

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27745

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

IN THE MATTER OF THE MOTION TO QUASH
AN ADMINISTRATIVE SUBPOENA BETWEEN:

OFFICE OF HAWAII COUNTY PROSECUTING ATTORNEY,
Subpoena Issuer/Appellee,

WALTER L. WAGNER and LINDA M. WAGNER,
Subpoena Recipients/Appellants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P. NO. 06-1-0001)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Subpoena Recipients/Appellants Walter L. Wagner and Linda M. Wagner (the Wagners) appeal from the Order Denying Recipients' Motion to Quash Administrative Subpoena filed on January 30, 2006 in the Circuit Court of the Third Circuit (circuit court).^{1/} On January 3, 2006, the Wagners filed a Motion to Quash Administrative Subpoena (Motion to Quash) #2005-238 issued by the Office of the Hawaii County Prosecuting Attorney (the Prosecutor's Office).

On appeal, the Wagners assert as their sole point of error that the circuit court "erred in issuing an administrative

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^{1/} The Honorable Greg K. Nakamura presided.

subpoena directed towards the appellants when there existed no factual basis that would serve as probable cause to examine their bank accounts, and when no written affidavits, neither sworn nor unsworn, were filed in support of issuance of such an administrative subpoena, and when no oral testimony was given which would support issuance of such an administrative subpoena."

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 raised by the parties, we resolve the Wagners' point of error as follows:

(1) The Wagners cannot claim protection under the former language of HRS § 28-2.5(2), which provided:

CHAPTER 28 ATTORNEY GENERAL

. . . .

28-2.5 Investigations.

. . . .

(2) . . . However, when the matter under investigation is the subject of a civil or criminal adjudication, or when the attorney general or a designated subordinate, determines that an adjudication is more probable than not, the office of the attorney general shall be subject to the relevant rules of court and shall exercise subpoena powers no different than those available to the probable opposing party.

This language was repealed as of June 25, 1990 and no longer appears in the statute. The case of Marsland v. First Hawaiian Bank, 70 Haw. 126, 131, 764 P.2d 1228, 1231 (1988), is inapplicable to this case because it relied on the repealed statutory language in reaching its holding; it created no broader common law rule pertaining to administrative subpoenas. Id. at 131, 764 P.2d at 1231.

(2) The Wagners have no reasonable expectation of privacy in their bank records under the United States or Hawai'i Constitutions. United States v. Miller, 425 U.S. 435, 440-43, 96

S. Ct. 1619, 1623-24 (1976); State of Hawai'i v. Klattenhoff, 71 Haw. 598, 605-06, 801 P.2d 548, 552 (1990).^{2/}

(3) The Wagners have not supplied a sufficient Record on Appeal to challenge the circuit court's relevancy determination. The circuit court's order denying the Motion to Quash stated:

RECIPIENTS' Motion to Quash Administrative Subpoena came on for hearing on January 13, 2006, with RECIPIENTS WALTER L. WAGNER and LINDA W. WAGNER and Deputy Prosecuting Attorney MICHAEL KAGAMI being present. The Court having heard the testimony of Detective Juergen Canda and, therefore, being fully advised of the relevance of the records being sought;

IT IS HEREBY ORDERED that Recipients' Motion to Quash Administrative Subpoena is denied.

The Record on Appeal contains no transcript of the hearing on the Wagners' motion. Hawai'i Rules of Appellate Procedure Rule 10(b)(1)(A) requires that an appellant raising a point on appeal requiring consideration of oral proceedings provide a transcript of "such parts of the proceedings as the appellant deems necessary that are not already on file." Failure to furnish transcripts so as to form a sufficient record may be considered fatal to an issue on appeal. Johnson for Galdeira v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 178-79, 664 P.2d 262, 265-66 (1983). Without a transcript, the appellants cannot positively demonstrate the circuit court's error to the appellate court. Id. Where the record is silent, we presume the circuit court acted correctly. State v. Hoang, 93 Haw. 333, 336, 3 P.3d 499, 502 (2000).

Therefore,

^{2/} Burrows v. Superior Court of San Bernardino County, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), cited by the Wagners, is not persuasive.

The Order Denying Recipients' Motion to Quash
Administrative Subpoena filed on January 30, 2006 in the Circuit
Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 13, 2007.

On the briefs:

Walter L. Wagner
Linda M. Wagner,
Subpoena Recipients/Appellants
pro se.

Jack N. Matsukawa,
Deputy Prosecuting Attorney,
County of Hawai'i
for State of Hawai'i

Corinne K.A. Uetanaka

Presiding Judge

Daniel R. Foley

Associate Judge

Amy A. Sn. Jiro

Associate Judge