

NO. 29441

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
SYDNEY NOBUTO TOKUNAGA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 06-1-2216)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Defendant-Appellant Sydney Nobuto Tokunaga (Tokunaga) appeals from the October 1, 2008 Judgment of Conviction and Sentence of the Circuit Court of the First Circuit (circuit court)¹ for Promoting a Dangerous Drug in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 712-1243 (Supp. 2005).

After a careful review of the issues raised, arguments advanced, applicable law, and the record in the instant case, we resolve Tokunaga's appeal as follows:

1. The circuit court did not err in finding Tokunaga's statement to the Honolulu Police Department (HPD) voluntary.

The circumstances surrounding Tokunaga's statement to HPD Officer Justin Aiu (Officer Aiu) do not indicate that the statement was the product of coercion. State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994). Rather, Tokunaga made his spontaneous statement in the course of a routine pat-down, conducted for the protection of the officers and others potentially nearby. See State v. Madamba, 62 Haw. 453, 457, 617 P.2d 76, 78 (1980).

When Officer Aiu arrived on the scene, Tokunaga was in custody, sitting on the sidewalk, and handcuffed. HPD Officer Brian Navares (Officer Navares), who was standing with HPD

¹ The Honorable Richard K. Perkins presided.

ESTERLANDO
CLERK / INTERMEDIATE COURTS
STATE OF HAWAII

2009 OCT 19 AM 8:13

FILED

Officer Landon Tafaoa² (Officer Tafaoa) next to Tokunaga, instructed Officer Aiu to do a pat-down of Tokunaga. Though Officer Aiu could not recall whether or not he told Tokunaga he would be conducting a pat-down, throughout the course of the pat-down, Officer Aiu did not ask Tokunaga any questions. While Officer Aiu was conducting the pat-down, Tokunaga stated he had a pipe in his pocket, which Officer Aiu subsequently recovered from Tokunaga's front-right pocket.

No evidence was presented that any of the officers on the scene acted impermissibly in obtaining the statement, nor that Tokunaga's mental/physical condition or attire affected the voluntariness of the statement. See State v. Kelekolio, 74 Haw. 479, 503-04, 849 P.2d 58, 69-70 (1993). Moreover, Tokunaga's disclosure to his cousin refutes the argument that a subsequent, similar disclosure to Officer Aiu was the product of coercion, regardless of whether Officer Aiu announced his intent to conduct a pat-down. In both instances, the statements were spontaneously volunteered, without solicitation or undue influence.

2. The circuit court did not err in instructing the jury. "[T]he instructions, as a whole, correctly stated the law." State v. Toro, 77 Hawai'i 340, 348, 884 P.2d 403, 411 (App. 1994).

3. Sufficient evidence was presented to convict Tokunaga of Promoting a Dangerous Drug in the Third Degree. To sustain a conviction for Promoting a Dangerous Drug in the Third Degree, the State was required to prove, beyond a reasonable doubt, that Tokunaga (1) possessed methamphetamine in any amount, and (2) was aware that he possessed methamphetamine.

As to possession, Officer Tafaoa and Officer Navares observed Tokunaga with a clear plastic bag containing a crystalline substance. Moreover, Officer Aiu recovered a pipe from a pocket of the jeans Tokunaga was wearing. Both the bag

² Officer Tafaoa's name also appears in the record as Tafafaoa. Police report bearing his signature gives the spelling Tafaoa.

and the pipe were found to contain methamphetamine. That Tokunaga did not appear to be under the influence, did not use the pipe within view of the officers, and did not resist arrest, does not undermine the evidence supporting Tokunaga's conviction. Recovery of other paraphernalia and/or a special butane torch often associated with methamphetamine use was not required.

As to awareness, Tokunaga's suspicious reaction to the officers presence, i.e., quickly placing his hands over the area where the bag was observed, combined with Tokunaga's statement to Officer Aiu that he had a pipe in his pocket, leads to a reasonable inference that Tokunaga was aware of his possession of methamphetamine.

Though Tokunaga emphasizes the lack of fingerprint and fit/visibility evidence and still maintains that the jeans he was wearing were not his jeans and that he did not know there was a bag or pipe containing drugs in the jeans, these arguments depend on the weight given to the evidence and the credibility of the witnesses, which, generally, will not be disturbed on appeal. State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (citation omitted).

4. The circuit court did not err in sentencing Tokunaga to a consecutive term of imprisonment. The Hawai'i Supreme Court has already decided the issue presented here in State v. Kahapea, 111 Hawai'i 267, 278-80, 141 P.3d 440, 451-53 (2006). In Kahapea, the court agreed with other jurisdictions who "aphoristically dismissed the proposition that either [Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004)] or [Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000)] proscribes consecutive term sentencing." Kahapea at 279-80, 141 P.3d at 452-53.

Contrary to Tokunaga's contentions, Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856 (2007) and State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) do not establish that Kahapea was wrongly decided. Neither Cunningham nor Maugaotega concerned consecutive term sentencing, and a recent

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

decision of the United States Supreme Court confirmed the constitutionality of the practice of allowing sentencing courts to determine the facts necessary to impose consecutive sentences. Oregon v. Ice, __ U.S. __, 129 S.Ct. 711 (2009).

Therefore,

IT IS HEREBY ORDERED that the October 1, 2008 Judgment of Conviction and Sentence of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 19, 2009.

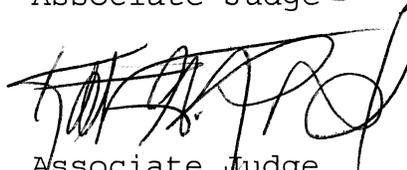
On the briefs:

Walter J. Rodby,
for Defendant-Appellant.


Chief Judge

Anne K. Clarkin,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge