NO. 27764

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WILLIAM N.S. MAINAAUPO, JR., aka William N.S. Mainaaopo, Jr., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-1213)

MEMORANDUM OPINION
(By: Watanabe, Presiding Judge, and Foley, J.;
and Nakamura, J., dissenting)

Defendant-Appellant William N.S. Mainaaupo, Jr., aka William N.S. Mainaaopo, Jr., (Mainaaupo) appeals from the Judgment of Conviction and Probation Sentence filed January 18, 2006 in the Circuit Court of the First Circuit (circuit court).[1/] On appeal, Mainaaupo argues that the circuit court failed to properly instruct the jury on the mistake-of-fact defense.

I. BACKGROUND

On June 14, 2005, the State of Hawai'i (the State) charged Mainaaupo via a Complaint with one count of Unauthorized Control of Propelled Vehicle, in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006).[2/] The Complaint alleged

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[1/] The Honorable Virginia Lea Crandall presided.

[2/] Hawaii Revised Statutes § 708-836 (Supp. 2006) provides:

> **§708-836 Unauthorized control of propelled vehicle.** (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.
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> (2) "Propelled vehicle" means an automobile, airplane,

(continued...)

that on or about June 6, 2005, Mainaaupo did intentionally or knowingly exert unauthorized control over a propelled vehicle, by operating the vehicle without consent of the owner of the said vehicle, Nancy R. Cordova (Cordova).

At trial, Cordova testified that on June 4, 2005 she was the sole owner of a 1991 Nissan Maxima sedan (license plate number BC 142) (Nissan). Cordova recalled that on the evening of that date (a Saturday), she went night scuba diving at Shark's Cove with her boyfriend, Brian Cornel (Cornel). Cordova parked the Nissan in the parking lot nearby. She remembered locking the doors and giving the key to Cornel, who put it in his pocket underneath his wet suit. They returned after an hour of diving to discover that the Nissan was gone. Cordova summoned the police and filed a report. She ultimately got the Nissan back, in the same condition and with nothing missing from it. Cordova testified that she did not know Mainaaupo and at no time did she give Mainaaupo permission to drive the Nissan.

[2/](...continued)
motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

(a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or

(b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

(5) Unauthorized control of a propelled vehicle is a class C felony.

Cornel testified that he spotted the Nissan two days later in the Waianae area being driven by Mainaaupo. Cornel called the police, and the police arrested Mainaaupo. Cornel testified that Cordova's purse and his wallet, containing both his and Cordova's identification and credit cards, were discovered in the Nissan's trunk.

Honolulu Police Officer Martin testified that he arrested Mainaaupo for Unauthorized Control of Propelled Vehicle. He looked at the key Mainaaupo had used to drive the Nissan and noted that it appeared to be shorter than the standard vehicle ignition key, but it worked in the ignition of the Nissan. Officer Martin stated that through his training, he knew that in older cars the ignition tended to get worn out and virtually any type of key would start the car.

Mainaaupo testified that on June 3, 2005 he was riding on a public bus when he bumped into his friend, Doug. He had known Doug for three to six months. Mainaaupo rode the bus because he could not afford to have a car. Mainaaupo testified that he knew Doug owned a car because Mainaaupo had seen Doug buying auto parts at an auto parts store. While they were on the bus, Doug handed Mainaaupo a single key and told Mainaaupo that it was a key to his car and that Mainaaupo could use it because Doug was enlisting in the military and would be gone for three months. Doug told Mainaaupo that the car was parked at Shark's Cove. However, Doug never told him what kind of car it was, so Mainaaupo went to the parking area the next evening and waited until there was only one car left -- the Nissan. The key Doug gave Mainaaupo opened the Nissan door and started the car so Mainaaupo assumed it was Doug's car and he drove off. Mainaaupo noticed some belongings in the back of the Nissan and placed them all in the trunk. He figured it all belonged to Doug. A cell phone began ringing among the belongings, and Mainaaupo just put

it in the trunk with everything else. Mainaaupo was arrested two days later.

On cross-examination, Mainaaupo stated that he did not know Doug's surname or where Doug lived. Mainaaupo testified that Doug was hiding so he could not confront Doug as to why Doug had given him a key to a stolen car.

On October 20, 2005, the jury found Mainaaupo guilty of the alleged offense. The circuit court filed its judgment on January 18, 2006. Mainaaupo filed a Notice of Appeal on February 15, 2006.

II. DISCUSSION

A. The circuit court was not required to instruct the jury as to a mistake-of-fact defense, under HRS § 702-218 where no evidence was adduced at trial supporting or warranting such a defense.

Mainaaupo argues on appeal that the circuit court erred in denying his requested jury instruction on a mistake-of-fact defense pursuant to HRS § 702-218 (1993), which provides:

> **§702-218 Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
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> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
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> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

Hawai'i precedent has firmly established that "a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be." State v. Maelega, 80 Hawai'i 172, 178-79, 907 P.2d 758, 764-65

(1995) (internal quotation marks, citation, and emphasis in original omitted). In addition,

> a defendant has the right to argue inconsistent defenses and he or she would be entitled to have the jury instructed on ostensibly inconsistent theories of defense if there is evidence supporting the theories. He or she would be entitled also to an instruction on a defense fairly raised by the evidence, though it may be inconsistent with the defense he advanced at trial.

State v. Ortiz, 93 Hawai'i 399, 404, 4 P.3d 533, 538 (App. 2000) (brackets in original omitted) (quoting State v. Ito, 85 Hawai'i 44, 46, 936 P.2d 1292, 1294 (App. 1997)).

However, HRS § 701-115(2) (1993) mandates that "[n]o defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented." Furthermore, "[i]t is error to instruct the jury on a state of facts not supported or warranted by the evidence adduced at trial." Loevsky v. Carter, 70 Haw. 419, 432, 773 P.2d 1120, 1128 (1989). In addressing the specific defense of ignorance or mistake of fact, the Hawai'i Supreme Court has opined:

> [W]here a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense.

State v. Locquiao, 100 Hawai'i 195, 208, 58 P.3d 1242, 1255 (2002). See State v. Eberly, 107 Hawai'i 239, 251, 112 P.3d 725, 737 (2005) ("[T]rial courts must specifically instruct juries, where the record so warrants, that the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the charged offense or offenses."). The mistake-of-fact defense "is premised on the proposition that a factual mistake on the defendant's part

negates the required state of mind under the statute and thus relieves the defendant of criminal liability." State v. Palisbo, 93 Hawai'i 344, 355, 3 P.3d 510, 521 (App. 2000) (footnote omitted).

In Palisbo, the mistake-of-fact defense was addressed by this court within the context of HRS § 708-836 (as amended in 1996 by the legislature).

