed. 2000) defines "repeated" as "renewed or recurring again and again." Officer Masse's testimony indicated Raqueno was questioned and that questioning was later renewed. Therefore, the circuit court did not clearly err in finding that Raqueno was subjected to repeated rounds of questioning.

(4) Raqueno's right to remain silent was not scrupulously honored, and thus his statement was rendered involuntarily. This court adheres to a flexible, case-by-case analysis as described in United States v. Hsu, 852 F.2d 407, 409 (9th Cir. 1988). The parties do not dispute that the

interrogation was custodial or that Raqueno exercised his right to silence by indicating he did not wish to give a statement. The parties also do not dispute that Raqueno's subsequent questioning was for the same crime as the first questioning and that approximately four hours had elapsed between questionings. Raqueno did nothing to indicate he had changed his mind and wished to make a statement. The context and atmosphere had not changed, although the parties do agree that a fresh set of constitutional warnings were given. In that context, this court concludes Raqueno's right to remain silent was not scrupulously honored and thus his statement was rendered involuntarily. The circuit court did not err in suppressing Raqueno's statement.

(5) Raqueno's subsequent "spontaneous" statement was tainted by the earlier impropriety. The State also challenges the circuit court's COL 14 and its finding that Raqueno's statement of "[w]here are the other two guys? They should be in jail too" followed from Raqueno's involuntary statement and should therefore be suppressed as "akin to fruit of the poisonous tree." The State argues that Raqueno's previous statement was not involuntary, the statement was not tainted by the previous statement, and the circuit court contradicted its oral findings that the statement should not be excluded. This court has already concluded that Raqueno's previous statement was not given voluntarily. In analyzing the State's contention that Raqueno's

subsequent statement was sufficiently removed from the previous statement so as to not be tainted, this court considers whether the challenged statement is the "result of the exploitation of a previous illegal act of the police." State v. Joseph, 109 Hawai'i 482, 498, 128 P.3d 795, 811, reconsideration denied, 109 Hawai'i 578, 128 P.3d 891 (2006). The test set forth in Joseph is that a statement will not be allowed unless (1) the State demonstrates that it "was not obtained by exploiting the initial illegality" or (2) the connection between the initial illegality and the subsequent statement had dissipated.[4/] Id. at 499, 128 P.3d at 812. In this case, Raqueno's return to the detention cell was not a meaningful break in the stream of events, and the record demonstrates that Raqueno was still agitated from his prior encounters with Officer Masse and had indeed just been placed under arrest. Officer Masse was unable to recall how soon Raqueno made the statement into the intercom after being returned to his cell, but it does not appear to have been a significant length of time. Moreover, little in Raqueno's situation or status had changed, and certainly nothing had changed that

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[4/] The court may wish to consider as other relevant factors "whether (1) there was a break in the stream of events sufficient to insulate the statement from the effect of the prior coercion, (2) it can be inferred that the coercive practices had a continuing effect that touched the subsequent statement, (3) the passage of time, a change in the location of the interrogation, or a change in the identity of the interrogators interrupted the effect of the coercion, and (4) the conditions that would have precluded the use of a first statement had been removed." Collazo v. Estelle, 940 F.2d 411, 421 (9th Cir. 1991)

Raqueno would see as an improvement from the time of the previous involuntary statement until he made his statement into the intercom. The circuit court was not wrong when it concluded the statement into the intercom should be suppressed.

(6) The circuit court's COLs as to Villados are not wrong.

(a) The circuit court was not wrong in COL 16 when it concluded Villados "indicated that he did not want to be questioned further about the school incident." Again, this court must evaluate the totality of the circumstances in which the statements were given. Gella, 92 Hawai'i at 142, 988 P.2d at 207. The State concedes that when asked by Officer Masse, Villados indicated he did not wish to make a statement -- as the circuit court noted in FOF 24. The State, however, argues that Villados never said he did not want to be questioned further. The State also argues FOF 26 was clearly erroneous because it omitted details that would have supported a contrary finding. The State essentially argues the defendant must state that he wishes to forever remain silent in order for interrogation to cease. That argument is meritless. To the contrary, Hawai'i case law clearly sets forth the rule that once an accused indicates a desire to remain silent, interrogation must cease. State v. Uganiza, 68 Haw. 28, 30, 702 P.2d 1352, 1354 (1985). The case law sets forth no formula or magic words an accused must

recite in order to preclude further questioning. Villados invoked his right to remain silent, and the circuit court was not wrong in so finding.

(b) The circuit court was not wrong in COL 17 when it concluded Villados's right to cut off questioning was not scrupulously honored. Applying the totality of the circumstances analysis as described above, this court concludes Villados's right to remain silent was not scrupulously honored. The record reflects that after Villados initially declined to make a statement at approximately 3:45 p.m., that questioning ceased. The record also shows Villados was questioned again after approximately one hour had passed. Officer Masse also testified that fresh warnings were provided to Villados prior to re-questioning. The facts surrounding Villados's arrest and interrogations are almost identical to those of Raqueno's involuntary statements. In the absence of any meaningful distinguishing characteristics, this court concludes Villados's statement also was involuntary when considered in light of the totality of the circumstances. The circuit court was not wrong when it concluded Villados's statement should be excluded.

Therefore,

The "Findings of Fact, Conclusions of Law, and Order Denying in Part and Granting in Part Defendants' Motions in

Limine Regarding Exclusion of Statements" filed on July 11, 2005 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, January 30, 2007.

On the briefs:

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James S. Burns
Chief Judge

Associate Judge

Daniel R. Foley
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