

DISSENTING OPINION BY FOLEY, J.

I respectfully dissent.

On appeal, Dawson asserts that the "existence of a 'possible warrant' did not constitute reasonable suspicion enabling the police to detain Dawson" and, thus, the circuit court "erred in denying Dawson's motion to suppress the pipe containing residue which the police observed during his illegal detention." Dawson contends that in the circuit court's January 16, 2007 Order Denying the Motion by Defendant Dawson to Suppress Evidence and Statements (Order), Findings of Fact (FOF(s)) 1, 4, and 5 were clearly erroneous, and portions of the Conclusions of Law (COLs) were wrong.

On February 15, 2006, Dawson filed a Motion to Suppress Evidence and Statements (Motion to Suppress), in which he sought to suppress "all evidence and statements that constitute 'fruits of the poisonous tree.'" Specifically, Dawson sought to suppress:

1. A three-inch glass pipe seized on October 14, 2005, at approximately 12:30 p.m. at 1421 Alapai Street by [Officer Kang].
2. White residue weighing 0.075 grams, containing methamphetamine, recovered from inside said glass pipe mentioned above, seized on October 14, 2005, at approximately 12:30 p.m. at 1421 Alapai Street by [Officer Kang].

On April 27, 2006, the circuit court heard Dawson's Motion to Suppress (4/27/06 hearing). Dawson and Honolulu Police Department Officers Pacheco and Kang testified at the hearing.

Officer Pacheco testified that on October 14, 2005, she was sent to 1421 Alapai Street to investigate the recovery of a stolen vehicle (the Vehicle). While she was en route to the address, she heard a dispatch report on her police radio that a person named Edward Dawson had a possible warrant. She testified that she was the first officer to arrive at the scene, and she

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recounted how she found and identified the Vehicle, which was in the parking lot at 1421 Alapai Street.

After Officer Pacheco informed dispatch she had found the Vehicle, she noticed a man standing nearby and approached him to see if he had any information that would aid her investigation. Officer Pacheco testified that she did not know the man, did not have any basis or facts to believe the man was engaged in any criminal activity, and did not consider the man a suspect in her investigation.

Officer Pacheco asked the man for his name, and when he responded "Eddie Dawson," she concluded that this was the person who had been reported to have a possible warrant. Officer Pacheco explained that after she obtained Dawson's name, she detained Dawson and asked dispatch to confirm the warrant. Defense counsel questioned Officer Pacheco about her detention of Dawson:

Q. [Deputy Public Defender:] . . . [T]he first thing you do when you meet Mr. Dawson is you get his name, his social security number and his birth date?

A. [Officer Pacheco:] Yes, sir.

Q. And as soon you hear this, you know this guy has a possible warrant?

A. Yes, sir.

Q. And so you immediately ask him to sit down?

A. Yes, sir.

. . . .

Q. And at this time Mr. Dawson was not free to leave, correct?

A. Yes, sir.

Officer Pacheco described how, during Dawson's detention, she observed Dawson with a glass pipe with a bulbous end, which she believed was drug paraphernalia:

A. [Officer Pacheco:] I asked [Dawson] to sit down, which he did, while I was detaining him to confirm the

warrant and while he was there, he kept putting his hand in his pockets, and I asked him to keep his hand out of his pockets. He took his hand out, and then he put it in again, and I said please keep your hands out of your pocket, and while he was -- he said he had a screwdriver.

Q. Okay.

A. So when he took his hand out, as I was watching him, he had a glass pipe in his right hand. Then he reached back behind him and put it in a plastic bag that was in the back.

. . . .

Q. Okay. Now you're saying that this item is a pipe. Have you had training and experience in the identification of drug and drug paraphernalia?

A. Yeah, it's a pipe commonly used to smoke crystal methamphetamine.

Officer Pacheco testified that when the warrant confirmation came back approximately six minutes later, she arrested Dawson "for both the drugs and the contempt warrant[]." ."

Officer Kang testified that while he was en route to 1421 Alapai to investigate the Vehicle recovery, he requested a warrant check on Dawson. Officer Kang explained what led him to request a warrant check on Dawson before reaching the Alapai address:

A. [Officer Kang:] I think it was about four months prior to [Dawson's arrest on the instant charges], maybe five months.

Q. [Deputy Public Defender:] Okay.

A. A vehicle was reported stolen, it was inside that lot.

Q. The same lot?

A. Yeah.

Q. Hm-hmm.

A. A gentleman came out of Sandra Domingo's apartment. And it was kind of embarrassing, because I went to confront him, he took off. I chased after him and my partner chased after him, but then we didn't know there was another person in the apartment who then took the truck while we were chasing the other guy.

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Q. He then took the truck, you said?

A. He stole the truck again while we were chasing the other guy. So when I started questioning Ms. Domingo, she gave up the name. That's the only reason I even know his name, is from his girlfriend.

Q. All right. That was the first time you had seen Mr. Dawson before?

A. I had never even saw him that first time. The first time I saw him, I was attempting a traffic stop on Pauoa Road that had expired -- a blue van, everything was expired. He pulls over, gets out and runs into the neighborhood. I started to chase him, and then I see Sandra getting out, so I didn't know if the vehicle was an unreported Code 10, so I just stayed with the vehicle.

. . . .

Q. And the only basis for your interest in him was that you got his name from Sandra Domingo that day?

A. Plus he stole a truck again.

Q. But you didn't see him do that, did you?

A. No, no. I was just told.

Q. That's just your suspicion?

A. That's correct. That's how his name first came up.

Officer Kang testified that once he learned Dawson's name, he "started running [Dawson's] name on a constant basis."

Dawson testified as to events leading up to his arrest on October 14, 2005. Dawson recounted that he and Sandra Domingo had just returned from a trip to a store and he was standing outside her apartment door when he saw Officer Pacheco in the parking lot of the apartment building. Dawson testified that Officer Pacheco quickly approached him and asked him only his name and social security number. After he gave her his name and social security number, Officer Pacheco immediately asked him to sit down. On cross-examination, Dawson said he did not know why Officer Pacheco had detained him.

Testimony was elicited from Dawson that he had seen a "transcript" that fixed the length of his detention, before

Officer Kang arrived, at six minutes. Upon further examination by the State, Dawson testified that he did not know exactly how long he had been detained by Officer Pacheco, but "[i]t seemed like forever I was sitting down."

On January 16, 2007, the circuit court filed its Order denying Dawson's Motion to Suppress.

On appeal Dawson contends the circuit court erred at the 4/27/06 hearing by not suppressing evidence of the glass pipe that contained methamphetamine residue.

Dawson claims that FOF 1 in the circuit court's Order was clearly erroneous; FOF 1 reads as follows:

1. On October 14, 2005, [Officer Pacheco] was sent to 1421 Alapai Street on a report of an outstanding stolen vehicle bearing Hawaii plates "JGJ023" which was parked in the lot. She arrived about 12:22 p.m.

Dawson contends that the portion of FOF 1, which states that "[s]he arrived about 12:22 p.m." is clearly erroneous because Officer Pacheco's testimony at the 4/27/2006 hearing was that she was assigned at 12:22 p.m., not that she arrived at 12:22. The exact arrival time is not critical to Dawson's Motion to Suppress. FOF 1 is substantially correct and not fatally flawed by any discrepancy between the arrival and assignment times.

Dawson contends that FOF 4 in the circuit court's Order was clearly erroneous; FOF 4 reads as follows:

4. At approximately 12:25 p.m., Officer Leo Kang (hereinafter "Officer Kang") requested a warrant check on Edward Dawson. Officer Kang is familiar with Defendant Dawson and aware that he visits his girlfriend residence [sic] located at 1421 Alapai Street.

Dawson argues that FOF 4 was clearly erroneous because it omitted pertinent facts and that FOF 4 should have read as follows (Dawson's changes are bracketed and bolded):

4. At approximately 12:25 p.m., [**prior to Officer Pacheco's arrival at 1421 Alapai Street**], Officer Leo Kang (hereinafter "Officer Kang") requested a warrant check on Edward Dawson. Officer Kang is familiar with

Defendant Dawson and aware that he visits his girlfriend['s] residence located at 1421 Alapai Street. [Officer Pacheco heard Dispatch respond that Dawson had a "possible warrant."]

These omissions fail to demonstrate a clearly erroneous FOF. The absence of the two statements Dawson believes the circuit court should have included in FOF 4 does not produce a misrepresentation of facts or alter the accuracy of FOF 4 in any material way. The circuit court's finding that Officer Kang requested a warrant check on Dawson at approximately 12:25 p.m. based on the officer's knowledge that Dawson's girlfriend lived at 1421 Alapai and that he might encounter Dawson there was not clearly erroneous.

Dawson contends that FOF 5 in the circuit court's Order was clearly erroneous; FOF 5 reads as follows:

5. At approximately 12:28 p.m., Officer Pacheco approaches the male who verbally identifies himself as Edward Dawson with a birthdate of . . . , 1970, with a social security number of At 12:29 p.m., this information was relayed to dispatch.

Dawson argues that the circuit court omitted facts from FOF 5, making it clearly erroneous, and that FOF 5 should have read as follows (Dawson's changes are bracketed and bolded):

5. At approximately 12:28 p.m., Officer Pacheco approaches the male [who][. **In response to Officer Pacheco's question, the male**] verbally identifie[d] himself as Edward Dawson with a birthdate of . . . , 1970, with a social security number of [Recognizing that "Edward Dawson" has a possible outstanding warrant, Officer Pacheco suspended her investigation of the auto theft recovery and case, ordered Dawson to sit down, and detained him solely to confirm the "possible warrant."] At 12:29 p.m., [this information was relayed to] [Officer Pacheco asked] Dispatch [to confirm the "possible warrant."]

The circuit court's failure in FOF 5 (or elsewhere in the FOFs) to find that (1) Dawson was detained solely for the purpose of waiting for the results of a warrant confirmation check, (2) his

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detention was prolonged because of the warrant check, and (3) his detention was illegal, was clearly erroneous.

Dawson's point of error as to FOF 5 leads to his point of error that the following portions of the circuit court's COLs were wrong:

CONCLUSIONS OF LAW

In the instant case, the police officers had specific and articulable facts to temporarily detain Defendant Dawson based on a reasonable suspicion that there was an outstanding warrant for his arrest and that he had been involved in an automobile theft. . . . Officer Kang knew Defendant Dawson was a suspect involved with car thefts. On prior occasions, Dawson had run from Police when HPD officers were sent to 1421 Alapai to investigate car thefts. For these reasons, it cannot be said that Defendant was not a suspect for the auto theft. Officer Kang specifically requested the warrant check because he knew that: (1) Defendant Dawson was seen in the past at 1421 Alapai Street, (2) Defendant Dawson was a suspect in other car theft cases, (3) he recalled that there was a warrant for Defendant Dawson and wanted to confirm that the warrant was still outstanding. The State asserts that the police did not detain Defendant Dawson solely to perform the check for outstanding warrants. Officer Pacheco's investigation was still in progress when the warrant confirmation was received. In requesting the warrant check prior to his arrival at the scene, Officer Kang was attempting to minimize the length of any detention of Defendant Dawson.

Officer Pacheco actions [sic] during the warrant check were completely appropriate. . . . Officer Pacheco's actions were in no way an attempt to lengthen Defendant Dawson's detention prior to receiving confirmation on the warrant.

ACCORDINGLY, Defendant Dawson's Motion to Suppress Evidence and Statements is hereby denied.

Dawson contends the circuit court erred in concluding that his detention was not illegal because "the police officers had specific and articulable facts to temporarily detain [Dawson] based on a reasonable suspicion that there was an outstanding warrant for his arrest"; the officers did not detain Dawson solely for the warrant check, but also because Officer Kang knew that "Dawson was a suspect in other car theft cases" and "Dawson was seen in the past at 1421 Alapai Street"; "Officer Pacheco's

investigation was still in progress when the warrant confirmation was received"; and "Officer Pacheco's actions were in no way an attempt to lengthen [Dawson's] detention prior to receiving confirmation on the warrant."

Dawson reasons that police had no "specific and articulable facts," Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968), or reasonable suspicion that warranted his detention. Dawson points out that the United States and Hawai'i Constitutions guarantee a person's right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV; see also Haw. Const. art. I, § 7. Dawson also points out that in contrast to the Fourth Amendment, the Hawai'i Constitution specifically guarantees a person's right to be free from "unreasonable . . . invasions of privacy." Haw. Const. art. I, § 7. Dawson contends his detention by police was illegal and the subsequent discovery of the glass pipe was "pursuant only to [Officer] Pacheco's, and later [Officer] Kang's, illegal detention" of him. Citing to State v. Poaipuni, 98 Hawai'i 387, 392-93, 49 P.3d 353, 358-59 (2002), Dawson argues that the evidence of the glass pipe and residue should have been suppressed by the circuit court at the 4/27/06 hearing as "fruit of the poisonous tree, since it was discovered as a result of his illegal detention."

It is well established that a "police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Terry, 392 U.S. at 22, 88 S. Ct. at 1880. However, "in justifying the particular intrusion 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." Id. at 21, 88 S. Ct. at 1880 (footnote

omitted). "This demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme] Court's Fourth Amendment jurisprudence." Terry, 293 U.S. at 21 n.18, 88 S. Ct. at 1880 n.18.

At the 4/27/06 hearing, the State made no attempt to support the reliability or credibility of the "possible warrant" response on which Officer Pacheco relied to detain Dawson. On cross-examination, Officer Pacheco acknowledged that on an unspecified number of prior occasions she had been unable to obtain a confirmation after receiving a "possible warrant" response because a paper copy of the warrant could not be found. She also acknowledged that a warrant could not be confirmed if the warrant had been cancelled for some reason. Officer Pacheco stated that in some cases it could take up to twenty-five minutes to receive a warrant confirmation.

Officer Pacheco testified that she does not make an arrest on a "possible warrant" report because she needs "to know first if there is in fact a warrant." During her testimony, Officer Pacheco described her understanding of the warrant check process, but offered no information as to how dependable a "possible warrant" response was or whether a police policy existed that instructed officers to detain a person pending confirmation of a "possible warrant" report.

Q. [Deputy Public Defender:] . . . I wanted to make sure how this works. When an officer calls dispatch for a warrant check, the first thing that happens is dispatch pulls up potentially a possible warrant on the dispatcher's computer?

A. [Officer Pacheco:] Yes, sir.

Q. And then -- I don't know, does the officer have to request a confirmation?

A. Yes, sir.

Q. All right. So the dispatch does not automatically ask for the confirmation?

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A. Yes, sir.

Q. And once the officer asks for a confirmation -- oh, and in this case you said after you got -- I believe you testified after you got Edward Dawson's personal information, that's when you called in for the confirmation?

A. Yes, sir.

Q. And now just picking up where we left off. When you call for the confirmation, dispatch has to have somebody go look for the paper warrant[?]

A. Yes, sir.

Q. And this person either finds it or they don't find it, and they relay that back to the dispatch?

A. Yes, sir.

Q. And then dispatch comes back to you and says yes or no?

A. Yes, sir.

Q. And this is a standard HPD procedure?

A. Yes, sir.

Q. And it's been a standard HPD procedure since you've been a police officer?

A. Yes, sir.

Q. Now, it can take sometime to confirm a warrant?

A. It could.

Q. But sometimes it's fast?

A. Yes, sir.

Q. But sometimes it might take 15, 20, 25 minutes?

A. It could.

Q. And when you start this procedure confirming a warrant, you don't know how long it's going to take?

A. No, sir.

Q. And in this case, Mr. Dawson's case, do you know -- well, was his physical warrant with the sheriffs or with HPD?

A. I don't remember.

Q. So I think I went over it before, but real quickly. Another reason why a warrant may no longer be confirmed is because it's been previously served?

A. Yes, sir.

Q. And so the reason the warrant's still there is perhaps -- well, let me restart. The reason that possible warrant still comes up is because there's a lag time between when the warrant is served and when it's taken off as a possible warrant in the computer system?

A. That's -- that may be the reason.

Q: So you certainly don't want to arrest somebody for a warrant that's already been cancelled?

A. Correct.

In its answering brief, the State argues that "the probability that from half to two-thirds of the warrants in the computer system will be confirmed as valid warrants is sufficient reasonable suspicion to detain [Dawson] long enough for dispatch to confirm the actual physical paper warrant." Such statistics, even if they were supported by evidence in the record, do not establish the reasonableness of an "intrusion upon personal liberty." State v. Goudy, 52 Haw. 497, 501, 479 P.2d 800, 803 (1971). To support a reasonable suspicion, the State must produce "specific and articulable" facts. Terry, 392 U.S. at 21, 88 S. Ct. at 1880. These facts need to be more "specific and articulable" than an argument on appeal that an intrusion on an individual's liberty will be correct from one-half to two-thirds of the time. It was erroneous for the circuit court to conclude that the officers or the State had demonstrated that a "possible warrant" constituted reasonable suspicion to detain Dawson pending confirmation.

During the 4/27/06 hearing, the circuit court, sua sponte, cited two cases it found persuasive regarding the issue of the Motion to Suppress. First, the circuit court mentioned State v. Barros, 98 Hawai'i 337, 48 P.3d 584 (2002). In Barros, the Hawai'i Supreme Court held that "an officer is not prohibited from requesting a warrant check in a traffic violation stop when the check does not prolong the length of time needed to issue the

citation." Id. at 338, 48 P.3d at 585. The Barros court made it clear that authority to detain a person to run a warrant check ends when the officer has concluded the purpose of the stop:

In *State v. Silva*, 91 Hawai'i 80, 979 P.2d 1106 (1999) [hereinafter *Silva II*], *aff'g* [*State v. Silva*, 91 Hawai'i 111, 979 P.2d 1137 (1999) (*Silva I*)], we noted that we "d[id] not read [*Silva I*] as generally allowing the police to prolong the detention of individuals subjected to brief, temporary investigative stops . . . solely for the purpose of performing a check for outstanding warrants." *Silva II*, 91 Hawai'i at 81, 979 P.2d at 1107. We now hold that the police may not do so.

Id. at 342, 48 P.3d at 589 (some bracketed material in original and some added; ellipsis in original; footnote omitted).

The circuit court also referred to State v. Rife, 133 Wash. 2d 140, 943 P.2d 266 (1997). In Rife, the Supreme Court of Washington found that a police officer lacked statutory authority to detain a person stopped for a traffic offense for the purpose of running a warrant check. 133 Wash. 2d at 150-51, 943 P.2d at 270-71. In response to that decision, the Washington state legislature amended Washington Revised Code § 46.61.021 to permit an officer to detain a person to check for any outstanding warrants:

- (2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

1997 Wash. Sess. Laws, 1st Sp. Sess., Ch. 1 § 1 (emphasis added); State v. Barnes, 96 Wash. App. 217, 221 n.2, 978 P.2d 1131, 1134 n.2 (1999).

In Barros, the Hawai'i Supreme Court distinguished its decision from Rife:

In *Rife*, the Washington Supreme Court interpreted Washington's statute to find that the police lacked statutory authority to run a warrant check after stopping the pedestrian for jaywalking. *Rife*, however, is distinguishable from this case. In *Rife*, the police

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detained the defendant for five to ten minutes while the initial check was made and another five to ten minutes while verification was made. In the instant case, Barros was not detained for any longer than it took to issue the citation.

Barros, 98 Hawai'i at 341, 48 P.3d at 588.

In Barros, the stop was made for a reason (traffic violation) other than a warrant check, and the Hawai'i Supreme Court held that the police officer had not "prolong[ed] impermissibly the stop in order to allow dispatch to complete the warrant check he requested." Id. at 342-43, 48 P.3d at 589-90.

It was erroneous for the circuit court to conclude that a "possible warrant" provided reasonable suspicion to detain Dawson pending confirmation. Detaining Dawson beyond the objective of investigating the auto theft matter exceeded that degree of intrusion absolutely necessary under the circumstances of this case. See State v. Silva, 91 Hawai'i 80, 81, 979 P.2d 1106, 1107 (1999).

The conclusion that reasonable suspicion for detaining Dawson could be found in Officer Kang's knowledge that Dawson was a suspect in a past auto theft was also erroneous. A criminal record alone cannot justify detaining an individual for questioning where there are no additional facts to suggest that a crime actually has been or is about to be committed. United States v. Jerez, 108 F.3d 684, 693-94 (7th Cir. 1997). Officer Kang's reliance on his suspicion that Dawson may have been involved in a prior auto theft case did not provide reasonable suspicion to detain Dawson in the investigation at hand. The Hawai'i Supreme Court has recognized the unlawfulness of police officers detaining a person in a Terry-type situation based only on knowledge of prior arrests:

If the law were otherwise, any person with any sort of criminal record -- or even worse, a person with arrests but no convictions -- could be subjected to a Terry-type investigative stop by a law enforcement officer at any time without the need for any other justification at all. Any such rule would clearly run counter to the requirement of a

reasonable suspicion, and of the need that such stops be justified in light of a balancing of the competing interests at stake.

State v. Kaleohano, 99 Hawai'i 370, 377, 56 P.3d 138, 145 (2002) (quoting United States v. Sandoval, 29 F.3d 537, 543 (10th Cir. 1994)).

That Dawson had been seen in the past at 1421 Alapai Street did not indicate he was involved in the theft of the Vehicle. The Alapai address is that of Punchbowl Homes, an apartment complex presumably accessible to the public and the residence of Dawson's girlfriend.

The circuit court also erred in concluding that Officer Pacheco's auto theft investigation was still in progress during Dawson's detention. Officer Pacheco stated in her testimony at the 4/27/06 hearing that she suspended her investigation into the auto theft recovery case for the purpose of detaining Dawson to conduct a warrant confirmation check on him.

Dawson's glass pipe and the drug residue therein were fruits of an illegal detention. Therefore, it was erroneous for the circuit court to deny Dawson's Motion to Suppress these items. See State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997).

Claniel R. Foley