> In 1996, the legislature again amended HRS § 708-836, defining the term "owner"[FN9] and altering the affirmative defense provision. 1996 Haw. Sess. L. Act 195, § 1, at 447. The purpose of the amendments was to close "a large, unintended loophole for defendants who are able to avoid conviction by alleging that a 'friend' loaned the car to him [or] her. Senate Stand. Comm. Rep. No. 1659, in 1996 Senate Journal, at 841. The legislature believed that "even if the police arrest someone driving a stolen vehicle, that person may escape conviction by stating that he or she received permission to use the vehicle from another person and that he or she was unaware that the vehicle had been stolen." 1996 Haw. Sess. L. Act 195, § 1, at 447. Therefore, it found "under the current law, prosecution [wa]s ineffective because of the loophole in the . . . affirmative defense" and the interpretation of "owner." Senate Stand. Comm. Rep. No. 1659, in 1996 Senate Journal, at 841.
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> Prior to 1996, the term "owner" was not defined. The legislature, however, believed that "'[o]wner' . . . [had been] defined by the law as a person having possession of the property involved, even if that possession is unlawful[,]" House Stand. Comm. Rep. No. 1236-96, in 1996 House Journal, at 1522, allowing a "loophole" in the law for those claiming to have permission to use the vehicle and to not know the vehicle was stolen. 1996 Haw. Sess. L. Act 195, § 1, at 447. "Owner" was thus defined as "the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership." 1996 Haw. Sess. L. Act 195, § 2, at 448.
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> The legislature also enacted a new affirmative defense provision which absolved a defendant of criminal liability only upon proof that the defendant "[r]eceived authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use[.]" *Id.* at 447-48; *see* HRS § 708-836 *supra* at 3. The agent affirmative defense was retained because
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> > it was not the intention of [the c]ommittee to make a felon out of a person who innocently accepts the word of an agent in lawful possession of a vehicle that the agent had the permission of the vehicle's owner to permit others to operate the vehicle, [therefore, the

> c]ommittee has included an affirmative defense to cover such a scenario.
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> House Stand. Comm. Rep. No. 1236-96, in 1996 House Journal, at 1522.
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> Hence, the effect of the most recent amendments to HRS § 708-836 is to place upon a non-owner driver of a vehicle the legal duty of obtaining consent to operate the vehicle directly from the registered owner[FN10]; the violation of such a duty will subject the non-owner to criminal liability unless he or she can prove by a preponderance of the evidence[FN11] that permission to use the vehicle was obtained from an agent who had actual or apparent authority to allow such use from the registered owner.
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> [FN9] The legislative history indicates that the drafters believed they were "amending" the definition of "owner"; however, we note that "owner" had never been defined when the statute was first enacted in 1972, or when amended in 1974.
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> [FN10] "Owner is also defined as "the unrecorded owner of the vehicle pending transfer of ownership." HRS § 708-836(4).
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> [FN11] HRS § 701-115(2)(b) (1993) states in part that "[i]f the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence . . . proves by a preponderance of the evidence the specified fact or facts which negative penal liability."

Palisbo, 93 Hawai'i at 352-53, 3 P.3d at 518-19.

Pursuant to Palisbo, the only factual mistake that would absolve Mainaaupo of the liability for the offense charged would be a mistaken belief that the registered owner of the vehicle, Cordova, had authorized Mainaaupo's use of the Nissan. Hawai'i precedent clearly mandated that in order to avail himself of such an instruction, Mainaaupo must put forth some scintilla of evidence "no matter how weak, inconclusive, or unsatisfactory" that purports to demonstrate he ignorantly or mistakenly thought Cordova gave him permission to drive the Nissan. However, here no such mistaken belief is possible given the factual circumstances as presented.

Mainaaupo had known Doug for roughly three to six months, but did not know Doug's surname or where Doug lived.

Mainaaupo would see Doug at the beach and they, along with some other guys, would cruise and talk story with one another. Mainaaupo also saw Doug at an auto parts store getting auto parts. From this observation, Mainaaupo concluded that Doug owned a car. However, Mainaaupo had never seen Doug's car and did not know the make or model of the car. On the day Doug gave Mainaaupo permission to borrow his car, Doug never relayed to Mainaaupo what type of car Doug owned. Mainaaupo thought the Nissan belonged to Doug -- not because it matched Doug's description of the car he allegedly owned, but because it was the only car in the parking lot that evening. Mainaaupo had not heard from Doug since Mainaaupo's arrest.

At trial, Cordova and Cornel testified that they did not know Mainaaupo and had not given Mainaaupo permission to use the Nissan. Mainaaupo did not offer any evidence that would warrant the circuit court to give the mistake-of-fact defense instruction.

III. CONCLUSION

The Judgment of Conviction and Probation Sentence filed on January 18, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 31, 2007.

On the briefs:

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Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge